

**Court of Appeals**  
*of the*  
**State of New York**

---

In the Matter of the Application of

NEW YORK CIVIL LIBERTIES UNION,

*Petitioner-Respondent,*

– against –

CITY OF ROCHESTER and ROCHESTER POLICE DEPARTMENT,

*Respondents-Appellants.*

---

---

**OPPOSITION TO MOTION FOR LEAVE TO APPEAL**

---

---

SHEARMAN & STERLING LLP  
Joshua Ebersole, Esq.  
599 Lexington Avenue  
New York, New York 10022  
(212) 848-4000  
joshua.ebersole@shearman.com

NEW YORK CIVIL LIBERTIES  
UNION FOUNDATION  
Robert Hodgson, Esq.  
Lisa Laplace, Esq.  
125 Broad Street, 19<sup>th</sup> Floor  
New York, New York 10004  
(212) 607-3300  
rhodgson@nyclu.org  
llaplace@nyclu.org

*Attorneys for Petitioner-Respondent*

---

---

**TABLE OF CONTENTS**

	<b>Page</b>
CORPORATE DISCLOSURE STATEMENT .....	1
PRELIMINARY STATEMENT .....	1
STATEMENT OF FACTS AND PROCEDURE.....	2
ARGUMENT .....	6
I.    ROCHESTER’S PROPOSED APPEAL DOES NOT PRESENT A NOVEL LEGAL ISSUE .....	6
II.   ROCHESTER HAS NOT IDENTIFIED ANY AUTHORITY SPLIT OR COURT OF APPEALS AUTHORITY THAT WARRANTS REVIEW OF THE DECISION HERE.....	10
CONCLUSION .....	11

**TABLE OF AUTHORITIES**

	<b>Page</b>
<b>Cases</b>	
<i>Matter of Abdur-Rashid v New York City Police Dept.</i> , 31 NY3d 217 [2018], <i>rearg denied</i> 31 NY3d 1125 [2018].....	8
<i>Matter of Data Tree, LLC v Romaine</i> , 9 N.Y.3d 454, 849 N.Y.S.2d 489, 880 N.E.2d 10 [2007] .....	9
<i>Matter of Gould v New York City Police Dept.</i> , 89 NY2d 267 [1996] .....	8
<i>Matter of Hawley v Village of Penn Yan</i> , 35 AD3d 1270 [4th Dept 2006], <i>amended on rearg</i> 38 AD3d 1371 [4th Dept 2007] .....	8
<i>Matter of Johnson v New York City Police Dept.</i> , 257 A.D.2d 343, 694 N.Y.S.2d 14 [1st Dept. 1999], <i>lv dismissed</i> 94 N.Y.2d 791, 700 N.Y.S.2d 422, 722 N.E.2d 502 [1999] .....	9
<i>Matter of LaRocca v Board of Educ. of Jericho Union Free School Dist.</i> , 220 A.D.2d 424, 632 N.Y.S.2d 576 [2d Dept. 1995] .....	9
<i>Matter of National Lawyers Guild, Buffalo Ch. v Erie County Sheriff's Off.</i> , 196 AD3d [4th Dept 2021] .....	8
<i>New York Civil Liberties Union v City of Syracuse</i> (CA 21-00796, AD4) .....	<i>passim</i>
<i>Matter of Nix v New York State Div. of Criminal Justice Servs.</i> , 167 AD3d 1524 [4th Dept 2018], <i>lv denied</i> 33 NY3d 908 [2019].....	8
<i>Matter of Schenectady County Socy. for the Prevention of Cruelty to Animals, Inc. v Mills</i> , 18 N.Y.3d 42, 935 N.Y.S.2d 279, 958 N.E.2d 1194 [2011] .....	9
<i>Matter of Sell v New York City Dept. of Educ.</i> , 135 A.D.3d 594, 24 N.Y.S.3d 41 [1st Dept. 2016] .....	9
<i>Matter of Thomas v New York City Dept. of Educ.</i> , 103 A.D.3d 495, 962 N.Y.S.2d 29 [1st Dept. 2013] .....	8

*Matter of Western Suffolk Bd. of Coop. Educ. Servs. v Bay Shore Union Free School Dist.*,  
250 A.D.2d 772, 672 N.Y.S.2d 776 [2d Dept. 1998] .....9

