Appellate Division, First Department Case No. 2023-00242
New York County Clerk's Index No. 159132/21

Court of Appeals

STATE OF NEW YORK

NYP HOLDINGS, INC. and CRAIG MCCARTHY,

Petitioners-Respondents-Appellants,

—against—

NEW YORK CITY POLICE DEPARTMENT, DERMOT F. SHEA, in his official capacity as Commissioner of the New York City Police Department, and POLICE BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC.,

Respondents-Appellants-Respondents.

MOTION FOR LEAVE TO APPEAL AND FOR A STAY PENDING APPEAL

FREDERICK W. VASSELMAN
OFFICE OF THE GENERAL COUNSEL OF THE POLICE BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC.
125 Broad Street
New York, New York 10004
(212) 298-9144
fvasselman@nycpba.org

MATTHEW C. DALY
GOLENBOCK EISEMAN ASSOR BELL & PESKOE LLP
711 Third Avenue
New York, New York 10017
(212) 907-7300
mdaly@golenbock.com

Attorneys for Respondent-Appellant-Respondent Police Benevolent Association of the City of New York, Inc.

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NOTICE OF MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS AND FOR A STAY

PLEASE TAKE NOTICE, that upon the annexed Memorandum of Law, dated October 27, 2023, and the exhibits thereto, the briefs and Record of Appeal to the Appellate Division, First Department provided herewith, and all prior pleadings and proceedings had herein, Respondent-Appellant-Respondent Police Benevolent Association of the City of New York, Inc. ("PBA") will move this Court at the Courthouse located at 20 Eagle Street, Albany, New York 12207, on the 6th day of November 2023, at the opening of the Court on that day, or as soon as counsel can be heard, for an Order: (i) pursuant to CPLR §5602(a)(1)(i) and/or

CPLR §5602(a)(2) and Rule 500.22 of the Rules of Practice of the Court of Appeals, granting the PBA leave to appeal to the Court of Appeals from the Decision and Order of the Appellate Division, First Department, entered on October 12, 2023, which affirmed, as modified, the Decision and Order of the Supreme Court, New York County, entered on December 6, 2022; and (ii) pursuant to CPLR §5519(c), granting a stay pending appeal, and pending the determination of the leave motion, of the lower court decisions to the extent they require the disclosure of records that predate the June 12, 2020 repeal of Civil Rights Law §50-a.

PLEASE TAKE FURTHER NOTICE, that opposition papers, if any, must be served and filed in the Court of Appeals with proof of service on or before the return date of the motion.

Dated: New York, New York
October 27, 2023

Respectfully submitted,

FREDERICK W. VASSELMAN
Office of the General Counsel of
the Police Benevolent
Association of the City of New
York, Inc.
125 Broad Street
New York, New York 10004

Of Counsel:
Dave Morris
Andrew J. Dempster

GOLENBOCK EISEMAN ASSOR
BELL & PESKOE LLP

By:_____
Matthew C. Daly

711 Third Avenue
New York, New York 10017
(212) 907-7300

Attorneys for Respondent-Appellant-Respondent Police Benevolent Association of the City of New York, Inc.

To: Clerk of the Court of Appeals
Court of Appeals Hall
20 Eagle Street
Albany, New York 12207

Jeremy A. Chase, Esq.
DAVIS WRIGHT TREMAINE LLP
1251 Avenue of the Americas, 21st Floor
New York, New York 10020
Attorneys for Petitioners-Respondents-Appellants NYP Holdings, Inc. and Craig McCarthy

Hon. Sylvia O. Hinds-Radix
Corporation Counsel of the
City of New York
Attn: Diana Lawless
100 Church Street
New York, New York 10007
Attorneys for Respondents-Appellants-Respondents New York City Police Department and Dermot F. Shea

CORPORATE DISCLOSURE STATEMENT

Pursuant to 22 NYCRR 500.1(f) and 500.22(b)(5), Respondent-Appellant-Respondent Police Benevolent Association of the City of New York, Inc. states that it is a domestic not-for-profit corporation that has no parent corporation, subsidiaries or affiliates.

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Police Benevolent Association of the City of New York, Inc. ("PBA") respectfully submits this memorandum in support of its motion: (i) for leave to appeal from a Decision and Order of the Appellate Division, First Department, dated October 12, 2023 ("Decision"); and (ii) for a stay pending appeal and pending the determination of this leave motion.

PRELIMINARY STATEMENT

This motion asks the Court to review the First Department's holding that the New York State legislature's repeal of Civil Rights Law ("CRL") §50-a was retroactive. Based on that holding, the New York City Police Department ("NYPD") has been ordered to disclose all disciplinary records – without date limitation – for over 100 officers in response to Freedom of Information Law ("FOIL") requests issued by petitioners, who are the publisher and a reporter for the *New York Post* ("Petitioners"). The case is of unquestionable public importance, and presents an issue of law on which lower courts and agencies across the State are divided: whether law enforcement officers, corrections officers, and firefighters continue to have a confidentiality right for personnel records that predate the repeal of CRL §50-a.

While no appellate court had previously addressed this issue, the First Department deviated from the majority of lower courts that held that the repeal of CRL §50-a was not retroactive. *See Abbatoy v. Baxter*, 77 Misc.3d 711 (Sup. Ct.

