*To be Argued by:*
ROBERT HODGSON
*(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 PETITIONER-RESPONDENT


ROBERT HODGSON, ESQ.
LISA LAPLACE, ESQ.
NEW YORK CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 19th Floor
New York, New York 10004
(212) 607-3300
rhodgson@nyclu.org
llaplace@nyclu.org

JOSHUA EBERSOLE, ESQ.
SHEYLA SORIANO, ESQ.
SHEARMAN & STERLING LLP
599 Lexington Avenue
New York, New York 10022
(212) 848-4000
joshua.ebersole@shearman.com
sheyla.soriano@shearman.com

*Attorneys for Petitioner-Respondent*


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## DISCLOSURE STATEMENT PURSUANT TO RULE 500.1(f)

The New York Civil Liberties Union 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.

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## COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. In light of the full repeal of Civil Rights Law section 50-a and the amendment of the Freedom of Information Law ("FOIL") adding a broad definition of the "law enforcement disciplinary records" now subject to disclosure that includes "complaints," "allegations," any "disposition," and the "name of the employee complained of or charged," can an agency invoke FOIL's narrow unwarranted-invasion-of-privacy exemption to justify the categorical withholding of all complaints it deems "unsubstantiated"?

*The Fourth Department correctly held that Respondents-Appellants (hereinafter, "Rochester" or "Appellants") may not categorically withhold the law enforcement disciplinary records at issue.*

2. In light of the detailed redaction scheme FOIL now includes specifically for law enforcement disciplinary records, must an agency produce all such records subject only to the narrowly construed redactions and withholdings permitted by FOIL, and with any such redactions or withholdings justified in a specific and particularized manner that is reviewable by a court?

*The Fourth Department correctly held that Rochester must produce all responsive law enforcement disciplinary records, with any of the narrow redactions or withholdings permitted by FOIL subject to a specific and particularized justification articulated in a manner reviewable by a court.*

## PRELIMINARY STATEMENT

"[T]he more open a government is with its citizenry, the greater the understanding and participation of the public in government." (Public Officers Law § 84.) In its appeal, Rochester asks this Court to rewrite New York's Freedom of Information Law and render a straightforward legislative enactment opening up police misconduct complaint records to the public a virtual nullity. Because Rochester's arguments cannot be squared with the plain language of the statute, clear legislative intent, or this Court's precedent regarding the narrow scope of longstanding FOIL exemptions, they all fail.

For decades, section 50-a of the Civil Rights Law ("Section 50-a") kept secret all records regarding police misconduct complaints, investigations, and discipline. In June 2020, in response to massive statewide and nationwide protests for police accountability, the legislature fully repealed Section 50-a. It simultaneously amended FOIL to define the "law enforcement disciplinary records" an agency must disclose as including all "complaints," "allegations," the "name of the employee complained of or charged," and any "disposition," regardless of the outcome. It further amended the statute to establish a detailed redaction scheme for these specific records to address privacy concerns, mandating the redaction of information like officers' home addresses, personal numbers, and medical histories.

Since that time, hundreds of thousands of records of exactly the type in dispute

here have been published—sometimes proactively—on a wide scale by FOIL-compliant agencies across New York. The result of these disclosures has been only positive, enlightening for the public, and devoid of any of the type of speculative harms that critics of the new statute suggested might occur. Nevertheless, many other agencies continue to resist even the most basic forms of transparency, acting as though no change in law occurred, and post-Section-50-a FOIL compliance remains frustratingly out of reach for communities across New York.

Here, Rochester argues that FOIL should be read to permit it to categorically withhold every part of every complaint and investigation record that Rochester did not ultimately "substantiate."[1] In support, it offers two primary arguments. *First*, it argues that the 2020 FOIL amendments had no effect on the availability of police misconduct complaint records in the vast majority of cases. *Second*, it argues that FOIL's longstanding unwarranted-invasion-of-privacy exemption now permits the blanket withholding of every record associated with an "unsubstantiated" complaint, and that redaction categorically cannot address officers' privacy concerns.

[1] Rochester's use of the term "unsubstantiated" is both imprecise and inconsistent. "Unsubstantiated" is not a term with a clear definition across agencies, and at various points in its brief Rochester refers to the withheld records as "unsubstantiated or unverified" (brief for Rochester at 5) and "unfounded, exonerated, or unsubstantiated" (*id.* at 15). For the purpose of this brief, the NYCLU understands Rochester to be arguing that it can withhold every part of every record where Rochester itself has not reached a finding that misconduct occurred.

On the first point, Rochester's statutory construction argument would render much of the new statutory text and structure meaningless, contradictory, or incoherent. A plain reading of the law, supported by its legislative history, mandates the disclosure of exactly these "complaint," "allegation," and "disposition" records.

On the second, Rochester's sweeping version of the scope of the unwarranted-invasion-of-privacy exemption cannot be reconciled with the plain text and structure of the law. It also conflicts with this Court's precedent mandating targeted redaction instead of blanket withholding, with all applicable case law, and with Rochester's own cited authorities. Notably, Rochester also fails to acknowledge or address the public's strong interest—now codified into law—in having a full and transparent understanding of how the entire police accountability process functions, from "complaint" to "disposition," not just the small fraction of cases in which a law enforcement agency chooses to impose discipline.

Every Appellate Division court to consider this issue—the First, Second, and Fourth Departments—has squarely rejected Rochester's arguments. This Court should do the same and should hold that the law is clear: in response to a FOIL request like the NYCLU's, law enforcement agencies must produce all responsive records regardless of status or disposition, subject to the narrow, targeted redaction of material that is exempt under FOIL.

For all these reasons, the NYCLU respectfully requests that the Court affirm.