*Police Benevolent Assn. of N.Y. State, Inc.*,  
145 A.D.3d 1391, 44 N.Y.S.3d 578 [3d Dept. 2016] .....8

**Other Authorities**

Public Officers Law § 87 (2) .....5, 8, 9

Public Officers Law § 87 (2) (b).....5, 8

## **CORPORATE DISCLOSURE STATEMENT**

The New York Civil Liberties Union, by its undersigned counsel, hereby discloses that it is a non-profit, 501(c)(4) organization, and is the New York State affiliate of the American Civil Liberties Union.

## **PRELIMINARY STATEMENT**

This Court should not grant Rochester leave to appeal the Fourth Department's well-reasoned decision. The Fourth Department held that, after the 2020 repeal of Civil Rights Law Section 50-a, in response to a Freedom of Information Law ("FOIL") request seeking police officer disciplinary files, Rochester may not rely on FOIL's "unwarranted invasion of privacy" exemption to categorically withhold every part of every police officer disciplinary file related to "open" or "unsubstantiated" complaints. Rather, Rochester must review such files, apply any appropriate redactions, and then produce those files. This case is particularly ill-suited for review by the Court of Appeals for two reasons.

*First*, this is not a novel decision. In this and the accompanying *Syracuse* Decision (defined below), the Fourth Department relied on a litany of cases that predated the repeal of Section 50-a and corresponding FOIL amendments—including from the Court of Appeals—that support its holding that state agencies may not apply blanket withholding of certain government records in response to a FOIL request. For good reason, as there is nothing novel about the legal principle that all

government records are presumed open for public inspection unless they fall within one of the narrowly construed enumerated exemptions and, if an exemption is implicated, the record should be redacted (to protect the narrowly construed exemption) and disclosed (to protect the public's interest). This decision merely affirmed that longstanding principle.

*Second*, as Rochester concedes, there is no Appellate Division split on this issue. Rochester itself only identifies two appellate-level decisions dealing with what it refers to as “the production of records of unsubstantiated complaints against a police officer.” The two decisions—which are this decision and a companion decision by the Fourth Department in a similar appeal involving Syracuse—were decided together and are entirely consistent with one another. Moreover, one of the trial court decisions that Rochester claims hints at a forthcoming conflict is the trial court decision that was unanimously modified by the Fourth Department in its *Syracuse* Decision. Syracuse itself decided not to seek leave to appeal the Fourth Department decision, presumably because it saw no basis to do so.

For these reasons, Rochester's motion for leave to appeal should be denied.

### **STATEMENT OF FACTS AND PROCEDURE**

The full background of this case is set forth in the NYCLU's opening brief to the Appellate Division, Fourth Department. (*See* brief for NYCLU (“NYCLU Br.”) at 4-7.) The following summary is provided for the Court's convenience.

The NYCLU submitted a FOIL request to the Rochester Police Department (“RPD”) on September 15, 2020, which sought records related to the RPD’s police accountability processes, including many records that had previously been shielded from the public by Section 50-a. (R.<sup>1</sup> at 75.) The NYCLU filed this action on December 14, 2020, challenging the RPD’s constructive denial and seeking production of responsive documents. (R. at 14.)

On February 11, 2021, the Respondents published an online database containing certain “substantiated” disciplinary records for a small percentage of the City’s total police force, dated between 1986 and 2021. On March 1, 2021, the City began producing additional documents related to the NYCLU’s FOIL request, but none of those productions filled the gaps in the February database relating to complaints that the RPD had deemed “unsubstantiated”—a catch-all term the RPD used to cover every complaint where the RPD chose not to impose discipline on an officer—or that had not been resolved. Accordingly, on March 12, 2021, the NYCLU communicated to the Respondents that its FOIL request was only partially satisfied. (*See* R. at 145-47.) In response, the Respondents provided a “supplemental response,” in which they stated for the first time their position that disciplinary files related to such complaints were not “encompassed within the

---

<sup>1</sup> References to “R.” are to the Appellate Record filed in the Appellate Division, Fourth Department (CA 21-01191).

definition of law enforcement disciplinary records set forth in the Freedom of Information Law.” (See R. at 153-58.) Additionally, the Respondents asserted that disclosure of any part of any complaint that had not resulted in officer discipline would constitute a *per se* unwarranted invasion of privacy. Having exhausted its available administrative remedies, on May 17, 2021, the NYCLU filed a supplemental brief to its Article 78 petition, seeking immediate production of all disciplinary records, regardless of disposition, redacted as permitted by FOIL.

