To be Argued by:
PATRICK BEATH
(Time Requested: 30 Minutes)

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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.

BRIEF FOR RESPONDENTS-APPELLANTS

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PROCEDURAL HISTORY SUMMARY

This matter originated with the New York Civil Liberties Union (hereinafter "NYCLU") submitting a Freedom of Information Law (hereinafter "FOIL") request dated September 15, 2020 ("FOIL Request"), which was extra-ordinary in its breadth and size. The FOIL request sought a great number of documents related to Rochester Police Department (hereinafter "RPD"), including internal investigation, personnel and disciplinary records. *See Record pg. 75-84 (hereinafter R. pg. 107-109).* The FOIL request was accompanied by a letter detailing NYCLU's request. *See R. pgs. 75-84.* The City of Rochester Department of Communications, which handled all FOIL requests at that time, received NYCLU's Request on September 15, 2020, and assigned FOIL # RR20-04503 as the identifying number for that request. *See R. pg. 86.*

In relevant part, the request sought police personnel, internal investigation and disciplinary records, all of which was information previously protected by the Civil Rights Law §50-a (hereinafter "§ 50-a"), until the New York State legislature repealed that law on June 12, 2020.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 response would be forthcoming. The reason for the extended date of the response was due to the large volume of records being sought by the NYCLU. *See R. pgs. 127-129.*

On November 10, 2020 NYCLU sent a letter to the City stating that they were appealing the "constructive denial" of their request as the anticipated March 31, 2021 date was not reasonable. *See R. pg. 96.* It should be recognized that there was no denial of the FOIL or even a partial denial of the FOIL request made by the NYCLU's at that date. The City continued to gather materials to provide in response to their FOIL request. The NYCLU filed an Article 78 Proceeding on December 14, 2020, more than three months prior to the date by which the City was to make its production.

Following the repeal of § 50-a, and simultaneous to the City processing NYCLU's FOIL request, the City created a public database of all internal police misconduct matters that resulted in a hearing or discipline for active officers of the Rochester Police Department. This database was made available to the public in February of 2021.

Ultimately, NYCLU's Article 78 focused exclusively on the production of internal police complaint and investigative files that were unsubstantiated or that predated the repeal of Civil Rights Law §50-a.

A decision issued from the Trial Court on August 10, 2021, which dismissed the Article 78 Petition. (*R. pgs 11-13)*. A Notice of Appeal was filed by the NYCLUs on August 23, 2021 *(R. pg. 4)* and the appeal to the Appellate Division Fourth Department was perfected on February 22, 2022. The City submitted a

responsive brief 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. Record Fourth Department Appellate Division Decision. 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 Citys.

PRELIMINARY STATEMENT

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

Two main issues remain present here in this appeal and this case presents substantial issues regarding FOIL procedure and Public Officers Law which resonate throughout the entirety of the State of New York. This matter deals directly with the application of FOIL to unsubstantiated and unverified citizen complaints against uniformed law enforcement officers since the repeal of §50-a by the New York State legislature.

Repeal of Civil Rights Law

On June 12, 2020 the New York State legislature repealed §50-a, which had previously barred disclosure on personal privacy grounds of police officers' personnel records, including unsubstantiated complaints of misconduct. The intention of CRL § 50-a was to prevent harassment and reprisals against police officers and limit improper cross-examination in criminal and civil matters (*Capital Newspapers v. Burns*, 67 NY2d 562 [1986]). Following the repeal of §50-a, a flood of requests were made throughout the state, to municipalities, for access to police

internal investigation and disciplinary records, irrespective of the reason therefor. This case is one of the initial cases to be decided at the appellate level dealing with the production of records of unsubstantiated complaints against a police officer and if partial redaction or non-disclosure of the document is the appropriate protection for the uniformed government employee. The other matter decided at the appellate court level was the companion case to the City of Rochester, *New York Civil Liberties Union v. the City of Syracuse* (CA 21-00796, AD 4). The City of Syracuse matter was decided by the Appellate Division Fourth Department on the same day as the City of Rochester case and both decisions were decided with same reasoning stating that unsubstantiated complaints were to be disclosed subject to limited redaction in an effort to avoid an unwarranted invasion of personal privacy.

While municipal and government employees have long had their personnel files and work disciplinary history protected to some degree from public disclosure on privacy grounds, following the repeal of §50-a, arguments are now being made that would make law enforcement officers a separate category of municipal employee under FOIL and lessen their privacy protections from other non-uniformed public employees. Notwithstanding the repeal of §50-a, police officers should have the same protection as other governmental employees and not be subjected to public scrutiny over complaints that are unsubstantiated or unverified. A close review of the language of the revisions to the Public Officers Law, enacted

simultaneous to the repeal of §50-a, shows that the legislature merely meant to bring law enforcement into parity with other public employees, not reduce their privacy protections further than those provided to other public employees, as the Fourth Department's decision would do.