Monroe Cty. 2022); *Gannett Co. v. Herkimer Police Dep't*, 76 Misc.3d 557 (Sup. Ct. Oneida Cty. 2022); *Khasira v. County of Nassau*, 2022 WL 1048505 (Sup. Ct. Nassau Cty. Feb. 23, 2022); *People v. Francis*, 74 Misc.3d 808 (Sup. Ct. Monroe Cty. 2022); *Brighton Police Patrolman Ass'n v. Catholdi*, 2021 WL 7287668 (Sup. Ct. Monroe Cty. Apr. 16, 2021). As such, the First Department's Decision contributes to a division of authority regarding the interpretation and effect of State law and creates inconsistent results for similarly-situated employees across the State, warranting this Court's intervention.

The First Department decided to imply retroactivity in the repeal of CRL §50-a notwithstanding that the legislature was completely silent on retroactivity in the repeal legislation and its legislative history. In doing so, the First Department disregarded New York's strong presumption against retroactivity, and instead reached back and wiped away four decades of reliance interests by police officers and other covered employees who undisputedly relied on the statutory confidentiality when they made binding decisions about how to resolve disciplinary cases. This Court has recognized that people guide their affairs based on existing law, and that they need to be protected against such an interpretation of new legislation that would retroactively undo their reliance interests. This Court has therefore consistently required a clear expression of legislative intent to overcome the presumption against retroactivity.

The First Department's Decision is glaring in its failure to identify any such clear expression of legislative intent for retroactivity in the repeal of CRL §50-a. Rather, the Decision creates a dangerous precedent by empowering courts to apply new legislation retroactively where the legislature was silent simply by labeling the legislation as "remedial." But as this Court has recognized, virtually any legislative change can be characterized as remedial. Indeed, the label does not even fit here, where the legislature repealed CRL §50-a after more than 40 years of consistent interpretation. Moreover, the First Department ignored the severe injustice to police officers and other covered employees who irreversibly relied on the statutory confidentiality. New York's strong presumption against retroactivity required that the repeal of CRL §50-a be deemed non-retroactive, as the majority of courts held before the First Department's erroneous Decision.

The Court should grant leave to appeal to clarify the retroactivity issue, and it should also grant a stay pending appeal (and pending the determination of the leave motion) to the extent the lower court decisions require the disclosure of records that predate the repeal of CRL §50-a. This is a prototypical case for a stay pending appeal, because if the NYPD were to disclose the records at issue while the appeal is pending, it would be virtually impossible to un-ring that bell if this Court reverses the Decision. And there would be no prejudice to the other parties by staying the Decision. The First Department granted the PBA's motion for a stay

pending appeal, and a stay in this Court would simply preserve the status quo as to records that predate June 12, 2020 while the retroactivity issue is decided.

QUESTION THAT JUSTIFIES GRANTING LEAVE

1. Whether the repeal of Civil Rights Law §50-a was retroactive, where there is nothing in the repeal legislation or its legislative history stating that the repeal was intended to apply retroactively, and retroactive application would infringe substantial, vested rights of police officers and other covered employees who for more than four decades relied on the statutory confidentiality in deciding how to respond to disciplinary matters.

This issue was preserved below. *See* PBA Br. 18-26; R355-58.[1] In fact, the First Department's Decision held that the PBA properly raised this retroactivity issue. *See* Decision (Ex. A) at 2.

TIMELINESS OF THIS MOTION

Petitioners served Notice of Entry of the Decision by electronic filing on October 12, 2023, and the PBA is serving this motion within 30 days thereafter. *See* CPLR §5513(b).

[1] "R" refers to the record on appeal. "PBA Br." and "PBA Reply Br." refer to the PBA's principal brief, dated May 5, 2023, and reply brief, dated June 30, 2023, filed with the First Department.

JURISDICTIONAL STATEMENT

This Article 78 proceeding originated in Supreme Court, New York County. This Court has jurisdiction over this motion for leave to appeal and the PBA's proposed appeal pursuant to CPLR §5602(a)(1)(i). Although the Decision remanded to Supreme Court solely for purposes of calculating the amount of costs and attorneys' fees owed by the NYPD to Petitioners under Public Officers Law ("POL") §89(4)(c), the Decision is final under CPLR §5602(a)(1)(i), including for either or both of the following independent reasons:

First, the Decision is unquestionably final as to the PBA. The Decision affirmed Supreme Court's holding requiring the disclosure of the records at issue regardless of date, and therefore the Decision finally determined all issues involving the PBA. The only issue left to be decided is the amount of costs and attorneys' fees owed by the NYPD to Petitioners. That is a matter solely between the NYPD and Petitioners that does not involve the PBA in any way, and therefore does not affect the finality of the Decision for purposes of the PBA's proposed appeal. *See We're Assocs. Co. v. Cohen, Stracher & Bloom, P.C.*, 65 N.Y.2d 148, 149 n.1 (1985) ("The order from which our permission to appeal was sought is final as to the individual defendants, and therefore is properly before us, because the action was finally determined as to them, and because they are separate and distinct entities from the corporate defendant.").

Second, the aspect of the Decision at issue in this proposed appeal – requiring the disclosure of records regardless of date – constituted an adjudication on the merits of the principal relief in the case. That holding is immediately effective (subject to the PBA's request for a stay pending appeal) and is not impacted whatsoever by the only remaining ministerial issue regarding the calculation of costs and attorneys' fees to be awarded to Petitioners against the NYPD. *See Jones v. Jones*, 28 N.Y.2d 896, 897 (1971) (order affirming interlocutory judgment that directed transfer of shares was final even though other portion of order was nonfinal); *Rae v. Sutbros Realty Corp.*, 5 N.Y.2d 800, 801 (1958) (order affirming so much of interlocutory judgment as awarded plaintiff possession of real property was final even though order also remanded for a trial on damages); *Stevens v. Stevens*, 305 N.Y. 926, 927 (1953) (order requiring defendant to turn over passbooks to bank account was final even though other portions of order were nonfinal).