The Supreme Court for Monroe County issued its decision and order on August 10, 2021, holding: (1) that Respondents need not produce any portion of any records related to “unsubstantiated” complaints against officers; (2) that Respondents were not required to provide any police misconduct records dated before June 12, 2020; and (3) that the NYCLU was not entitled to attorneys’ fees and costs. (R. at 7-13.) The NYCLU appealed to the Appellate Division, Fourth Department.

The Fourth Department issued its decision on November 10, 2022 (the “*Rochester Decision*”), along with its decision in a companion case styled *New York Civil Liberties Union v City of Syracuse* (CA 21-00796, AD4) (the “*Syracuse Decision*,” and together with the *Rochester Decision*, the “*NYCLU Decisions*”). The *Syracuse Decision* is attached hereto as Exhibit A.

In the *Rochester Decision*, the Fourth Department ordered as follows:



[T]hat 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.

*Rochester* Decision at 1.<sup>2</sup> The Fourth Department held that the trial 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.” (*Id.* at 2.) Rather, the Fourth Department directed Rochester to conduct a particularized review and make only those redactions that are permitted under FOIL:

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.

(*Id.*)

---

<sup>2</sup> Rochester does not seek leave to appeal that portion of the decision ordering it to produce records created before June 2020.

Similarly, in the *Syracuse* Decision, the Fourth Department held that blanket withholding of pending or “unsubstantiated” complaints of police officer misconduct was inappropriate under FOIL, and that Syracuse must conduct a review of such documents to determine whether they may be redacted and disclosed:

In order to invoke the personal privacy exemption . . . respondents must review each record responsive to petitioner’s FOIL request and determine whether any portion of the specific record is exempt as an invasion of personal privacy and, to the extent that any portion of a law enforcement disciplinary record concerning an open or unsubstantiated complaint of [Syracuse Police Department] officer misconduct can be disclosed *without* resulting in an unwarranted invasion of personal privacy, respondents must release the non-exempt, i.e., properly redacted, portion of the record to petitioner.

(*Syracuse* Decision at 3.)

Rochester now seeks leave to appeal the *Rochester* Decision. The City of Syracuse did not seek leave to appeal the *Syracuse* Decision. For the reasons discussed herein, Rochester’s motion should be denied.

## ARGUMENT

### **I. ROCHESTER’S PROPOSED APPEAL DOES NOT PRESENT A NOVEL LEGAL ISSUE**

As an initial matter, Rochester mischaracterizes the question preserved for review in a manner that implies a breadth and novelty that the *Rochester* Decision does not possess. Rochester formulates the question as “Should all unsubstantiated police complaints and disciplinary records be turned over based on a FOIL request?”

(Rochester Br. 8.) And Rochester goes on to state that 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.” (*Id.*) But that is not what the Fourth Department ordered. Rather, as stated above, the Fourth Department ordered that Rochester:

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.

(*Rochester* Decision at 2.) The distinction is important, because the Fourth Department decision here did not stand for the broad proposition that Rochester claims and was in fact narrowly tailored to the normal application of FOIL in light of the repeal of Section 50-a.

Accordingly, the *Rochester* Decision merely stands for the unremarkable proposition that introducing documents into the FOIL universe (police officer disciplinary files) that were previously withheld by statute (Section 50-a) does not change an agency’s obligation to consider the appropriateness of redaction rather than issue a blanket denial withholding an entire category of records. Indeed, in the accompanying *Syracuse* Decision, the Fourth Department cited prior authority from

the Court of Appeals and the Fourth Department laying out the well-established framework for considering whether an agency properly invoked a FOIL exemption to deny access to records:

It is well settled that, under FOIL, “[a]ll government records are . . . presumptively open for public inspection and copying unless they fall within one of the enumerated exemptions of Public Officers Law § 87 (2)” (*Matter of Gould v New York City Police Dept.*, 89 NY2d 267, 274-275 [1996]; *see Matter of Abdur-Rashid v New York City Police Dept.*, 31 NY3d 217, 225 [2018], *rearg denied* 31 NY3d 1125 [2018]), that exemptions are to be “ ‘narrowly construed’ ” (*Gould*, 89 NY2d at 275; *see Matter of Hawley v Village of Penn Yan*, 35 AD3d 1270, 1271 [4th Dept 2006], *amended on rearg* 38 AD3d 1371 [4th Dept 2007]), that government agencies have the burden to demonstrate that “ ‘the material requested falls squarely within the ambit of [one] of the exemptions’ ” (*Abdur-Rashid*, 31 NY3d at 225; *see Matter of National Lawyers Guild, Buffalo Ch. v Erie County Sheriff’s Off.*, 196 AD3d 1195, 1196 [4th Dept 2021]), and that those agencies “must articulate ‘particularized and specific justification’ for not disclosing requested documents” (*Gould*, 89 NY2d at 275; *see Matter of Nix v New York State Div. of Criminal Justice Servs.*, 167 AD3d 1524, 1525 [4th Dept 2018], *lv denied* 33 NY3d 908 [2019]).

(*Syracuse Decision* at 2.)

More specifically, the Fourth Department’s straightforward application of FOIL’s privacy exemption—Public Officers Law § 87 (2) (b)—also relied on binding precedent from the Court of Appeals and numerous Appellate Divisions:

[T]he personal privacy exemption “does not ... categorically exempt ... documents from disclosure” (*Police Benevolent Assn. of N.Y. State, Inc.*, 145 A.D.3d

1391, 1392, 44 N.Y.S.3d 578 [3d Dept. 2016]; *see Matter of Thomas v New York City Dept. of Educ.*, 103 A.D.3d 495, 497, 962 N.Y.S.2d 29 [1st Dept. 2013]; *Matter of Johnson v New York City Police Dept.*, 257 A.D.2d 343, 348-349, 694 N.Y.S.2d 14 [1st Dept. 1999], *lv dismissed* 94 N.Y.2d 791, 700 N.Y.S.2d 422, 722 N.E.2d 502 [1999]; *see generally Matter of Schenectady County Socy. for the Prevention of Cruelty to Animals, Inc. v Mills*, 18 N.Y.3d 42, 46, 935 N.Y.S.2d 279, 958 N.E.2d 1194 [2011]), even in the case where a FOIL request concerns release of unsubstantiated allegations or complaints of professional misconduct (*see e.g. Matter of Western Suffolk Bd. of Coop. Educ. Servs. v Bay Shore Union Free School Dist.*, 250 A.D.2d 772, 772-773, 672 N.Y.S.2d 776 [2d Dept. 1998]; *Matter of LaRocca v Board of Educ. of Jericho Union Free School Dist.*, 220 A.D.2d 424, 427, 632 N.Y.S.2d 576 [2d Dept. 1995]). In order to invoke the personal privacy exemption here, respondents must review each record responsive to petitioner's FOIL request and determine whether any portion of the specific record is exempt as an invasion of personal privacy and, to the extent that any portion of a law enforcement disciplinary record concerning an open or unsubstantiated complaint of SPD officer misconduct can be disclosed *without* resulting in an unwarranted invasion of personal privacy, respondents must release the non-exempt, i.e., properly redacted, portion of the record to petitioner (*see Matter of Sell v New York City Dept. of Educ.*, 135 A.D.3d 594, 594, 24 N.Y.S.3d 41 [1st Dept. 2016]; *see generally Schenectady County Socy. for the Prevention of Cruelty to Animals, Inc.*, 18 N.Y.3d at 46, 935 N.Y.S.2d 279, 958 N.E.2d 1194; *Matter of Data Tree, LLC v Romaine*, 9 N.Y.3d 454, 464, 849 N.Y.S.2d 489, 880 N.E.2d 10 [2007]).

(*Syracuse* Decision at 3.) Therefore, there is nothing novel about the Fourth Department's determination that the trial 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.” (*Rochester* Decision at 2.)