TIMING AND JURISDICTIONAL STATEMENT

This action originated in the Supreme Court Monroe County by way of a CPLR Article 78 proceeding demanding that the City disclose all records sought in NYCLU's FOIL request. R. 14-97. The issue in the CPLR Article 78 proceeding was limited to disclosure of unsubstantiated police misconduct complaints. The trial court issued a judgment dismissing the Article 78 proceeding. R. 7-13. On appeal, the Fourth Department issued a final decision which modified the judgment so appealed from by granting the NYCLU's claim seeking unsubstantiated complaints against law enforcement officers 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)(b), and otherwise affirmed the judgment below. R. 188-189. The City 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. Motion for Leave to Appeal was timely when filed on or before December 15, 2020. This Court granted leave to appeal on

January 14, 2023. R. 187. Accordingly, this Court has jurisdiction over the City's appeal here.

STATEMENT OF QUESTIONS PRESERVED FOR REVIEW

A. Are unsubstantiated complaints of misconduct made against police officers, and investigation records related thereto, subject to disclosure under the Freedom of Information Law as a disciplinary record?

Answer: No, unsubstantiated complaints and related investigation records do not qualify as a disciplinary record under the Freedom of Information Law.

B. Does disclosure of records related to unsubstantiated complaints made against police officers constitute an unwarranted invasion of personal privacy, even where the records are subject to redaction?

Answer: Yes, even where redacted, disclosure of records of unsubstantiated complaints would work an unwarranted invasion of personal privacy.

I. RELEASE OF RECORDS OF UNFOUNDED, EXONERATED AND UNSUBSTANTIATED MISCONDUCT COMPLAINTS OR INVESTIGATIONS CAUSE AN UNWARRANTED INVASION OF PERSONAL PRIVACY

A. THE REPEAL OF § 50-A BROUGHT PARITY BETWEEN THE PRIVACY PROTECTIONS AFFORDED TO LAW ENFORCEMENT OFFICERS AND THOSE LONG PROVIDED TO NON-UNIFORMED PUBLIC EMPLOYEES

The NYCLU argued below that the repeal of § 50-a requires law enforcement entities to turn over all documents contained in the personnel files of any officer, including disciplinary records and internal investigation records, whether or not the allegations under investigation were substantiated. This contention is incorrect. While the repeal of § 50-a had the effect of removing a special privacy protection available to only law enforcement officers, in repealing that statute, the legislature placed law enforcement officers in the same position as any other public employee—all of whom have long been protected from *any* disclosure of unsubstantiated internal investigation records.

Public Officers Law § 87(2)(b) allows an agency to deny access to records where disclosure would "constitute an unwarranted invasion of personal privacy." The Committee on Open Government (hereinafter "Committee") has long opined—with regard to non-uniformed public employees who were never protected by §50-a—that release of unsubstantiated complaints would constitute an unwarranted invasion of personal privacy. In Opinion No. f103399, dated October 31, 1997, the

question before the Committee was whether or not to release "written reports of an incident of alleged sexual harassment submitted by an employee to the Sexual Harassment Committee[.]" This matter did not involve uniformed employees. The Committee opined that "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 my view, be withheld, for disclosure would result in an unwarranted invasion of personal privacy." In rendering this opinion, the Committee relied upon the matter of *Herald Company v. School District of City of Syracuse*, (430 NYS2d 460 [Sup. Ct. Onondaga Cty. 1980]), which upheld a FOIL denial of a request for information about internal misconduct charges pending against a tenured teacher during the pendency of the hearing on those charges.

Similarly, in opinion 17195, dated May 29, 2008, which involved a request for records concerning 9 firefighters who had been found "guilty of some but not all" of the departmental charges brought against them, the Committee, considering the applicability of Public Officers Law § 87(2)(b), opined:

> 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 my view, be withheld, for disclosure would result in an unwarranted invasion of personal privacy [*see e.g., Herald Company v. School District of City of Syracuse*, 430 NYS 2d 460 (1980)]. Further, to the extent that charges are dismissed or allegations are found to be without merit, I believe that they may be withheld based on considerations of privacy.