In the alternative, this Court has jurisdiction over this motion for leave to appeal and the PBA's proposed appeal pursuant to CPLR §5602(a)(2), because this Article 78 proceeding was commenced against the NYPD and its Commissioner challenging the NYPD's determinations of the FOIL requests at issue, and the lower court decisions require the NYPD to produce the records. The PBA, as intervenor-respondent, has the same rights as the municipal respondents to seek

leave to appeal under CPLR §5602(a)(2). *See Power Auth. of State of N.Y. v. Williams*, 60 N.Y.2d 315, 323 (1983) (environmental groups that intervened in action were granted leave to appeal; CPLR §5602(a)(2) "accords its benefit to every party to the proceeding if any one party comes within its ambit").

This Court also has jurisdiction pursuant to CPLR §5519(c) to grant a stay of the lower court decisions. *See Marine Midland Bank v. John E. Russo Produce Co.*, 46 N.Y.2d 1013, 1013 (1979) (staying "the effect of the order appealed from, as well as that of the order of Special Term").

STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. CRL §50-a Created Protected Rights On Which Covered Employees Relied

CRL §50-a was enacted as a State statute in 1976. It created rights not only for police officers across the State (whether employed by the State or any political subdivision thereof) but also for, *inter alia*, firefighters and corrections officers. CRL §50-a(1).

CRL §50-a provided that these employees' "personnel records used to evaluate performance toward continued employment or promotion . . . shall be considered confidential and not subject to inspection or review without the express written consent of such police officer . . . except as may be mandated by lawful court order." In addition to the exceptions based on consent or "lawful court order," the statute provided a further exception for use by district attorneys, the

attorney general, a grand jury, or other government agencies "in the furtherance of their official functions." CRL §50-a(4)

For decades, this Court consistently interpreted CRL §50-a as protecting disciplinary records against disclosure absent an applicable statutory exception, including in response to FOIL requests. *See, e.g.*, *Prisoners' Legal Servs. of N.Y. v. N.Y. State Dep't of Corr. Servs.*, 73 N.Y.2d 26, 31-33 (1988). This Court long recognized that CRL §50-a served the important statutory purpose "of preventing the use of personnel records as a device for harassing or embarrassing police and correction officers." *Id.* at 32. The statute sought "to prevent *any* 'abusive exploitation of personally damaging information contained in officers' personnel records.'" *N.Y. Civil Liberties Union v. N.Y. City Police Dep't*, 32 N.Y.3d 556, 564 (2018) (emphasis in original) (quoting *Daily Gazette Co. v. City of Schenectady*, 93 N.Y.2d 145, 154 (1999)).

The statutory confidentiality of personnel records impacted how police officers and other covered employees across the State responded to and resolved complaints and other disciplinary matters asserted against them. For example, "[r]eliance on the right to confidentiality certainly impacted police officer decision-making in responding to complaints, such as a decision to compromise a meritless claim to avoid burden and distraction rather than vigorously contesting it to protect one's reputation." R357.

It is not surprising that covered employees made decisions in reliance on the confidentiality protections afforded by CRL §50-a, because that reliance was supported by decisions from this Court that confirmed that CRL §50-a "expressly operate[d] to *guarantee confidentiality* notwithstanding FOIL's permissive disclosure regime," and "[n]othing in FOIL authorizes a petitioner – or a government agency – to exercise 'absolute discretion' to override these critical statutory protections or their *promise of confidentiality*." *N.Y. Civil Liberties Union*, 32 N.Y.3d at 567-68 (emphasis added). Moreover, the confidentiality right belonged to the covered employees, not the agencies, and thus the employees' reliance interests were further supported by the fact that the agency could not waive the confidentiality protections on their behalf. *See Molloy v. N.Y. City Police Dep't*, 50 A.D.3d 98, 100 (1st Dep't 2008) ("[t]he confidentiality of the statute is designed to protect the police officer, not the Department, and therefore should not be deemed automatically waived by the inaction of the Department"); *Patrolmen's Benevolent Ass'n v. City of N.Y.*, 171 A.D.3d 636, 636 (1st Dep't 2019) ("the statute creates protected rights (for police officers)"); *Gallogly v. City of N.Y.*, 51 Misc.3d 296, 300 (Sup. Ct. N.Y. Cty. 2016) ("the confidentiality of the statute is designed to protect individual police officers and not the NYPD"); *Patrolmen's Benevolent Ass'n of City of N.Y., Inc. v. De Blasio*, 2018 WL 3036350, at *2 (Sup.

Ct. N.Y. Cty. June 19, 2018) ("there is no exception for municipal advantage or fiat").

B. The Legislature Repealed CRL §50-a After More Than 40 Years Without Saying Anything About Retroactivity

More than 40 years after the passage of CRL §50-a and after decades of consistent judicial interpretation, on June 12, 2020, the New York legislature repealed CRL §50-a. R337.

The repeal of CRL §50-a was not a prompt reaction by the legislature to a judicial interpretation of the statute. As noted above, the statute had been consistently interpreted by the New York courts for decades as providing broad confidentiality protections for covered employees. And proposed legislation for the repeal of CRL §50-a had been pending for at least five years before the statute was repealed. PBA Reply Br. 14 n.7 (citing N.Y. Senate, Floor Debate, 243rd N.Y. Leg., Reg. Sess. (June 9, 2020), at 58).