## STATEMENT OF FACTS AND PROCEDURAL HISTORY

In response to the repeal of Section 50-a—and as part of a statewide effort to better understand police accountability in over a dozen jurisdictions around the state[2]—the NYCLU submitted a FOIL request to the Rochester Police Department on September 15, 2020. It sought records related to the RPD's police accountability practices, including many records that had previously been shielded from the public by Section 50-a. (R. at 76-84.[3]) Of relevance here, the request sought all civilian complaints, related investigative records, and all related law enforcement disciplinary records, regardless of disposition, status, or outcome, over the requested time period. (*Id.*)

Initially, Rochester did not meaningfully engage with the NYCLU regarding its FOIL request and its letters and phone calls seeking to negotiate a timely production schedule. Given Rochester's response, the NYCLU filed its Article 78 petition on December 14, 2020, seeking the timely production of all responsive documents, with only those redactions permitted by FOIL. (R. at 14-97.) It was only after initial briefing was completed that Rochester indicated to the NYCLU that it

[2] To date, the NYCLU has been involved in litigation associated with similar FOIL requests in Schenectady, Buffalo, New York City, Nassau County, Syracuse, Troy, Freeport, Saratoga Springs, Suffolk County, and Yonkers, and with several New York State law enforcement agencies.

[3] "R" refers to the record on appeal submitted by Rochester.

would soon begin to produce documents. (R. at 145-150.)

On February 11, 2021, Rochester published an online database containing redacted "substantiated" disciplinary records for 117 active police officers—roughly 17% of its total police force—dated between 1986 and 2021. However, the database did not include "unsubstantiated" or pending complaints or the files of officers who had quit, retired, or been fired. (*See* R. at 145-46.[4])

After additional communications in which the NYCLU noted and objected to Rochester's incomplete responses, Rochester stated for the first time its position that disciplinary files related to "unsubstantiated" complaints were not "encompassed within the definition of law enforcement disciplinary records set forth in the Freedom of Information Law" and that disclosure of any part of any unsubstantiated complaint or investigation material would constitute an unwarranted invasion of privacy. (R. at 153-158.)

In light of these new facts, on May 17, 2021, the NYCLU filed a supplemental brief and supporting materials addressing the parties' remaining disputes and reiterating its request for the timely production of all responsive records, regardless

[4] The database is available at https://www.cityofrochester.gov/policediscipline/ (last accessed Dec. 2, 2023), and it confirms that records are limited to "current" officers and to "completed investigation[s] where charges were substantiated."

of disposition, redacted only as permitted by FOIL. (Compendium[5] at 25-50.) Rochester filed an amended answer and affirmation on July 14, 2021, newly raising an argument that it should not be compelled to produce records dated prior to June 12, 2020. (R. at 175-79.)

The Supreme Court for Monroe County issued its decision and order on August 10, 2021, denying the petition and holding that: (1) Rochester was not required to produce records of "unsubstantiated" complaints against officers; (2) Rochester was not required to provide disciplinary records dated before June 12, 2020; and (3) the NYCLU was not entitled to attorneys' fees and costs. (R. at 11-13.) The NYCLU filed a notice of appeal on August 23, 2021. (R. at 3-6.)

The NYCLU appealed every portion of the lower court's decision. It argued that the plain text and structure of the statute, as amended, do not permit Rochester to categorically withhold "unsubstantiated" complaint records or records where Rochester "did not come to a decision" and instead requires their production with only the narrow redactions permitted by FOIL (Compendium at 69-70), and it argued that Rochester could not withhold pre-June-2020 materials (*id.* at 70-71).

On November 10, 2022, the Fourth Department held that: (1) Rochester could not categorically withhold records of "unsubstantiated" complaints against officers;

[5] "Compendium" refers to the compendium of the parties' lower court briefs, submitted by the NYCLU pursuant to Rule 500.14(c) for this Court's convenience.

and (2) Rochester was required to produce records dated on or before June 12, 2020. (*New York Civil Liberties Union v City of Rochester*, 210 AD3d 1400 [4th Dept 2022] [hereinafter "*Rochester II*"], *lv granted* 39 NY3d 915 [2023]; *see also New York Civil Liberties Union v City of Syracuse*, 210 AD3d 1401, 1403-04 [4th Dept 2022] [hereinafter "*Syracuse II*"] [decided concurrently and referenced in *Rochester II*].) The court ordered Rochester to produce such records subject to redaction "pursuant to a particularized and specific justification for exempting each record or portion thereof" under Public Officers Law Section 87 (2) and mandated that Rochester document any claimed redaction or exemption "in a manner that allows for review by a court." (*Rochester II*, 210 AD3d at 1401.)

Rochester sought leave to appeal the Fourth Department's decision only on the issue of complaints that have not been "substantiated," not on the issue of pre-June-2020 materials (*see* Rochester Motion for Leave to Appeal at 8-12). On June 13, 2023, this Court granted Rochester's motion and this appeal followed.

## ARGUMENT

In light of the presumption of access that FOIL creates, the plain text and structure of the law, its legislative history, and longstanding precedent regarding the unwarranted-invasion-of-privacy exemption, Rochester's categorical withholding of "unsubstantiated" complaints cannot stand. Its arguments to the contrary all fail.

To date, all five Appellate Division courts to have considered the issue agree.

(*Newsday, LLC v Nassau County Police Dept.*, —AD3d—, 2023 NY Slip Op 06050 [2d Dept Nov. 22, 2023], *NYP Holdings, Inc v New York City Police Dept.*, 220 AD3d 487 [1st Dept 2023]; *New York Civil Liberties Union v New York City Dept. of Corr.*, 213 AD3d 530 [1st Dept 2023]; *Syracuse II*, 210 AD3d 1401; *Rochester II*, 210 AD3d 1400.) While of course none of these decisions is binding on this Court, the NYCLU respectfully submits that the evident and growing unanimity on this issue provides a persuasive indication that the statutory text is clear and the withheld records must be produced.

## I. FOIL CREATES A PRESUMPTION OF MAXIMUM ACCESS.

As a threshold matter, well-settled FOIL principles regarding the statute's expansive scope and purpose establish the lens through which Rochester's denials must be analyzed. "To promote open government and public accountability, . . . FOIL imposes a broad duty on government to make its records available to the public." (*Gould v New York City Police Dept.*, 89 NY2d 267, 274 [1996] [citing Public Officers Law § 84].) This Court has long held that, pursuant to FOIL, "all records of a public agency are presumptively open to public inspection . . . unless otherwise specifically exempted," that "[e]xemptions are to be narrowly construed to provide maximum access," and that "the agency seeking to prevent disclosure carries the burden of demonstrating that the requested material falls squarely within a FOIL exemption by articulating a particularized and specific justification for

denying access." (*Capital Newspapers Div. of Hearst Corp. v Burns*, 67 NY2d 562, 566 [1986].)