## **II. ROCHESTER HAS NOT IDENTIFIED ANY AUTHORITY SPLIT OR COURT OF APPEALS AUTHORITY THAT WARRANTS REVIEW OF THE DECISION HERE**

Rochester concedes, as it must, that there is no Appellate Division split or contrary Court of Appeals authority on the issue decided by the Fourth Department here. (*Rochester* Br. at 5.) Indeed, the only two Appellate Division decisions on this issue are the Fourth Department’s *NYCLU* Decisions, and they are entirely consistent. Rochester does not deny that.


Rather, Rochester focuses entirely on trial court decisions—including the trial court decision that was overturned by the Fourth Department in its *Syracuse* Decision—as well as an opinion from the Committee on Open Government, to argue that this Court should grant leave to appeal to confirm that “[t]he 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.” (*Rochester* Br. at 11-12.) But, as discussed above, the Fourth Department did not hold otherwise. And, in any event, the Fourth Department considered all of the authorities cited by Rochester in coming to its well-reasoned decision, and none of them disturbed that court’s straightforward application of FOIL principles to the facts presented. As such, it is no surprise that there is not an Appellate Division split on the issue

presented here, and in the absence of such a split there is no compelling reason to grant Rochester's motion for leave.

**CONCLUSION**

For the foregoing reasons, the NYCLU respectfully requests that the Court deny Rochester's motion for leave to appeal.

Dated: December 27, 2022  
New York, NY

By:   
Joshua Ebersole  
SHEARMAN & STERLING LLP  
599 Lexington Avenue  
New York, NY 10022  
(212) 848-4000

NEW YORK CIVIL LIBERTIES  
UNION FOUNDATION, by:  
Robert Hodgson  
Lisa Laplace  
125 Broad Street, 19th Floor  
New York, NY 10004  
(212) 607-3300

*Counsel for Petitioner-Respondent the New  
York Civil Liberties Union*

# **EXHIBIT A**



**SUPREME COURT OF THE STATE OF NEW YORK**  
***Appellate Division, Fourth Judicial Department***

690

CA 21-00796

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 SYRACUSE AND SYRACUSE POLICE DEPARTMENT,  
RESPONDENTS-RESPONDENTS.

---

NEW YORK CIVIL LIBERTIES UNION FOUNDATION, NEW YORK CITY (ROBERT HODGSON OF COUNSEL), AND LATHAM & WATKINS LLP, FOR PETITIONER-APPELLANT.

HANCOCK & ESTABROOK, LLP, SYRACUSE (MARY L. D'AGOSTINO OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

---

Appeal from a judgment (denominated order) of the Supreme Court, Onondaga County (Gerard J. Neri, J.), entered May 5, 2021 in a proceeding pursuant to CPLR article 78. The judgment granted the motion of respondents to dismiss the petition.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by denying the motion in part, reinstating the petition insofar as it seeks disclosure of law enforcement disciplinary records, subject to redaction pursuant to particularized and specific justification under Public Officers Law § 87 (2), and granting the petition to that extent, 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 Syracuse and Syracuse Police Department (SPD), to disclose, pursuant to the Freedom of Information Law ([FOIL] Public Officers Law § 84 *et seq.*), certain law enforcement disciplinary records. As relevant here, petitioner seeks law enforcement disciplinary records concerning open complaints, i.e., those in which an investigation had commenced but the law enforcement disciplinary proceeding had not yet reached a final disposition, and law enforcement disciplinary records concerning closed but unsubstantiated complaints, i.e., those in which it was determined that the allegations of SPD officer misconduct were unfounded or without merit. In opposition, respondents moved to dismiss the petition on the basis that the records sought were categorically exempt from disclosure pursuant to the "personal privacy" exemption under Public Officers Law § 87 (2) (b). Petitioner now appeals from a judgment granting respondents' motion to

dismiss the petition. We agree with petitioner that Supreme Court erred in determining that the records sought are categorically exempt from disclosure and may be withheld in their entirety.

At the outset, we reject respondents' contention that petitioner failed to exhaust its administrative remedies with respect to its contentions on appeal (see *Matter of Exoneration Initiative v New York City Police Dept.*, 114 AD3d 436, 437 [1st Dept 2014]; *Council of Regulated Adult Liq. Licensees v City of N.Y. Police Dept.*, 300 AD2d 17, 18-19 [1st Dept 2002]).

