To be Argued by:
PATRICK BEATH
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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.

REPLY BRIEF FOR RESPONDENTS-APPELLANTS

PATRICK BEATH, ESQ.
DEPUTY CORPORATION COUNSEL
JOHN M. CAMPOLIETO, ESQ.
MUNICIPAL ATTORNEY
CITY OF ROCHESTER-LAW DEPARTMENT
Attorneys for Respondents-Appellants
30 Church Street, Room 400A
Rochester, New York 14614
Tel.: (585) 428-7410
patrick.beath@cityofrochester.gov
john.campolieto@cityofrochester.gov

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INTRODUCTION

Revocation of Civil Rights Law

It would seem simple to state that there is no argument that the New York State Legislature repealed Civil Rights Law §50-a ("§50-a") on June 20, 2020. §50- previously barred disclosure, for personal privacy protections, of law enforcement officers' personnel records, including disciplinary records. The intention of § 50-a was to prevent harassment and reprisals against police officers and limit improper cross-examination in criminal and civil matters.

The intention of the repeal of §50-a was to provide additional access to law enforcement officers disciplinary records which mirrors stated goals of the FOIL. The repeal of §50-a was initiated in the wake of national and high profile citizen and law enforcement interactions. Access to municipal records, both from the repeal of §50-a and the purpose of FOIL was acknowledged by the City of Rochester when it published its database of all substantiated police disciplinary records, its response to the Respondent's unprecedentedly large FOIL request and its decision not to challenge the application of the repeal of §50-a to the years prior to the repeal.

The City of Rochester's argument, running through the entirety of this appeal, is that unsubstantiated complaints, which have not resulted in the proffer of charges or sent to a hearing officer for a disciplinary hearing, are not disciplinary records.

And that mere redaction of these records to protect the privacy of law enforcement officers is inconsistent with longtime guidance of the Committee on Open Government and the language of the revisions to the FOIL statute.

A. DISCIPLINARY RECORDS

In the wake of the repeal of §50-a, law enforcement disciplinary records are treated in the same manner that disciplinary records of non-law enforcement public employees always have been. The issue here is relatively simple: personnel records that do not result in the proffer of charges leading to a hearing or discipline are not disciplinary records. Where there is no discipline contemplated, the record can hardly be considered a "disciplinary" record. And the Committee on Open Government has long opined that public employee internal investigation records that do not result in sustained charges need not be disclosed, as disclosure would constitute an unwarranted invasion of personal privacy.

The revisions to the Public Officers Law changes none of this. Public Officers Law § 86 defines a Law Enforcement Disciplinary Record as any record created in furtherance of a law enforcement disciplinary proceeding. As set forth in detail in the City's opening brief, only where the internal investigation sustains a charge and sends it to a hearing or imposes discipline can the record be considered a "disciplinary record" subject to release through FOIL.

Respondent argues that the City has a broad and movable definition of unsubstantiated complaints and that the Court must look to the legislative history to determine intent. But there is no reason to cherry-pick legislators commentary as

NYCLU does, because the statute is clear on its fact: at issue are disciplinary records, not records of investigation that result in no discipline or even the prospect of discipline. Had the legislature wished to make all internal investigations available to the public irrespective of discipline, they would have said so. Yet the FOIL revision say nothing of disclosure of internal complaint investigations *except* to note that, in disclosing a disciplinary record, the municipality must give not only the ultimate outcome, but also the original complaint and investigation record.

In other words, the City looks only to the words of the statute to discern legislative intent, and finds that it is the phrase "disciplinary record" that is used there, not the word unsubstantiated. "[L]aw enforcement disciplinary record" is more completely defined under Public Officers Law §87 (4) and disciplinary record is the issue on the appeal. 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, under New York law, a disciplinary proceeding is defined by Public Officer's Law §86(7) as both the commencement of an investigation and a subsequent hearing or disciplinary action. If 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 under Public Officer's Law §86.

Where following an investigation a complaint is unsubstantiated, exonerated or unfounded, there are no charges, no process issued and no disciplinary proceeding commenced, and therefore no disciplinary proceeding and no responsive disciplinary records.. Thus, where an investigation does not find misconduct and no disciplinary proceeding is commenced, it cannot be said that there is an investigative file 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. MERE REDACTION IS INADEQUATE

The Court below, the Fourth Department, found that, rather than withhold records of unsubstantiated allegations, as other Courts and the Committee on Open Government have a long history of recommending, a new approach would be to redact from the records information that would result in an unwarranted invasion of personal privacy. This decision is against precedent and the language of the FOIL revisions—is that it inadequate to protect public employee's privacy which in turn could subject the City to a claim for defamation or subject the public employee top abuse, both in his private life and in his public work and work in the the judicial system.

Public Officers Law § 87(2)(b) exempts from disclosure any record or part of a record which if disclosed would constitute an unwarranted invasion of personal privacy under the provisions of §89. The disclosure of unsubstantiated complaints have been considered exempt, as an invasion of personal privacy, and redacted in their entirety by precedential court decisions. The additional FOIL revisions should be used in conjunction with precedent to provide an adequate measure, of wholesale redaction, for unsubstantiated complaints.

The disclosure of unsubstantiated complaints have generally been ruled exempt from disclosure as an invasion of personal privacy. Respondent asserts that only names, phone numbers and medical information or description of acts

statements or injuries to any individual, including law enforcement officers. would be subject to redaction. Respondent's position, if adopted by the Court, could create a statutory scheme of different classes of privacy protection for municipal employees. Less privacy protection would be given to uniformed municipal employees than non-uniformed municipal employees. Respondent's argument turns the repeal of §50-a into a weapon, as it would have the effect of lessening the privacy protections for members of law enforcement.

Dated: December 20, 2023

City of Rochester-Law Department

By:_____

Patrick Beath, Esq.
Deputy Corporation Counsel
John M. Campolieto, Esq.
Municipal Attorney
30 Church Street, Room 400A
Rochester, New York 14614
Tel.: (585) 428-7410
patrick.beath@cityofrochester.gov
john.campolieto@cityofrochester.gov
Attorneys for Respondents-Appellants

NEW YORK STATE COURT OF APPEALS
CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR PART 500.1(j) that the foregoing brief was prepared on a computer using Microsoft Word.

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Dated: December 20, 2023

PATRICK BEATH, ESQ.
DEPUTY CORPORATION COUNSEL
JOHN M. CAMPOLIETO, ESQ.
MUNICIPAL ATTORNEY
CITY OF ROCHESTER-LAW DEPARTMENT
Attorneys for Respondents-Appellants
30 Church Street, Room 400A
Rochester, New York 14614
Tel.:(585) 428-7410
patrick.beath@cityofrochester.gov
john.campolieto@cityofrochester.gov

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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 20, 2023

deponent served the within: Reply Brief for Respondents-Appellants

upon:

Robert Hodgson, Esq.
Lisa Laplace, Esq.
New York Civil Liberties
Union Foundation
Attorneys for Petitioner-Respondent
125 Broad Street, 19th Floor
New York, New York 10004
Tel.: (212) 607-3300

Joshua Ebersole, Esq.
Stephen P. Ross, Esq.
Shearman & Sterling LLP
Attorneys for Petitioner-Respondent
599 Lexington Avenue
New York, New York 10022
Tel.: (212) 848-4000

the address(es) designated by said attorney(s) for that purpose by depositing **3** true copies 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 20, 2023

Mariana Braylovskiy

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

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