Consistent with these principles, "blanket exemptions for particular types of documents are inimical to FOIL's policy of open government." (*Gould*, 89 NY2d at 275; *see also* Public Officers Law § 87 [2] ["A denial of access shall not be based solely on the category or type of such record."].) If the agency is unable to demonstrate that a statutory exemption applies, FOIL "compels disclosure, not concealment." (*Westchester Rockland Newspapers v Kimball*, 50 NY2d 575, 580 [1980].) And, in the context of the unwarranted-invasion-of-privacy exemption, targeted redaction is required in order to avoid wholesale withholding if some portion of a record may be exempt but the remainder is not. (*Schenectady County Soc'y for Prevention of Cruelty to Animals, Inc. v Mills*, 18 NY3d 42, 46 [2011] [holding that an agency cannot "refuse to produce the whole record simply because some of it may be exempt from disclosure"].)

## II. THE LEGISLATURE REPEALED SECTION 50-A AND AMENDED FOIL TO MAKE POLICE MISCONDUCT COMPLAINT RECORDS PUBLIC REGARDLESS OF DISPOSITION.

### A. The plain text of the statute mandates that "unsubstantiated" complaints be disclosed and establishes a detailed redaction scheme addressing officer privacy concerns.

When interpreting any statute, a court's "primary consideration" is "to ascertain and give effect to the intention of the legislature." (*Riley v County of*

*Broome*, 95 NY2d 455, 463 [2000] [internal quotes and citation omitted].) The "plain language of the statute . . . is the clearest indicator of legislative intent." (*T-Mobile Ne., LLC v DeBellis*, 32 NY3d 594, 607 [2018].) Rochester's decision to categorically deny access to every part of every record associated with an "unsubstantiated" complaint cannot be squared with plain statutory language identifying exactly these records and mandating a process for their disclosure.

Until the summer of 2020, Section 50-a barred from public disclosure "police personnel records used to evaluate performance towards continued employment or promotion." Although the state agency charged with aspects of FOIL implementation has noted that the intended breadth of Section 50-a when first enacted in 1976 was narrow, its scope had expanded dramatically and controversially by the time of repeal. According to the Department of State Committee on Open Government (the "COOG"), Section 50-a had been "expanded in the courts to allow police departments to withhold from the public virtually any record that contains any information that could conceivably be used to evaluate the performance of a police officer." (R. at 35 [collecting cases].)

Against this backdrop, in response to massive statewide and nationwide attention focused on improving police accountability and transparency following the murder of George Floyd, the New York State legislature passed the #Repeal50a Bill (2020 Senate Bill 8496, Assembly Bill 10611), and the governor signed it on June

12, 2020. In addition to fully repealing Section 50-a, it simultaneously amended Public Officers Law sections 86-89 to address the production of law enforcement disciplinary records.

Specifically, FOIL now mandates that an agency "responding to a request for law enforcement disciplinary records" must identify those records and redact certain items "prior to disclosing such record under this article" (Public Officers Law § 87 [4-a]). "Law enforcement disciplinary records" are "any record[s] created in furtherance of a law enforcement disciplinary proceeding, including, but not limited to . . . *complaints, allegations*, and charges against an employee; . . . the name of the employee *complained of or* charged; . . . [and] the *disposition* of any disciplinary proceeding" (*id.* § 86 [6] [emphasis added]). A "law enforcement disciplinary proceeding means *the commencement of any investigation* and any subsequent hearing or disciplinary action conducted by a law enforcement agency." (*Id.* § 86 [7] [emphasis added].)

To address specific privacy concerns related to law enforcement disciplinary records, the legislation requires the agency to redact: (i) the officer's medical history information; (ii) their home addresses, personal telephone numbers, personal cell phone numbers, and personal e-mail addresses, and those of their family members; (iii) the officer's social security number; and (iv) the officer's use of an employee assistance program, mental health service, or substance abuse assistance service.

(*Id.* §§ 89 [2-b], [2-c].) In these sections, the legislature set forth exactly what type of material would be mandatorily exempt from production and what would be permissively exempt.[6] It did so with care, avoiding the inclusion of any broader exemption and notably *not* including "unsubstantiated" complaints.

In sum, with these amendments, FOIL now includes an explicit requirement to identify and produce "[l]aw enforcement disciplinary records" with certain redactions (*id.* § 87 [4-a]); a definition of "law enforcement disciplinary records" that includes "complaints" and "allegations" against an officer, the name of an officer "complained of or" charged, and the "disposition of any disciplinary proceeding" (*id.* § 86 [6]); and a definition of "law enforcement disciplinary proceeding" that begins with the "commencement of any investigation" and includes but does not require "any subsequent hearing or disciplinary action" (*id.* § 86 [7]).

Nowhere does the statute distinguish between complaints based on their disposition, and nowhere does it create a categorical exemption for any type of law enforcement record. As such, an agency must produce a complaint even if it was deemed "unsubstantiated" or did not result in disciplinary action. This

[6] An additional provision permits—but does not require—redaction of any portion of a law enforcement disciplinary record that pertains only to "technical infractions." (Public Officers Law §§ 87 [4-b], 89 [2-c].) "Technical infractions" is a limited term of art and cannot include incidents stemming from an interaction with the public, that are of public concern, or that are otherwise related to an officer's investigative or enforcement responsibilities. (*Id.* § 86 [9] [defining "technical infractions"].)

straightforward reading of the statute is the only one that tracks the plain meaning of its language and structure, and indeed the Second Department concisely summarized why it makes good sense:

> Upon repealing Civil Rights Law § 50-a, the Legislature amended the Public Officers Law to specifically contemplate the disclosure of "law enforcement disciplinary records," which it defines to include "complaints, allegations, and charges against an employee" (Public Officers Law § 86[6][a]). If the Legislature had intended to exclude from disclosure complaints and allegations that were not substantiated, "it would simply have stated as much" (*Matter of Friedman v Rice*, 30 NY3d 461 at 478 [2017]). It did not, and instead included "complaints, allegations, and charges" in its definition of disciplinary records, along with "the disposition of any disciplinary proceeding" (Public Officers Law § 86[6][d]), without qualification as to the outcome of the proceeding. Furthermore, the Legislature directed the types of information that shall and may be redacted from law enforcement disciplinary records prior to disclosure (*see id.* § 87[4-a], [4-b]). Notably, unsubstantiated allegations or complaints are not among either the mandated or the permissible redactions (*see id.* § 89[2-b], [2-c]).