Based upon this general analysis, the Committee concluded: "With respect to your specific questions, it is my opinion that the hearing board's recommendation is accessible to the public, *except to the extent that it includes charges that were dismissed or that could not be substantiated, or information relating to those charges*" (emphasis added). Thus, again, unsubstantiated allegations, and information about them, could, in the Committee's opinion, be withheld in their entirety.[1]

This line of opinions continued even after the repeal of § 50-a. On July 27, 2020, just over a month after the repeal of § 50-a, the Committee issued Opinion AO 19775 which does not waver from its prior interpretation of the application of Public Officers Law 87(2)(b) to requests for unsubstantiated allegations of misconduct:

> Accordingly, it is our opinion, in 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

[1] Courts, too, have held that release of records of unsubstantiated allegations would constitute an unwarranted invasion of personal privacy. The Second Department, in the matter of *LaRocca v. Board of Educ.* (220 AD2d 424 [2d Dept 1995]), held that while an agreement settling charges brought against a teacher pursuant to Education Law § 3020-a could be released, "the release of that portion of the agreement which contains references to charges which were denied and/or not admitted by Horowitz or which contain the names of any teachers, would constitute an unwarranted invasion of privacy as defined by Public Officers Law § 87(2). Therefore, the agreement must be redacted prior to its release to the petitioner." That portion of the settlement agreement containing references to unsubstantiated charges was redacted *in its entirety*.

> 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.*

(emphasis added).

Courts have followed the Committee's lead. In *Gannett Co., Inc. v Herkimer Police Dept.*, (76 Misc 3d 557, 563-565 [Sup Ct, Oneida County 2022]), the Court—relying on decisions of the Second Department—held that, even after the repeal of § 50-a, unsubstantiated police misconduct records should be withheld on privacy grounds under Public Officers Law § 87(2)(b), reasoning:

> The respondents, for their part, acknowledge that the "repeal of Civil Rights Law § 50-a removed the extra layer of protection [previously afforded to] police employment records," but they also correctly highlight that the protection afforded by Public Officers Law § 87 (2) (b), which is applicable to public servants generally, was not in any way altered or diminished by that repeal. That provision of the Public Officers Law expressly exempts from disclosure any records, which, if released, would result in "an unwarranted invasion of personal privacy."

Moreover, this court is aware of at least two appellate cases, one of which was cited by the respondents, that stand for the proposition that an unwarranted invasion of personal privacy would be wrought by the disclosure of records related to unsubstantiated claims. *See Matter of Western Suffolk Bd. of Coop. Educ. Servs. v Bay Shore Union Free School Dist.* (250 AD2d 772, 772, 672 NYS2d 776 [2d Dept 1998]), dealing with "unproven disciplinary charges," and *Matter of LaRocca v Board of Educ. of Jericho Union Free School Dist.* (220 AD2d 424, 427, 632 NYS2d 576 [2d Dept 1995]), dealing with "charges [that] were denied and/or not admitted." To be sure, these cases were decided by the Appellate Division, Second Department, but the petitioner has not cited any decisional authority from the Appellate Division, Fourth Department, to suggest that this court is not bound by these decisions or, at least, free to follow them. Additionally, this court is persuaded by the multiple Advisory Opinions issued by the Committee on Open Government, which take the position that, "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 be withheld" on the ground that "disclosure would result in an unwarranted invasion of personal privacy." (*See* Comm on Open Govt FOIL-AO-19775 [2020], citing Comm on Open Govt FOIL-AO-17195 [2008], and Comm on Open Govt FOIL-AO-19785 [2021].) And while this court is mindful that opinions from the Committee on Open Government are not binding authority, it is also true that, "[s]ince the Committee is the state agency charged with administering the Freedom of Information Law, its interpretation of the statute, if not irrational or unreasonable, should be upheld." (*Matter of Miracle Mile Assoc. v Yudelson*, 68 AD2d 176, 181, 417 NYS2d 142 [4th Dept 1979], citing *Matter of Sheehan v City of Binghamton*, 59 AD2d 808, 398 NYS2d 905 [3d Dept 1977]; *see also Matter of TJS of N.Y., Inc. v New York State Dept. of Taxation & Fin.*, 89 AD3d 239, 932 NYS2d 243 [3d Dept 2011].) Most importantly, as the court aptly pointed out in *Matter of New York Civ. Liberties Union v*

> *City of Syracuse* (72 Misc 3d at 467), "the public interest in the release of unsubstantiated claims does not outweigh the privacy concerns of individual officers." For these reasons, this court finds that Public Officers Law § 87 (2) (b) may indeed be invoked to withhold records related to unsubstantiated claims of misconduct.

It is thus long and well established—both before and after the repeal of § 50-a—that disclosure of public employee personnel records of unsubstantiated allegations of misconduct would work an unwarranted invasion of personal privacy.

B. REVISIONS TO THE FOIL LAW PROMOTE PARITY BETWEEN LAW ENFORCEMENT AND OTHER PUBLIC EMPLOYEES BY EXPRESSLY ALLOWING DISCLOSURE ONLY OF DISCIPLINARY RECORDS, NOT RECORDS OF UNSUBSTANTIATED MISCONDUCT ALLEGATIONS

When the legislature amended the Freedom of Information Law to expressly make available law enforcement disciplinary records, it was well aware of the foregoing opinions of the Committee on Open Government and court decisions, and the requirement to disclose such disciplinary records cannot be read as a mandate to disclose records concerning unsubstantiated allegations. This is clear from the text of the FOIL itself.