There is nothing in the repeal legislation stating that the repeal was intended to apply retroactively. The text of the legislation pertaining to the repeal stated only: "Section 50-a of the civil rights law is REPEALED."[2] The only language in the legislation relating to the timing of its effectiveness was that "[t]his act shall

[2] Sen. B. S8496, 243rd Legislative Session, at §1 (https://www.nysenate.gov/legislation/bills/2019/s8496).

take effect immediately."[3] There is also nothing in the legislative history stating that the repeal was intended to be retroactive. *See* R231-36; *see also infra* at 19.

C. Petitioners' FOIL Requests Without Date Limitation

Immediately upon the repeal of CRL §50-a, in June 2020, Petitioners NYP Holdings, Inc. and Craig McCarthy, who are the publisher and a reporter for the *New York Post*, served the NYPD with FOIL requests for "all disciplinary records" relating to 144 uniformed members of the NYPD, without date limitation (the "FOIL Requests"). R47-48.

The NYPD expressly took no position on the non-retroactivity of the repeal of CRL §50-a. Rather, over the course of June through September 2021, the NYPD denied certain of the FOIL Requests, without responding to others, on grounds not relevant here, including, among others, the privacy exemption. R50-R52. The NYPD produced records, with redactions, in response to one of the FOIL Requests relating to a particular officer. R50.

D. Procedural History

Before the NYPD responded to all of the FOIL Requests, on October 6, 2021, Petitioners commenced this proceeding, pursuant to CPLR Article 78, seeking an order directing the NYPD to comply with the FOIL Requests, and for costs and attorneys' fees against the NYPD pursuant to POL §89(4)(c). R45-55.

[3] *Id.* at §5.

On November 16, 2021, before the NYPD responded to the Petition, the PBA moved to intervene as a respondent, asserting, among other defenses, that records that predate the repeal of CRL §50-a are statutorily protected from disclosure because that repeal was not retroactive. R325-425. On December 8, 2021, Supreme Court granted the PBA's motion to intervene. R436-37.

On August 12, 2022, the NYPD filed a cross-motion to dismiss the Petition. R443-79. The NYPD limited the scope of its cross-motion to the issue of whether the FOIL requests were unreasonably burdensome to the extent they seek unsubstantiated records. The NYPD stated that, for purposes of its cross-motion, it was "taking no position on the issues of retroactivity of 50-a." R452.

On September 12, 2022, the PBA filed a response to the NYPD's cross-motion to clarify that the PBA's defense based on the non-retroactivity of the repeal of CRL §50-a was not, and could not be, waived by the NYPD. R578-83.

E. The Lower Court Decisions

On December 6, 2022, Supreme Court issued a final Decision and Order denying the NYPD's cross-motion to dismiss and granting the Petition to the extent of ordering the NYPD to disclose records for the 144 subject officers without date restriction. R6-15. Supreme Court did not rule on the merits of the PBA's non-retroactivity defense, instead holding that the PBA could not raise this argument because it had not been asserted by the NYPD. R12. Supreme Court also

denied Petitioners' request for costs and attorneys' fees, holding that "this proceeding at this stage concerns a novel interpretation of legislation that both repealed a statute and enacted new provisions to a longstanding statutory scheme." R13-14.

The PBA appealed with respect to the non-retroactivity issue. On June 20, 2023, the First Department granted the PBA's motion to stay Supreme Court's order pending the appeal pursuant to CPLR §5519(c).[4] The NYPD also appealed on the independent ground that Supreme Court granted the Petition before the NYPD had an opportunity to file an answer. However, the NYPD withdrew its appeal. The NYPD's appeal, while it was pending, also imposed a stay of Supreme Court's order. *See* CPLR §5519(a)(1). Petitioners cross-appealed from the aspect of Supreme Court's order denying their request for costs and attorneys' fees.

On October 12, 2023, the First Department issued the Decision. The Court held that Supreme Court erred by failing to address the merits of the PBA's non-retroactivity argument, recognizing that "section 50-a, prior to its repeal, created protected rights (for police officers), which should not be deemed automatically waived by the inaction of respondents." Decision (Ex. A) at 2 (internal quotes and brackets omitted).

[4] *See* First Department Case No. 2023-00242, NYSCEF 27.

The First Department went on to address the merits of the non-retroactivity issue as a matter of first impression in the Appellate Division, and it held that the repeal of CRL §50-a was retroactive. *Id.* at 3.

The First Department acknowledged that there is no express statement of retroactivity in the repeal legislation or its legislative history. *Id.* Nevertheless, the Court decided to imply retroactivity where the legislature was silent. The Court relied on the fact that the repeal "went into effect immediately." *Id.* The Court also concluded, without support, that the legislature "intended for the legislation to be remedial." *Id.* The Court held that enforcing the presumption against retroactivity "would run counter to the clear legislative purpose of providing public access to records that may contain information about actual or alleged police misconduct." *Id.* Yet, the Court did not identify any basis for a "clear legislative purpose" for that access to apply retroactively as opposed to going forward. The Decision also failed to address the decades-long reliance interests of covered employees while CRL §50-a was in effect.

The First Department also held that Supreme Court should have awarded Petitioners costs and attorneys' fees against the NYPD, and remanded to Supreme Court solely "for calculation of attorneys' fees and costs." *Id.* at 4.

ARGUMENT

I. THE COURT SHOULD GRANT LEAVE TO APPEAL THE DECISION

A. The Decision Contributes To A Conflict Among The Courts On An Issue Of State Law

The Court should grant leave to appeal because of the public importance of the issue raised, involving the interpretation and effect of recent State legislation. *See Bd. of Educ. of Monroe-Woodbury Cent. Sch. Dist. v. Wieder*, 72 N.Y.2d 174, 183 (1988) (granting leave to appeal in light of "novel and significant issues tendered for review" regarding meaning of statute). While CRL §50-a was in effect, it was subject to numerous decisions by this Court, demonstrating the importance of consistent interpretation and application of the statute. *See, e.g.*, *supra* at 8. Now, there is a new question as to whether §50-a continues to apply to records that predate the repeal, which is equally a matter of statewide importance warranting guidance from this Court. Granting leave to appeal in this case can put to rest the question of whether the repeal of CRL §50-a applies retroactively.