(*Newsday*, 2023 NY Slip Op 06050, at *3.)

Rochester, failing to acknowledge or address nearly all of the relevant statutory language, argues that the law permits an agency to withhold in full every "complaint" and "allegation" that does not result in substantiation, every name of an officer "complained of" but not charged, and every "disposition" that is not a substantiated one. (Brief for Rochester at 16 [asserting "the legislature did nothing that would require disclosure—or prohibit non-disclosure—of records related to unsubstantiated allegations of misconduct"].) But such an interpretation would render those terms' inclusion in the statute incoherent, violating the "well-

established rule that courts should not interpret a statute in a manner that would render it meaningless." (*Suarez v Williams*, 26 NY3d 440, 451 [2015].)

Instead, Rochester argues that the statutory phrase "'Law Enforcement Disciplinary Proceeding' means the commencement of any investigation and any subsequent hearing or disciplinary action" (Public Officers Law § 86 [7]) should be read to mean that a "law enforcement disciplinary proceeding" does not exist until and unless a "hearing or disciplinary action" has occurred (brief for Rochester at 14-15). This is neither a natural nor a plausible reading of the text.

Pursuant to the statutory definition, the proceeding begins with "*the commencement of any investigation*," and while the proceeding also includes "any subsequent hearing or disciplinary action" if one should occur, the words "and any subsequent hearing or disciplinary action" cannot be read to require the existence of either. To do so rewrites the words "and *any* subsequent" to mean "only if followed by a subsequent." The legislature said no such thing, and instead created an expansive, inclusive definition. By way of example, consider if a lawyer stated to a court that she would represent a client *pro bono* for a particular "'case,' meaning the commencement of any lawsuit and any subsequent hearing or trial." It cannot be said that if there is no hearing or trial, the *pro bono* "case" never existed and thus the lawyer could charge the client for the hours spent commencing their lawsuit and working it through to some other disposition.

If the legislature had intended to adopt Rochester's proposed meaning, it would have done so clearly, and it would not have included so many terms and phrases throughout the statute rendered meaningless or contradictory by its definition. (*See Indus. Comm'r. of State of NY v Five Corners Tavern*, 47 NY2d 639, 646-47 [1979] ["It remains a basic principle of statutory construction that a court will not by implication read into a clause of a rule or statute a limitation for which no sound reason [can be found] and which would render the clause futile"] [internal quotation marks omitted, brackets in original].)[7] Instead, the legislature spoke clearly, and it mandated disclosure of the disputed records.

### B. The legislative history confirms the legislature intended to make "unsubstantiated" complaint records public.

Because the language of the statute is clear, the Court need not look to legislative history, but to the extent it does that history plainly supports the NYCLU's position. In repealing Section 50-a and amending FOIL, the legislature intended to heighten transparency and accountability broadly for police and other law enforcement agencies amid a nationwide reckoning with institutional racism and the fatal use of force against Black people. Passed in the wake of the murder of

[7] Rochester's cited authorities on this issue actively undermine its argument. The Black's Law Dictionary language quoted in Rochester's brief includes multiple general definitions of a "proceeding," including "all acts and events between the time of commencement and the entry of judgment" (brief for Rochester at 15), and the Civil Service Law provision offers no definition of "disciplinary proceeding" at all (*id.*).

George Floyd and in response to reports that revealed disproportionately high rates of "unsubstantiated" dispositions arising from racial profiling complaints, the legislative record makes clear that lawmakers intended to provide New Yorkers broad insight into how and why complaints might not have resulted in discipline.

The enacted bill's "justification" emphasized that "[p]olice-involved killings by law enforcement officials who have had histories of *misconduct complaints*, and in some cases . . . charges, have increased the need to make these records more accessible," stressing the importance of access to "records of complaints *or* findings of law enforcement misconduct" (2020 Senate Bill 8496 [emphasis added]). While debating the repeal,[8] legislators disagreed about whether the bill *should* make "unsubstantiated" complaints public, but both proponents and detractors agreed that it *would* do so. (*See e.g.* NY Assembly, Floor Debate, 243rd NY Leg, Reg Sess [June 9, 2020],[9] at 61, 100, 152, 198, 205-06 [Assemblymembers O'Donnell, the sponsor, and Ramos, Mosely, Bichotte, and Abinanti, respectively, expressing support because the bill would render "unsubstantiated" complaints public]; *id.* at 132, 167,

[8] If there is any ambiguity in the text of a statute, New York courts may examine records of legislative debates and "utilize [those] proceedings to ascertain the legislative intent" (McKinney's Cons Laws of NY, Book 1, Statutes § 125; *see also People ex rel. Fleming v Dalton*, 158 NY 175, 184 [1899]).

[9] Available at https://nystateassembly.granicus.com/DocumentViewer.php?file=nystateassembly_e9af7a3d256bee2d470e331a2a0dd9ae.pdf&view=1 (last accessed Dec. 2, 2023).

243, 221, 241 [statements of Assemblymembers Fitzpatrick, Garbarino, Goodell, and Reilly, respectively, opposing specifically because the bill would make "unsubstantiated" complaints public].)