It is well settled that, under FOIL, "[a]ll government records are . . . presumptively open for public inspection and copying unless they fall within one of the enumerated exemptions of Public Officers Law § 87 (2)" (*Matter of Gould v New York City Police Dept.*, 89 NY2d 267, 274-275 [1996]; see *Matter of Abdur-Rashid v New York City Police Dept.*, 31 NY3d 217, 225 [2018], *rearg denied* 31 NY3d 1125 [2018]), that exemptions are to be " 'narrowly construed' " (*Gould*, 89 NY2d at 275; see *Matter of Hawley v Village of Penn Yan*, 35 AD3d 1270, 1271 [4th Dept 2006], *amended on rearg* 38 AD3d 1371 [4th Dept 2007]), that government agencies have the burden to demonstrate that " 'the material requested falls squarely within the ambit of [one] of the exemptions' " (*Abdur-Rashid*, 31 NY3d at 225; see *Matter of National Lawyers Guild, Buffalo Ch. v Erie County Sheriff's Off.*, 196 AD3d 1195, 1196 [4th Dept 2021]), and that those agencies "must articulate 'particularized and specific justification' for not disclosing requested documents" (*Gould*, 89 NY2d at 275; see *Matter of Nix v New York State Div. of Criminal Justice Servs.*, 167 AD3d 1524, 1525 [4th Dept 2018], *lv denied* 33 NY3d 908 [2019]).

Under Public Officers Law § 87 (2) (a), agencies shall disclose records unless they are "specifically exempted from disclosure by state or federal statute." For decades, law enforcement personnel records were wholly and categorically exempt from disclosure inasmuch as a state statute provided that such records "[were] considered confidential and not subject to inspection or review without the express written consent of such [law enforcement] officer . . . except as may be mandated by lawful court order" (former Civil Rights Law § 50-a [1]; see *Matter of New York Civ. Liberties Union v New York City Police Dept.*, 32 NY3d 556, 560 [2018]; *Matter of Prisoners' Legal Servs. of N.Y. v New York State Dept. of Correctional Servs.*, 73 NY2d 26, 29 [1988]). Effective June 12, 2020, the New York State Legislature fully repealed former Civil Rights Law § 50-a (see L 2020 ch 96, § 1). Thus, the statutory exemption under Public Officers Law § 87 (2) (a) no longer applies to law enforcement personnel records.

The bill repealing former Civil Rights Law § 50-a also made several amendments to FOIL concerning disciplinary records of law enforcement agencies (see L 2020, ch 96, §§ 2-4). Of particular relevance here, Public Officers Law § 86 was amended by adding subdivisions (6) and (7), defining " '[l]aw enforcement disciplinary records' " and a " '[l]aw enforcement disciplinary proceeding.' "

We agree with petitioner that the court erred in determining that the personal privacy exemption under Public Officers Law § 87 (2) (b) allows respondents to categorically withhold the law enforcement disciplinary records at issue. Public Officers Law § 87 (2) (b) provides that an "agency may deny access to records or portions thereof that . . . if disclosed would constitute an unwarranted invasion of personal privacy under the provisions of [section 89 (2)]." The personal privacy exemption "allows agencies and their employees to protect sensitive matters in which there is little or no public interest, like personal information or unsubstantiated allegations, from public disclosure" (*Matter of New York Times Co. v City of New York Off. of the Mayor*, 194 AD3d 157, 165 [1st Dept 2021], *lv denied* 37 NY3d 913 [2021]). The personal privacy exemption "is qualified" by Public Officers Law § 89 (2) (c) (i) (*Matter of New York Comm. for Occupational Safety & Health v Bloomberg*, 72 AD3d 153, 160 [1st Dept 2010]; see e.g. *Matter of Scott, Sardano & Pomeranz v Records Access Officer of City of Syracuse*, 65 NY2d 294, 298 [1985]; *Matter of Police Benevolent Assn. of N.Y. State, Inc. v State of New York*, 145 AD3d 1391, 1392-1393 [3d Dept 2016]; *Matter of Obiajulu v City of Rochester*, 213 AD2d 1055, 1056 [4th Dept 1995]), which provides that "disclosure shall not be construed to constitute an unwarranted invasion of personal privacy . . . when identifying details are deleted" (§ 89 [2] [c] [i]). An agency invoking the personal privacy exemption must "establish that the identifying details [of a record] could not be redacted so as to not constitute an unwarranted invasion of personal privacy" if the record was disclosed (*Matter of Aron Law, PLLC v New York City Fire Dept.*, 191 AD3d 664, 666 [2d Dept 2021]; see *Police Benevolent Assn. of N.Y. State, Inc.*, 145 AD3d at 1392-1393).