In the three-and-a-half years since CRL §50-a was repealed, staunch disagreement has emerged across agencies and courts regarding the question of the retroactivity of the repeal. Prior to the First Department Decision in this case, five lower courts held that the repeal was not retroactive. *See Abbatoy v. Baxter*, 77 Misc.3d 711 (Sup. Ct. Monroe Cty. 2022); *Gannett Co. v. Herkimer Police Dep't*, 76 Misc.3d 557 (Sup. Ct. Oneida Cty. 2022); *Khasira v. County of Nassau*, 2022

WL 1048505 (Sup. Ct. Nassau Cty. Feb. 23, 2022); *People v. Francis*, 74 Misc.3d 808 (Sup. Ct. Monroe Cty. 2022); *Brighton Police Patrolman Ass'n v. Catholdi*, 2021 WL 7287668 (Sup. Ct. Monroe Cty. Apr. 16, 2021). On the other hand, Petitioners cited three trial court cases that went the other way. *See Puig v. City of Middletown*, 71 Misc.3d 1098 (Sup. Ct. Orange Cty. 2021); *Schenectady Police Benevolent Ass'n v. City of Schenectady*, 2020 WL 7978093 (Sup. Ct. Schenectady Cty. Dec. 29, 2020); *Cooper v. N.Y.*, 2021 NY Misc. LEXIS 5169 (Ct. Claims Jan. 26, 2021).

The First Department deviated from the majority of courts that have addressed the issue, without any attempt to distinguish the majority line of cases. Given the number of cases generated already, the retroactivity issue is certainly going to recur, and thus agencies, the public, and the courts would benefit from a resolution of the issue by this Court. The current landscape where covered employees' confidentiality rights depend on the agency and locality where the individual is employed creates inconsistency and inequity on what is supposed to be a matter of uniform State law.

B. The Decision Violates New York Retroactivity Standards In Numerous Respects And Eviscerated Decades Of Reliance Interests

Leave to appeal is also warranted because the Decision "conflict[s] with prior decisions of this Court," 22 NYCRR 500.22(b)(4), and violates the General

Construction Law by failing to properly enforce New York's strong presumption against retroactivity. By reading retroactivity into the repeal legislation where the legislature was silent, the First Department erroneously swept away decades of reliance interests by police officers and other covered employees by judicial decision instead of clear legislative expression as required, and therefore leave to appeal is "required in the interest of substantial justice." N.Y. Const. Art. VI §3(b)(6).

This Court has issued several retroactivity decisions in recent years, yet the First Department still departed from this Court's precedents, requiring intervention again from this Court. It is blackletter law that there is a "presumption against retroactivity" of a statute. *Regina Metro. Co. v. N.Y. State Div. of Hous. & Cmty. Renewal*, 35 N.Y.3d 332, 370 (2020). The presumption against retroactivity is not merely some abstract doctrine, but protects important rights and expectations of the public:

> This "deeply rooted" presumption against retroactivity is based on "[e]lementary considerations of fairness [that] dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly." As the Supreme Court has cautioned, careful consideration of retroactive statutes is warranted because "[t]he Legislature's unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration" and "[i]ts responsivity to political pressure poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals."

Id. (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265-66 (1994)).

Thus, "it takes a clear expression of the legislative purpose to justify a retroactive application of a statute." *Id.* (internal quotes and alterations omitted). "[T]he expression of intent must be sufficient to show that the Legislature *contemplated the retroactive impact on substantive rights and intended that extraordinary result*." *Id.* at 370-71 (emphasis added).

The First Department's failure to properly enforce the presumption against retroactivity was particularly egregious in this case because, with respect to repeal legislation in particular, the presumption against retroactivity exists not only in the common law, but has been codified by New York statute. General Construction Law §93 provides:

> The repeal of a statute or part thereof shall not affect or impair any act done, offense committed or right accruing, accrued or acquired, or liability, penalty, forfeiture or punishment incurred prior to the time such repeal takes effect, but the same may be enjoyed, asserted, enforced, prosecuted or inflicted, *as fully and to the same extent as if such repeal had not been effected*. (Emphasis added.)

General Construction Law §93 applies "with special force to statutes which otherwise would be *ex post facto* or would deprive persons of substantial rights." *People v. Roper*, 259 N.Y. 635, 635 (1932).

The "elementary considerations of fairness" underlying New York's strong presumption against retroactivity are squarely implicated in this case. *Regina Metro.*, 35 N.Y.3d at 370. For decades, CRL §50-a protected important rights of

covered employees. As discussed above, "[t]he statute was designed to prevent abusive exploitation of personally damaging information contained in officers' personnel records," and "was sponsored and passed as a safeguard against potential harassment of officers through unlimited access to information contained in personnel files." *Daily Gazette Co.*, 93 N.Y.2d at 154-55. It is undisputed that, for the more than 40 years that §50-a was in effect, officers and other covered employees relied on it in making permanent disciplinary decisions. There is no evidence that the legislature considered and intended the "patently unfair" result "to now reach back and lay bare the records that those officers justifiably believed would remain shielded from public disclosure." *Gannet Co.*, 76 Misc.3d at 566.