Assemblymember Ramos cited public access to "unsubstantiated" complaints as a possible means of establishing patterns of misconduct and identifying officers "who might be a problem and might be a risk to the public[,]" arguing that "the core of the problem is that throughout history, crimes against people of color have been unsubstantiated." (*Id.* at 100.) Assemblymember O'Donnell and Senator Bailey, the Senate sponsor, cited data to make a similar point. (*See id.* at 98 ["The last two years there were 4,000 complaints at the CCRB alleging racial profiling. Do you know how many have been substantiated? Zero. Zero. Which means to me very clearly that the process, whatever that may be, is fatally flawed."]; *see also* NY Senate, Floor Debate, 243rd NY Leg, Reg Sess [June 9, 2020][10] at 1805-06 [describing similar statistic].) Contemporaneous public reports confirm that the NYPD's Internal Affairs Bureau, for example, substantiated none of the 2,495 complaints alleging biased policing made against NYPD officers from 2014 to 2018. (*See* Office of the Inspector General for the NYPD, *Complaints of Biased Policing in New York City:*

[10] Available at legislation.nysenate.gov/pdf/transcripts/2020-06-09T11%3A53 (last accessed Dec. 2, 2023).

*An Assessment of NYPD's Investigations, Policies, and Training* [2019][11] at 17-18.) These repeated points all highlight that the drafters believed the public had a significant interest in the specific issue of which complaints go unsubstantiated and why, and they confirm that the bill language that passed was intended to make records public that would provide answers.[12]

## III. THE UNWARRANTED-INVASION-OF-PRIVACY EXEMPTION DOES NOT JUSTIFY ROCHESTER'S BLANKET DENIAL AND REQUIRES NARROW TARGETED REDACTIONS.

### A. Rochester has not met its burden—nor could it—to provide a particularized and specific reason why every part of every "unsubstantiated" record constitutes an unwarranted invasion of privacy.

In the absence of Section 50-a, Rochester must carry its burden to demonstrate that any withheld material "falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access." (*Capital Newspapers*, 67 NY2d at 566.) But Rochester offers no specific or particularized discussion of any withheld record, and it asserts only in the most general terms that the disclosure of any "public employee personnel records of unsubstantiated allegations of

[11] Available at nyc.gov/assets/doi/press-releases/2019/jun/19BiasRpt_62619.pdf (last accessed Dec. 2, 2023).

[12] It is notable that during this same time period, the legislature considered and rejected a narrower bill that would have facilitated the release of specific categories of records only in situations where the allegations had been substantiated. (*See* 2019 Senate Bill 4213.)

misconduct" would constitute "an unwarranted invasion of personal privacy" as a *per se* matter (brief for Rochester at 14). This bare assertion is not enough.

To start, leaving aside that Rochester's sweeping articulation of the unwarranted-invasion-of-privacy exemption's scope was not accurate before the 2020 FOIL amendments, it certainly cannot be reconciled with the plain text and structure of the statute as amended. As discussed in the previous section, FOIL now contains specific language defining law enforcement records that must presumptively be disclosed as including "complaints," "allegations," the "name" of an officer "complained of or charged," and any "disposition" (*see supra* Part II[A]). Interpreting the general "privacy" language of section 87 (2) (b) to permit the blanket withholding of all that material would violate one of this Court's "standard rules of construction": "whenever there is a general and a particular provision in the same statute, the general does not overrule the particular." (*People v Lawrence*, 64 NY2d 200, 204 [1984].)

While the Court's analysis can begin and end with the text of FOIL's "law enforcement disciplinary proceeding" provisions, any analysis of pre-2020 case law further serves to support the NYCLU's position. FOIL has never listed "unsubstantiated" complaint materials as an unwarranted invasion of privacy (*see* Public Officers Law § 87 [2] [b]), nor has this Court ever held that such material may be withheld. By contrast, the statute has long proscribed any "denial of access

. . . based solely on the category or type of . . . record" (*id.* § 87 [2]), and pre-2020 courts across the state considering public employee disciplinary FOILs observed that "there is no statutory blanket exemption for investigative records, even where the allegations of misconduct are 'quasi criminal' in nature *or not substantiated*," since "the ability to withhold records under FOIL can only be based on the effects of disclosure in conjunction with attendant facts" (*Thomas v New York City Dept. of Educ.*, 103 AD3d 495, 498 [1st Dept 2013] [emphasis added] [citing *Gould*, 89 NY2d at 275 ["blanket exemptions for particular types of documents are inimical to FOIL's policy of open government"]]).

Here, the law is clear that Rochester's blanket denial invoking the unwarranted-invasion-of-privacy exemption goes too far. Rochester cites no particularized or specific invasion of privacy for this Court to consider. The only common fact Rochester has offered about its withheld records is that they are all associated with complaints that Rochester did not "substantiate"—and that fact, standing alone, does not and cannot rise to the level of a *per se* unwarranted invasion of privacy justifying the categorical withholding of every part of every record.

Rochester notably fails to acknowledge or address that there are large swaths of withheld material that could not plausibly implicate anyone's privacy, let alone create an unwarranted invasion of it. For example, there is material within its responsive records that, if produced, would likely reveal key information like the

total number of allegations Rochester investigated over a period of time, their dispositions, the general category of alleged misconduct reported, the volume of investigative materials, and the length of time Rochester's investigative process can take—none of which implicates any officer's privacy.

Rochester also fails to acknowledge or address the public interest in these complaints and investigations. When weighed against the general privacy interests Rochester asserts (*see Harbatkin v New York City Dept. of Recs. & Info. Servs.*, 19 NY3d 373, 380 [2012]), the balance overwhelmingly tilts in favor of disclosure. On the privacy side, courts have explained persuasively that "public employees enjoy a lesser degree of privacy than others" because "public employees are required to be more accountable than others" (*Thomas*, 103 AD3d at 499 [internal citations omitted]). Whereas on the public interest side, a robust, agency-wide production of minimally-redacted complaint records across all dispositions would allow the public to understand, in a way it never has before, the operation of the Rochester Police Department's accountability system as a whole.

The public's interest is not limited to individual instances where the Rochester Police Department has chosen to discipline one of its own officers; rather, that interest is particularly strong in obtaining a comprehensive picture of many previously secret details regarding when, how, and why complaints of police misconduct might *not* result in discipline. (*See e.g.* NY Assembly, Floor Debate,

243rd NY Leg, Reg Sess [June 9, 2020] at 98 [Assemblymember O'Donnell describing a "process" where "4,000 complaints . . . alleging racial profiling" resulted in "zero" substantiations as "fatally flawed"].) Police have the "authority to take a life" (*id.* at 99), and the public's interest in understanding police systems for monitoring the behavior that could lead to an improper use of deadly force could not be higher. Indeed, in Rochester specifically—where one the NYCLU's requests sought records "concerning the death of Daniel Prude" (R. at 80), and where increased community control over police accountability passed overwhelmingly in a 2019 referendum that led to recent litigation[13]—the public's interest in maximally robust transparency regarding these records is particularly apparent.