Contrary to respondents' contention, the personal privacy exemption "does not . . . categorically exempt . . . documents from disclosure" (*Police Benevolent Assn. of N.Y. State, Inc.*, 145 AD3d at 1392; see *Matter of Thomas v New York City Dept. of Educ.*, 103 AD3d 495, 497 [1st Dept 2013]; *Matter of Johnson v New York City Police Dept.*, 257 AD2d 343, 348-349 [1st Dept 1999], *lv dismissed* 94 NY2d 791 [1999]; see generally *Matter of Schenectady County Socy. for the Prevention of Cruelty to Animals, Inc. v Mills*, 18 NY3d 42, 46 [2011]), even in the case where a FOIL request concerns release of unsubstantiated allegations or complaints of professional misconduct (see e.g. *Matter of Western Suffolk Bd. of Coop. Educ. Servs. v Bay Shore Union Free School Dist.*, 250 AD2d 772, 772-773 [2d Dept 1998]; *Matter of LaRocca v Board of Educ. of Jericho Union Free School Dist.*, 220 AD2d 424, 427 [2d Dept 1995]). In order to invoke the personal privacy exemption here, respondents must review each record responsive to petitioner's FOIL request and determine whether any portion of the specific record is exempt as an invasion of personal privacy and, to the extent that any portion of a law enforcement disciplinary record concerning an open or unsubstantiated complaint of SPD officer misconduct can be disclosed *without* resulting in an unwarranted invasion of personal privacy, respondents must release the non-exempt, i.e., properly redacted, portion of the record to petitioner (see *Matter of Sell v New York City Dept. of Educ.*, 135 AD3d 594, 594 [1st

Dept 2016]; see generally *Schenectady County Socy. for the Prevention of Cruelty to Animals, Inc.*, 18 NY3d at 46; *Matter of Data Tree, LLC v Romaine*, 9 NY3d 454, 464 [2007]).

Inasmuch as respondents withheld the requested law enforcement disciplinary records concerning open and unsubstantiated claims of SPD officer misconduct in their entirety and did not articulate any particularized and specific justification for withholding any of the records, we conclude that respondents did not meet their burden of establishing that the personal privacy exemption applies (see *Aron Law, PLLC*, 191 AD3d at 666; *Police Benevolent Assn. of N.Y. State, Inc.*, 145 AD3d at 1393; *Matter of Livson v Town of Greenburgh*, 141 AD3d 658, 661 [2d Dept 2016]). Respondents further failed to establish that "identifying details" in the law enforcement disciplinary records concerning open and unsubstantiated claims of SPD officer misconduct "could not be redacted so as to not constitute an unwarranted invasion of personal privacy" (*Aron Law, PLLC*, 191 AD3d at 666; see *Police Benevolent Assn. of N.Y. State, Inc.*, 145 AD3d at 1393). Thus, the court erred in granting that part of respondents' motion seeking to dismiss petitioner's request for law enforcement disciplinary records concerning open or unsubstantiated claims of SPD officer misconduct in reliance on the personal privacy exemption under Public Officers Law § 87 (2) (b).

Further, we agree with petitioner that, in the administrative proceeding, respondents did not invoke the exemption under Public Officers Law § 87 (2) (e), and we therefore conclude the court erred in relying on that subdivision in granting respondents' motion with respect to petitioner's request for law enforcement disciplinary records concerning open claims of SPD officer misconduct (see *Matter of Madeiros v New York State Educ. Dept.*, 30 NY3d 67, 74-75 [2017]; *Matter of McFadden v McDonald*, 204 AD3d 672, 675 [2d Dept 2022]). "[J]udicial review of an administrative determination is limited to the grounds invoked by the agency and the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis" (*Madeiros*, 30 NY3d at 74 [internal quotation marks omitted]). Consequently, the court erred in relying on Public Officers Law § 87 (2) (e) and we make no determination whether respondents may rely on section 87 (2) (e) to withhold law enforcement disciplinary records.