The legislature did not say anything about retroactivity in the text of the repeal legislation or its legislative history, which the First Department was forced to acknowledge. *See* Decision at 3; *see also Francis*, 74 Misc.3d at 815-16 ("Further, the Legislature made no express statement in the repeal itself, or in the limited legislative history concerning the same, as to whether the repeal was to be applied retroactively."); *Gannett*, 76 Misc.3d at 566 ("as far as this Court can tell, the legislative history underlying the repeal makes no specific mention whatsoever of retroactivity"); *Abbatoy*, 77 Misc.3d at 718 ("[T]he statute is silent as to retroactivity. The sponsor memo is silent as to retroactivity. The justification memo is silent as to retroactivity.").

Instead, the First Department attempted to prop up its retroactivity holding on the fact that the repeal legislation took effect immediately. Decision at 3. Such language is irrelevant to the question of retroactivity because "the date that legislation is to take effect is a separate question from whether the statute should apply to claims and rights then in existence." *Majewski v. Broadalbin-Perth Cent. Sch. Dist.*, 91 N.Y.2d 577, 583 (1998). Thus, this Court reaffirmed just a few months ago that "shall take effect immediately" language "is equivocal" in the analysis of retroactivity. *Gottwald v. Sebert*, -- N.E.3d --, 2023 WL 3959051, at *7 (June 13, 2023); *see also State v. Daicel Chem. Indus.*, 42 A.D.3d 301, 302 (1st Dep't 2007) ("Language in the statute that it shall 'take effect immediately' does not support retroactive application."); *Aguaiza v. Vantage Props., LLC*, 69 A.D.3d 422, 423 (1st Dep't 2010) (even though statute stated that it was to take effect "immediately," "[n]o provision was made in the statute for retroactive application of its terms"). The First Department should not be permitted to pick and choose whether to rely on the "take effect immediately" language that is common in legislation simply to achieve a desired retroactivity outcome.

The First Department's determination to apply the repeal of CRL §50-a retroactively also completely ignored the impact on the decades-long rights and reliance interests of police officers and other covered employees. The Decision is

silent on this issue. But New York law requires the protection of such pre-existing rights. *See* GCL §93.

Other courts that have properly considered this issue have found that it is quite obvious that reading retroactivity into the repeal of CRL §50-a would improperly infringe protected rights. *See Francis*, 74 Misc.3d at 820 ("[T]he Court can take judicial notice that police officers and the other protected persons have relied upon the sealed nature of personnel records in resolving disciplinary matters . . . . To now reach back and lay bare matters, where that officer believed such would not be subject to public view at the time disciplinary action was meted out, is, in the Court's opinion, patently unfair."); *Gannett*, 76 Misc.3d at 566 (the Court was "particularly moved by the equitable argument" that "from the date on which [CRL] §50-a was enacted until the date of its repeal, police officers relied upon the protections afforded by that statute in making decisions with regard to disciplinary actions and that it would be patently unfair to now reach back and lay bare the records that those officers justifiably believed would remain shielded from public disclosure"); *Abbatoy*, 77 Misc.3d at 715-16 ("police officers facing disciplinary proceedings would rely upon the confidentiality provisions contained in [CRL] §50-a in determining whether to accept a lesser punishment and waive their due process rights to a hearing . . . It cannot be said that these rights to confidentiality were anything less than substantial, vested rights"); *Brighton Police Patrolman*

Ass'n, 2021 WL 7287668, at *2 ("to now allow for retroactive disclosure of the details of these same settlements would be to deprive these officers of their contractual or accrued rights"). By entirely discrediting covered employees' reliance interests on the statutory confidentiality, the First Department violated not only GCL §93, but this Court's recognition that "people guide their affairs *in the light of existing laws* and that it would be unfair to defeat expectations, rights and liabilities arising under those laws by subsequent retroactive changes." *People v. Oliver*, 1 N.Y.2d 152, 158 (1956) (emphasis added).

Lacking any clear statement that the legislature intended the repeal of CRL §50-a to be retroactive, the First Department resorted to a vague and unsupported conclusion that the legislature purportedly "intended for the legislation to be remedial." Decision at 3. Here, again, the First Department violated this Court's precedents, instead creating bad law that waters down the presumption against retroactivity and effectively allows a court to engage in judicial policymaking to apply a statutory change retroactively simply by labeling it as "remedial."

This Court has held that characterizing legislation as "remedial" is not sufficient to imply retroactivity because virtually any legislation can be labeled as such. This Court recently acknowledged that the U.S. Supreme Court has "limit[ed] the continued utility of the tenet that new 'remedial' statutes apply presumptively to pending cases." *Regina Metro.*, 35 N.Y.3d at 365 (citing

Landgraf, 511 U.S. at 285 n.37). And even earlier, this Court held that "[c]lassifying a statute as 'remedial' does not automatically overcome the strong presumption of prospectivity since the term may broadly encompass any attempt to supply some defect or abridge some superfluity in the former law." *Majewski*, 91 N.Y.2d at 584 (internal quotes omitted). Thus, "even assuming the repeal of [a statute] is properly classified as remedial, that classification is largely immaterial." *Ruth v. Elderwood at Amherst*, 209 A.D.3d 1281, 1287 (4th Dep't 2022).