**B. Rochester's cited authorities all undermine its argument.**

Instead of discussing these interests or providing its required "particularized and specific" justification for the material it has withheld pursuant to section 87 (2) (b), Rochester relies entirely on a handful of authorities it asserts support the proposition that all public employees are, as a *per se* legal matter, "protected from *any* disclosure of unsubstantiated internal investigations" (brief for Rochester at 9; *see also id.* at 9-14). Each of these authorities in fact supports disclosure.

[13] The referendum was considered in *Rochester Police Locust Club, Inc. v City of Rochester* (—NE3d—, 2023 NY Slip Op 05959, at *6 [Nov. 20, 2023] [noting that the referendum passed "with 75% support" but holding that it ultimately could not take full effect without further state legislative action]).

First, Rochester cites an ambiguously worded July 2020 advisory opinion from the Committee on Open Government suggesting, "in the absence of judicial precedent" otherwise, that the production of certain law enforcement complaints that did not result in discipline could constitute an unwarranted invasion of privacy. (*See* brief for Rochester at 11-12 [citing COOG, FOIL Advisory Opinion 19775 [July 27, 2020]].) Leaving aside that this Court has held that the opinion of the COOG is "neither binding upon the agency nor entitled to greater deference in an article 78 proceeding than is the construction of the agency" (*Buffalo News, Inc. v Buffalo Enter. Dev. Corp.*, 84 NY2d 488, 493 [1994]), here the COOG has in fact issued a subsequent, superseding, much more explicit articulation of its opinion, and it squarely rejects Rochester's argument.

In December 2022, in the context of reviewing more updated developments and case law on this issue, the COOG unequivocally stated that "a blanket exemption over records that concern what [agencies] call 'unsubstantiated' allegations . . . [would] bring back the large-scale withholding of information that occurred before the repeal of § 50-a, seriously impede public oversight of law enforcement agencies, and further erode public confidence in those agencies." (COOG, Annual Report[14] [Dec. 2022] at 7-8.) Such withholdings "contradict the legislative purpose in

[14] Available at https://opengovernment.ny.gov/system/files/documents/2022/12/2022-coog-annual-report-final.pdf (last accessed Dec. 2, 2023).

repealing § 50-a . . . [are] also inconsistent with settled FOIL principles that require a case-specific weighing of the competing public and private interests when the privacy exemption is invoked . . . [and are] clearly inappropriate." (*Id.*) Police departments invoking "FOIL privacy provisions . . . to prevent disclosure of allegations concerning police misconduct . . . is an untenable situation that threatens to undermine the purpose for the repeal—to increase police transparency and accountability." (*Id.* at 7.) The NYCLU is in agreement with all these conclusions.

Rochester focuses the remainder of its argument on *Gannett Co., Inc. v Herkimer Police Dept.* (76 Misc 3d 557 [Sup Ct, Oneida County 2022]), a lone trial court decision that was appealed, discontinued (*see* 214 AD3d 1358 [4th Dept 2023]), and, according to public reporting, resulted in "a settlement in which the village agreed to release the full selection of [requested] records." (Brandon Whiting, *Inside Herkimer Police Records*, Utica Observer-Dispatch [Aug. 2, 2023].[15]) On the merits, the NYCLU respectfully submits that the trial court's reasoning is not persuasive; it did not discuss the records or relevant public or private interests in any detail, did not acknowledge or consider this Court's holdings regarding redaction as an alternative to blanket withholding, and cited to outdated

[15] Available at www.uticaod.com/story/news/local/2023/08/02/ny-police-records-herkimer-disciplinary-documents-made-public/70172002007/ (last accessed Dec. 2, 2023).

COOG opinions. (*See Gannett*, 76 Misc 3d at 561-65.)

Finally, Rochester highlights one portion of the *Gannett* decision asserting that "at least two appellate cases . . . stand for the proposition that an unwarranted invasion of personal privacy would be wrought by the disclosure of records related to unsubstantiated claims" (brief for Rochester at 13 [quoting 76 Misc 3d at 564]). Leaving aside that the cited cases (*LaRocca v Bd. of Educ. Jericho Union Free School Dist.*, 220 AD2d 424 [2d Dept 1995]; *Western Suffolk Bd. of Coop. Educ. Services v Bay Shore Union Free School Dist.*, 250 AD2d 772 [2d Dept 1998]) are not binding on this Court and were interpreting a pre-2020 version of FOIL, they do not stand for any such sweeping proposition, and in fact they illustrate why Rochester's argument must fail here.

*LaRocca* and *Western Suffolk* were cases about the fact-specific partial redaction of one educator's disciplinary records, not a sweeping categorical withholding of disciplinary records involving police. Critically, they also relied on Education Law Section 3020-a—a separate statute making records of educators' (not officers') disciplinary proceedings confidential—and they discussed the specific privacy interests of educators (not officers) created by the Education Law. (*See LaRocca v Bd. of Educ. Of Jericho Union Free School Dist.*, 159 Misc 2d 90, 93 [Sup Ct, Nassau County 1993] ["[T]o allow the inspection sought would be violative of the legislative intent of Education Law Section 3020-a and [Public Officers Law

§ 89 [2]]."], *aff'd as mod by* 220 AD2d at 426 [disclosure "would violate the legislative intent of Education Law § 3020-a"].)

Here, no equivalent to Section 3020-a for police records exists because that equivalent—Section 50-a—*has been repealed*, and further, the legislature codified the public's unique interest in accessing law enforcement disciplinary records by affirmatively adding a broad definition of those records to FOIL. (*See* Public Officers Law § 86 [6]; *see also* NY Assembly, Floor Debate, 243rd NY Leg, Reg Sess [June 9, 2020] at 62 [legislator opposing the bill because "3020-a of the Education Law renders unfounded complaints against schoolteachers confidential," "many other professions" have similar standalone confidentiality statutes, and the repeal of Section 50-a would end such confidentiality for law enforcement].)