Public Officers Law § 86 defines 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" (Public Officers Law § 86(7)[emphasis added]). 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.

Once and internal investigation is concluded and determines a complaint to be unsubstantiated, no charges are served, no process is issued, nor is any proceeding commenced. Accordingly, records of unsubstantiated complaints 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 unsubstantiated complaint indicates no 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 complaint (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.

This general legal understanding of "proceeding" is also consistent with the more directly apposite use of "proceeding" in Article V of the Civil Service Law, which governs personnel changes. Civil Service Law § 75(4) provides that "[n]otwithstanding any other provision of law, *no removal or disciplinary proceeding* shall be commenced more than eighteen months after the occurrence of the alleged incompetency or misconduct complained of and described in the charges" (emphasis added). Thus, it is only after charges are served following an investigation substantiates the allegations made in a complaint that a proceeding is commenced under the Civil Service Law. Where an allegation is not substantiated and no charges result, there can be no disciplinary proceeding. The legislature was surely aware of this definition of proceeding when they drafted changes to the Public Officers Law.

Thus, in amending the Public Officers Law, the legislature did nothing that would require disclosure—or prohibit non-disclosure—of records related to unsubstantiated allegations of misconduct. Like the repeal of § 50-a, the changes to the Freedom of Information Law did nothing to disturb the long-standing precedent

that unsubstantiated records may be withheld where disclosure would constitute an unwarranted invasion of personal privacy.

II. REDACTION IS AN INADEQUATE MEANS TO PROTECT AGAINST AN UNWARRANTED INVASION OF PERSONAL PRIVACY

Below, the Fourth Department found that, rather than withhold records of unsubstantiated allegations wholesale, as other Courts and the Committee on Open Government have long espoused, the better approach would be to redact from the records information that would result in an unwarranted invasion of personal privacy. The problem with this approach—aside from its being out of step with precedent and the language of the FOIL revisions themselves—is that it risks being inadequately protective of the public employee's privacy which in turn could subject the City to a claim for defamation.

A. REDACTION DOES NOT PROVIDE ADEQUATE PROTECTION

There are a number of reasons why redaction risks allowing an unwarranted invasion of personal privacy. First, this is because so much depends upon context in deciding what to redact. If a request is made for a particular officer's complaint history, then no amount of redaction of unsubstantiated records will ever protect that officer's privacy because the fact of the potentially untrue allegations themselves can expose the officer to public ridicule. Alternatively, in a more general request, even where the officer's identity (name and work address) is redacted, once the file

is made public, there is a risk that members of the public might recognize the location of the incident, the date of the incident, other civilians present at the incident whose names were not redacted, and ultimately learn who the officer was. This risk is particularly stark in our digital age, where information (and misinformation) is quickly disseminated in 140-character sound bites (and images) around the world in no time.

Second, many internal investigation records are voluminous (as are many requests for them, as this matter demonstrates), which gives rise to the risk that the individual undertaking redactions may make a mistake, miss a redaction, then publicly disclose the materials. And as noted above, once released, these materials can quickly be disseminated far and wide, with absolutely no ability to put the genie back in the lamp.

Third, digital materials are subject to manipulation. It would not take a terrible amount of talent or creativity to alter a set of redactions to insert a name of an officer—whether an accurate identification or not—into a document then disseminate that document as if it were an original. The remainder of the document would have all the indicia of authenticity, making it less likely that the public would know that the document had been manipulated.

All told, there are unavoidable risks arising from redacted documents that simply don't exist when the unsubstantiated records are withheld in their entirety.

The best approach, in order to avoid an unwarranted invasion of personal privacy, is to allow a municipality to withhold records related to unsubstantiated allegations.

B. RELEASE OF REDACTED RECORDS COULD SUBJECT THE MUNICIPALITY TO DEFAMATION CLAIMS

The elements of a cause of action for defamation are a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se (*D'Amico v Corr. Med. Care, Inc*., 120 AD3d 956, 962 [4th Dept 2014]).

As noted in the preceding section, there are scenarios where, even with redactions, an officer's identity may ultimately be surmised by members of the public, either because certain unredacted details tip them off to the actual incident, or because of a mistake in the redacting itself that leads to the officer identification. Where that occurs, and where the allegation (which could not be substantiated following an investigation) is false, the City is potentially at risk of having a defamation claim filed against it for negligently publishing an untrue statement. Even short of a claim, an errant disclosure of this sort can only breed hostility between employee and employer. Thus, to preserve amity between employer and employee and to cabin the risk of liability, the best approach is, again, to withhold unsubstantiated records in their entirety.

Dated: October 20, 2023

City of Rochester-Law Department

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NEW YORK STATE COURT OF APPEALS
CERTIFICATE OF COMPLIANCE

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Dated: October 20, 2023

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