Indeed, the repeal of CRL §50-a is no more "remedial" than most other legislation. This is not a situation where the legislature acted quickly to clarify a statute in response to a judicial decision, where one could argue that the clarification reflects what the legislature always intended. Here, CRL §50-a was enacted in 1976, and for decades the courts interpreted it as protecting disciplinary records from disclosure. Repealing a statute after decades of consistent application is not "remedial"; it is simply a determination by the legislature to change the law. This Court so held just last year. *See People v. Galindo*, 38 N.Y.3d 199, 207 (2022) (fact that "legislature waited over 40 years after lower courts first declared that traffic infractions are not offenses within the meaning of CPL 30.30(1) before expressly abrogating that line of cases" weighed against retroactive effect); *see*

also Abbatoy, 77 Misc.3d at 719 ("the repeal of §50-a was not a 'remedial' statute requiring retroactive application").[5]

The First Department's Decision is irreconcilable with its own decisions in recent months. In *Raparthi v. Clark*, 214 A.D.3d 613, 614 (1st Dep't 2023), the legislative history expressly stated that the statutory amendment at issue was a "remedial amendment." Notwithstanding that express "remedial" language, the First Department held that the amendment was not retroactive because "classifying a statute as remedial does not automatically overcome the strong presumption of prospectivity." *Id.* (internal quotes and brackets omitted). And in *Gottwald v. Sebert*, 203 A.D.3d 488, 489 (1st Dep't 2022), *aff'd in relevant part*, 2023 WL 3959051 (June 13, 2023), the First Department held that amendments to New York's anti-SLAPP statute were not retroactive even though they were "remedial": "The fact that the amended statute is remedial, and that the legislature provided that the amendments shall take effect immediately, does not support the conclusion that the legislature intended retroactive application of the amendments." The

[5] The First Department ignored this Court's recent decision in *Galindo*, and instead cited *In re Gleason*, 96 N.Y.2d 117 (2001), but *Gleason* stands in stark contrast to the facts here. In *Gleason*, this Court had issued a decision interpreting a provision of the CPLR relating to the enforcement of arbitration awards, and "[t]he Legislative reaction was swift. At the next session, the Assembly introduced a bill to amend CPLR 7502(a) to require that all applications relating to an arbitration be brought within a single action or proceeding." *Id.* at 121. Here, the legislature cannot be said to have acted "swiftly" in repealing CRL §50-a after more than 40 years of consistent judicial interpretation. *Gleason* also did not involve any argument that retroactive application of the rule-change at issue would impact vested rights or otherwise create unfairness.

inconsistency of the First Department's Decision here with its prior decisions highlights that the presumption against retroactivity will become largely meaningless and unpredictable if courts can disregard it whenever they choose simply by relying on the fuzzy "remedial" concept.

Finally, the First Department's conclusory policy argument that enforcing the presumption against retroactivity to the repeal of CRL §50-a "would run counter to the clear legislative purpose of providing public access to records that may contain information about actual or alleged police misconduct" cannot save its implied retroactivity holding. Decision at 3. The record provides no basis to conclude that the legislature intended to dredge up historic records by making the repeal of CRL §50-a retroactive as opposed to lifting confidentiality prospectively.[6] On the other hand, numerous courts have recognized how unfair an implied retroactivity holding would be for the covered employees who relied on confidentiality. *See supra* at 21-22. The record is woefully deficient to show that "the Legislature contemplated the retroactive impact on substantive rights and

[6] In the proceedings below, the only statements that Petitioners could muster for their retroactivity argument were ambiguous comments by only two legislators during floor debates, which comments did not even directly address the issue of retroactivity. Ptr. Br. 29-30. Even the First Department does not appear to have relied on those comments. As the U.S. Supreme Court has held, statements by individual legislators during floor debates are not helpful for purposes of determining legislative intent because "[t]hose who did not speak may not have agreed with those who did, and those who spoke might differ from each other." *U.S. v. Trans-Mo. Freight Ass'n*, 166 U.S. 290, 318 (1897). Thus, as the Court held in *Abbatoy* in concluding that the repeal of CRL §50-a was not retroactive, "at best" the legislative record "is equivocal and does not overcome the strong presumption" against retroactivity. *Abbatoy*, 77 Misc.3d at 718-19.

intended that extraordinary result." *Regina Metro.*, 35 N.Y.3d at 370-71; *see also Majewski*, 91 N.Y.2d at 589 ("the discernible legislative purpose does not mandate a particular result"); *Ruth*, 209 A.D.3d at 1288 ("the memoranda submitted by the legislators who introduced the bill are, at best, inconclusive on the issue of retroactivity" (internal quotes and brackets omitted)).

Accordingly, leave to appeal should be granted to consider whether the Decision violated the law and created a misguided new precedent, and to finally resolve the conflict among the courts about whether the repeal of CRL §50-a was retroactive.

II. THE COURT SHOULD GRANT A STAY

The Court should stay the lower court decisions to the extent they ordered the disclosure of records that predate the repeal of CRL §50-a pending the PBA's proposed appeal (and pending the determination of leave to appeal) in order to prevent irreversible prejudice to the PBA and the subject officers. Indeed, in the appeal below, the First Department agreed that a discretionary stay was appropriate due to the retroactivity issue. The same reasons continue to support a stay in this Court.

CPLR §5519(c) provides in relevant part that "[t]he court . . . to which an appeal is taken . . . may stay all proceedings to enforce the judgment or order appealed from pending an appeal or determination on a motion for permission to

appeal." Appellate courts have commonly granted stays pending appeal in cases such as this where the underlying decision requires disclosure or discovery – *i.e.*, an act that cannot readily be undone if the appeal is granted. *See Samsung Am., Inc. v. Yugoslav-Korean Consulting & Trading Co.*, 199 A.D.2d 48, 48 (1st Dep't 1993) (order denying protective order with respect to discovery requests was stayed pending appeal); *Wasserman v. Amica Mut. Ins. Co.*, 193 A.D.3d 795, 797 (2d Dep't 2021) (order compelling disclosure of documents was stayed pending appeal); *Teran v. Ast*, 164 A.D.3d 1496, 1497 (2d Dep't 2018) (same); *Worysz v. Ratel*, 101 A.D.3d 893, 894 (2d Dep't 2012) (same); *Colley v. Colley*, 206 A.D.2d 652, 652 (3d Dep't 1994) (order enforcing subpoenas for the production of documents was stayed pending appeal).