### C. Redaction, facilitated by clear statutory guidance, provides more than adequate opportunity to address legitimate privacy concerns.

Rochester argues, without citing a single authority or fact, that categorical withholding is its only option because no amount of redaction could avoid the risk of "being inadequately protective of the public employee's privacy" (brief for Rochester at 17; *see also id.* 18-19). But the generalized and speculative concerns raised by Rochester are simply the common, everyday challenges that an agency undertakes when it applies any redaction, and accepting Rochester's argument would offer any agency the opportunity to avoid disclosure wholesale based on similar conjecture. Moreover, Rochester's unsupported speculation ignores the fact

that vast quantities of exactly this type of material have been made public on a wide scale for over three years by more FOIL-compliant agencies in New York (and around the country for much longer), with none of the negative results that Rochester suggests. Here, the text of the statute and this Court's holdings confirm that redaction is required, and they provide the guidance necessary to understand the targeted set of information an agency may redact.

FOIL makes records presumptively disclosable (*Gould*, 89 NY2d at 274) and only permits the withholding of "records or *portions thereof*" that fall within one of the statute's narrow exemptions (Public Officers Law § 87 [2] [emphasis added]). In the context of section 87 (2) (b), this Court has held that agencies must employ targeted redaction instead of blanket withholding where possible, specifically stating that agencies cannot "refuse to produce the whole record simply because some of it may be exempt from disclosure." (*Schenectady SPCA*, 18 NY3d at 46.) Consistent with that mandate, here, to address legitimate privacy concerns, the legislation amending FOIL introduced a law-enforcement-specific redaction scheme. (*See* Public Officers Law §§ 89[2-b], [2-c] [requiring redaction of a host of sensitive information including an officer's address, telephone number, and medical history, but notably not anything related to "unsubstantiated" complaints]; *id.* § 89 [2] [b] [additional enumerated redactions].)

Beyond those redactions, it is possible that additional particularly sensitive material from such records may be redacted as an "unwarranted invasion of privacy" pursuant to Section 87 (2) (b) on a case-by-case basis, considering whether the specific "invasion of privacy . . . is 'unwarranted' by balancing the privacy interests at stake against the public interest in disclosure of the information." (*Harbatkin*, 19 NY3d at 380 [internal citation omitted].) But in light of the fact that the legislature has, for law enforcement disciplinary records, provided particularly detailed guidance regarding what is exempt (home addresses, telephone numbers, etc. (*see* Public Officers Law §§ 89[2-b], [2-c])) and what is presumptively disclosable ("complaints," "allegations," the "name" of an officer "complained of or charged," and the "disposition" (*see id.* § 86 [6])), the universe of additional redactable or withholdable material must be construed narrowly to give effect to the specific wording of the statute.

Without acknowledging the statutory guidance available or the mine-run nature of the "risks" it describes, Rochester identifies four scenarios in support of its argument that it is permitted to withhold every part of every record associated with an "unsubstantiated" complaint. None counsels in favor of withholding.

First, Rochester asserts that an unspecified party could use digital "manipulation . . . 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." (Brief for Rochester at 18.) But the abstract risk of digital manipulation exists for any document in existence and cannot be the basis for a sweeping categorical FOIL withholding.

Second, Rochester states that the agency employee "undertaking redactions may make a mistake, miss a redaction, then publicly disclose the materials" (*id.* at 18). Again, the possibility of agency error exists universally whenever redaction occurs and cannot be the basis for a FOIL withholding. Additionally, it would create disturbingly perverse incentives if an agency's likelihood to botch its FOIL duties could justify that same agency's decision to categorically withhold responsive records.

Third, Rochester suggests that any release of an "unsubstantiated" complaint record "could subject the municipality to defamation claims" (*id.* at 19). Rochester offers no factual or legal support for the notion that a police department's production, pursuant to FOIL, of its own complaint and investigation records could ever satisfy the elements of a defamation claim, and it submits no authority showing that any such defamation claim has ever been filed.

Finally, Rochester argues that the mere potential for an officer's name to be associated with a complaint that was not substantiated creates an impermissible risk of "public ridicule" (*id.* at 17). As a threshold matter, the assertion that there is no form of redaction that could avoid the possibility a document will be associated with

a particular officer (*id.*), no matter how the redaction is carried out, strains credulity. Rochester's argument is orders of magnitude more "speculative" than the one considered and rejected by this Court in *Empire Ctr. for New York State Policy v New York State Teachers' Retirement Sys.* (23 NY3d 438, 446 [2014]), where the respondent articulated a concern that releasing a list of responsive names of retired teachers could, "by the use of modern technology," permit someone with a list of those names to "find most, if not all, of their home addresses" (*id.*). Even though the Court agreed that retirees' home addresses were exempt from FOIL, and conceded that such identification of addresses could occur, it ordered the release of their names because "the idea that anyone's privacy will be invaded is speculative." (*Id.*)

Further, and even more important, the premise on which Rochester's argument here relies is both false and dangerously all-encompassing. Rochester's argument assumes that the revelation or the confirmation that *any* police officer's name is associated with an "unsubstantiated" complaint constitutes a *per se* unwarranted invasion of privacy. (*See* brief for Rochester at 17-19.) But there is no authority for such a proposition. It has never been the case that agencies responding to FOIL requests can invoke section 87 (2) (b) to anonymize all responsive records or to refuse to produce records associated with a known officer or employee (*see e.g. Capital Newspapers*, 67 NY2d at 578-79 [ordering the disclosure of police records associated with a named officer]; *Gould*, 89 NY2d at 278 n 2 [discussing, in the

context of the privacy exemption, the police department's concession that "it routinely discloses law-enforcement documents pursuant to FOIL requests" including "arrest, complaint, and ballistic reports"]; *Empire Ctr.*, 23 NY3d at 446 [ordering the production of a list of names of public employees]).