Although we reject petitioner's contention that in the administrative proceeding respondents failed to invoke the exemption under Public Officers Law § 87 (2) (g) (iii), which applies to inter-agency or intra-agency materials that are not final agency policy or determinations, inasmuch as respondents cited it multiple times in their denial of petitioner's administrative appeal, we nonetheless agree with petitioner that the court erred in relying on that exemption as a categorical basis to grant respondents' motion with respect to petitioner's request for law enforcement disciplinary records concerning open claims of SPD officer misconduct. Respondents failed to meet their burden of establishing that the exemption applies inasmuch as they failed to establish whether law enforcement disciplinary records concerning open claims of SPD officer misconduct

"fall[] wholly or only partially within that exemption" (*Matter of Gedan v Town of Mamaroneck* [N.Y.], 170 AD3d 833, 834 [2d Dept 2019]; see *Matter of New York 1 News v Office of President of Borough of Staten Is.*, 231 AD2d 524, 525 [2d Dept 1996]; cf. *Matter of Sawma v Collins*, 93 AD3d 1248, 1248-1249 [4th Dept 2012]; *Matter of Miller v New York State Dept. of Transp.*, 58 AD3d 981, 984 [3d Dept 2009], lv denied 12 NY3d 712 [2009]).

Further, we agree with petitioner that the court erred in relying upon the statute regarding the confidentiality of materials related to the conduct or discipline of attorneys (see Judiciary Law § 90 [10]) and case law regarding the confidentiality of investigations into judicial conduct or discipline (see *Matter of Nichols v Gamsco*, 35 NY2d 35, 38 [1974]). Those rules are not applicable to the interpretation of FOIL or its application to disclosure of law enforcement disciplinary records concerning complaints of SPD officer misconduct.

We reject petitioner's contention that the court erred in granting respondents' motion with respect to petitioner's request for attorneys' fees and costs. Inasmuch as this proceeding at this stage concerns a novel interpretation of legislation that both repealed a statute and enacted new provisions to a longstanding statutory scheme, it cannot be said that respondents "had no reasonable basis for denying access" to the records at issue (Public Officers Law § 89 [4] [c]; cf. *New York Times Co.*, 194 AD3d at 166; see generally *Matter of Jewish Press, Inc. v New York City Police Dept.*, 190 AD3d 490, 491 [1st Dept 2021], lv denied 37 NY3d 906 [2021]).

We therefore modify the judgment by denying respondents' motion in part, reinstating the petition insofar as it seeks disclosure of law enforcement disciplinary records, subject to redaction pursuant to a particularized and specific justification under Public Officers Law § 87 (2) and granting the petition to that extent. Respondents are directed to review the requested law enforcement disciplinary records concerning open and unsubstantiated claims of SPD officer misconduct, 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 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]).

STATE OF NEW YORK     )  
  )  
COUNTY OF NEW YORK    )

ss.:

**AFFIDAVIT OF SERVICE  
BY OVERNIGHT FEDERAL  
EXPRESS NEXT DAY AIR**

I, Tyrone Heath, 2179 Washington Avenue, Apt. 19, Bronx, New York 10457, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above or at

**On December 27, 2022**

deponent served the within: **Opposition to Motion for Leave to Appeal**

**upon:**

**Linda S. Kingsley, Esq.  
Corporation Counsel of the City of Rochester  
400A City Hall, 30 Church Street  
Rochester, NY 14614-1224  
Attn: John M. Campolieto, Esq.**

the address(es) designated by said attorney(s) for that purpose by depositing 1 true copy(ies) of same, enclosed in a properly addressed wrapper in an Overnight Next Day Air Federal Express Official Depository, under the exclusive custody and care of Federal Express, within the State of New York.

**Sworn to before me on December 27, 2022**



**MARIANA BRAYLOVSKIY**  
Notary Public State of New York  
No. 01BR6004935  
Qualified in Richmond County  
Commission Expires March 30, 2026



---

**Job# 317857**