And here, after the 2020 amendments, the statutory language makes it even clearer that employee names cannot be categorically withheld and there can be no presumption of anonymity for police officers associated with a complaint that has not been substantiated. The definition of a "law enforcement disciplinary record" subject to disclosure includes the "name of the employee *complained of or* charged" (Public Officers Law § 86 [6] [emphasis added]). Any rule permitting the presumptive withholding of the "name of the employee complained of" (as opposed to "charged")—or otherwise suggesting that anonymization is appropriate when performing redactions—would impermissibly render the legislature's language "meaningless." (*See Suarez*, 26 NY3d at 451; *see also People v Viviani*, 36 NY3d 564, 582 [2021] ["An attempt by this court to so limit the statute would . . . be tantamount to wholesale revision of the Legislature's enactment."] [internal quote and citation omitted].) The fact that the "name of the employee complained of" appears with specificity in the affirmative definition of a "law enforcement disciplinary record" (Public Officers Law § 86 [6]) and does not appear anywhere on the list of mandatory or permissive redactions associated with those records (*id.*

§§ 89[2-b], [2-c]) indicates that the amended FOIL considers it presumptively public information.

To be clear, Rochester presumes not just that general requests for multiple officer disciplinary records may be broadly redacted to anonymize them. It also takes the breathtakingly sweeping position that any "request made for a particular officer's complaint history" would be protected from FOIL disclosure because "no amount of redaction" could prevent the officer's public association with potential unsubstantiated complaints (brief for Rochester at 17). Such an interpretation—meaning that any request for "Officer [name]'s" records could be categorically denied—would almost fully reimpose Section 50-a in a vast number of cases. This is not the law.

Taken together, Rochester's arguments offer far-ranging speculation unsupported by a single fact, and its reliance on conjecture is particularly inappropriate in light of the actual facts of post-50-a history. The exact materials in dispute here have already been made public routinely and in vast quantities for over three years in New York, and for much longer across the country. Rochester offers not a single example of any of the harms it imagines. In fact, the results of such disclosure have been just the opposite, as demonstrated by both facts and persuasive case law on this precise issue.

Shortly after the amendment of FOIL, New York City began to release what

would become hundreds of thousands of unique complaint records—including officer names and dispositions—involving allegations of NYPD misconduct, most of which were not substantiated (*see Uniformed Fire Officers Assn. v De Blasio*, 846 Fed Appx 25 [2d Cir 2021]; *see also e.g.* NYCLU, *NYPD Misconduct Complaint Database* [2023][16]). Several law enforcement unions sought to block public access to the records, raising similar concerns to those voiced by Rochester before a federal trial court and ultimately the Second Circuit (*UFOA*, 846 Fed Appx at 30-31).

Considering a voluminous record that included expert submissions, the Second Circuit affirmed an order releasing the material, holding that the record supported a finding that "numerous other States make similar records available to the public," with "no evidence from any jurisdiction that the availability of such records resulted in harm to employment opportunities;" that "future employers were unlikely to be misled by conduct records that contained 'dispositional designations' specifying that allegations of misconduct were unsubstantiated, unfounded, or that the accused officer was exonerated;" and that "the asserted [employment-related] harm was speculative." (*Id.*) By contrast, considering the public's demonstrated and tangible need for prompt disclosure, the court noted that its decision should reflect that the public has an even "stronger legitimate interest in the disciplinary records of

[16] Available at https://www.nyclu.org/en/campaigns/nypd-misconduct-database (last accessed Dec. 2, 2023).

law enforcement officers than in those of other public employees." (*Id.* at 31.)

Regarding "the Union's more general assertion of heightened danger and safety risks to police officers," the court, while "fully and unequivocally respect[ing] the dangers and risks police officers face every day," held that they had not "demonstrated that those dangers and risks are likely to increase because of the City's planned disclosures," and it was particularly persuaded by the fact "that many other States make similar misconduct records at least partially available to the public without any evidence of a resulting increase of danger to police officers." (*Id.* at 31.)

The court's reasoning is persuasive and consistent with the experience of jurisdictions across New York State that have been proactively making all types of complaint and investigation records public since 2020. For example, after the repeal of Section 50-a, the city of Utica promptly created its own searchable database of "all Utica Police Officer personnel records," from the chief on down, declaring this an "effort to maintain transparency" and including things like commendations and merit findings alongside discipline and complaint records. (*See* Utica Police Department, *Personnel Records* [2023].[17]) These records are, and have been, released for years now and have not resulted in the harms Rochester supposes. (*See also Schenectady Police Benevolent Ass'n v Schenectady*, No. 2020-1411, 2020 WL

[17] Available at cityofutica.com/departments/police-department/department-personnel-records/index (last accessed Dec. 2, 2023).

7978093 [Sup Ct, Schenectady County Dec. 29, 2020] [in which Schenectady affirmatively sought to produce "unsubstantiated" records and obtained an order permitting it to do so over the objection of a police union].)

Ultimately, in light of Rochester's stated intention to apply sweeping and impermissible redactions if ordered to produce records here—and the parties' starkly different and plainly presented arguments regarding the material that should be produced in this case—the NYCLU respectfully submits that this appeal presents an ideal opportunity for the Court to articulate with some specificity the responsive material in dispute that would and would not be properly subject to redaction under the law. For all the reasons articulated above and in previous sections of this brief (*see supra* Part II), the universe of redactable or withholdable material must be construed narrowly and must not, for example, permit the presumptive redaction of "the name of the employee complained of or charged."

Such a rule would be consistent with FOIL's general presumption in favor of disclosure, would give effect to the specific wording of the statute's detailed redaction scheme, and would further the public's strong interest in accessing robust FOIL responses that provide as much insight as possible into police accountability practices. It would also offer much-needed clarity to agencies across the state and avoid further delays to communities seeking to access non-exempt material who have been denied it for years for reasons similar to the ones Rochester articulates.

## CONCLUSION

For all these reasons, the NYCLU respectfully requests that the Court affirm the Fourth Department's decision as described herein.

Dated: December 4, 2023
New York, New York

By: _____

Joshua T. Ebersole
Sheyla D. Soriano
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*

**NEW YORK STATE COURT OF APPEALS**
**CERTIFICATE OF COMPLIANCE**

I hereby certify pursuant to 22 NYCRR PART 500.13 that the foregoing brief was prepared on a computer using Microsoft Word.

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Dated: December 4, 2023

Joshua T. Ebersole