Just like in the above cases where discovery or disclosure orders were stayed pending appeal, here there is a risk of irreparable harm if a stay is not granted. The Decision requires the NYPD to disclose disciplinary records for 144 officers without date limitation. If the NYPD produces records predating June 12, 2020 while the PBA's appeal is pending, then if this Court ultimately grants the PBA's appeal and determines that the Decision was erroneous on the retroactivity issue, the harm to the subject officers will have already occurred. This risk of irreversible harm is exacerbated because Petitioners are the publisher of, and a reporter for, the *New York Post*. If the NYPD discloses the records pending appeal, the *New York*

Post could publish the records publicly or otherwise disseminate them, which could not be undone if the PBA's appeal is subsequently granted.

On the other hand, there is no prejudice to the other parties from granting this motion for a stay. As noted above, the disclosure order was already stayed pending appeal in the First Department. The PBA is simply seeking to maintain the status quo pending appeal in this Court. Moreover, this request for a stay is limited to records that predate the June 12, 2020 repeal of CRL §50-a. Nothing has changed to create any purported sudden urgency for Petitioners to obtain those pre-repeal records.

Finally, for all of the reasons set forth in Part I above, the PBA should succeed on the merits of its proposed appeal.

CONCLUSION

The Court should (i) grant leave to appeal the Decision; and (ii) grant a stay of enforcement of the Decision and Supreme Court's order to the extent they require disclosure of records that predate June 12, 2020.

Dated: New York, New York
October 27, 2023

Respectfully submitted,

FREDERICK W. VASSELMAN
Office of the General Counsel of the Police Benevolent Association of the City of New York, Inc.
125 Broad Street
New York, New York 10004

Of Counsel:
Dave Morris
Andrew J. Dempster

GOLENBOCK EISEMAN ASSOR BELL & PESKOE LLP

By: 
Matthew C. Daly

711 Third Avenue
New York, New York 10017
(212) 907-7300

Attorneys for Respondent-Appellant-Respondent Police Benevolent Association of the City of New York, Inc.

EXHIBIT A

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the Matter of	:	
NYP HOLDINGS, INC. and CRAIG MCCARTHY,	:	
Petitioners-Plaintiffs,	:	Index No. 159132/2021 Hon. Arlene P. Bluth
-against-	:	
NEW YORK CITY POLICE DEPARTMENT, and DERMOT F. SHEA, in his official capacity as Commissioner of the New York City Police Department,	:	
Respondents-Defendants,	:	
For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules.	:	

NOTICE OF ENTRY

PLEASE TAKE NOTICE that annexed hereto is a true and correct copy of a Decision and Order that was entered in the office of the Clerk of the Supreme Court, Appellate Division, First Department, on the 12th day of October, 2023.

Dated: October 12, 2023
New York, New York

Respectfully submitted,

Jeremy A. Chase
Lindsey B. Cherner
DAVIS WRIGHT TREMAINE LLP
1251 Avenue of the Americas, 21st Floor
New York, New York 10020
Telephone: (212) 489-8230
Facsimile: (212) 489-8340
jeremychase@dwt.com
lindseycherner@dwt.com

Counsel for Petitioners
NYP Holdings, Inc. and Craig McCarthy

TO: All Counsel of Record via NYSCEF

Supreme Court of the State of New York
Appellate Division, First Judicial Department

Kapnick, J.P., Oing, Moulton, Higgitt, JJ.

788 In the Matter of NYP HOLDINGS, INC., et al.,
Petitioners-Respondents-Appellants,

Index No. 159132/21
Case No. 2023-00242

-against-

NEW YORK CITY POLICE DEPARTMENT et al.,
Respondents-Appellants-Respondents,

POLICE BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC.,
Intervenor Respondent-Appellant-Respondent.

Sylvia O. Hinds-Radix, Corporation Counsel, New York (Diana Lawless of counsel), for municipal appellants-respondents.

Golenbock Eiseman Assor Bell & Peskoe LLP, New York (Matthew C. Daly of counsel), for Police Benevolent Association of the City of New York, Inc., appellant-respondent.

Davis Wright Tremaine LLP, New York (Jeremy A. Chase of counsel), for NYP Holdings, Inc. and Craig McCarthy, respondents-appellants.

Judgment, Supreme Court, New York County (Arlene P. Bluth, J.), entered on or about December 7, 2022, insofar as appealed from as limited by the briefs, granting the petition brought pursuant to CPLR article 78 to compel respondents to disclose substantiated and unsubstantiated disciplinary records of the police officers identified in the subject requests pursuant to the Freedom of Information Law (FOIL) (Public Officers Law §§ 84-90), directing the parties to confer to determine a reasonable disclosure schedule, and denying petitioners' request for attorneys' fees and costs,

unanimously modified, on the law, to grant petitioners' request for attorneys' fees and costs, and remand the matter for further proceedings consistent with this decision, and otherwise affirmed, without costs.

As is relevant here, former Civil Rights Law § 50-a provided, with limited exceptions, that "[a]ll personnel records [of law enforcement officers] used to evaluate performance toward continued employment or promotion . . . shall be considered confidential and not subject to inspection or review" (*Matter of New York Civ. Liberties Union v New York City Police Dept.*, 32 NY3d 556, 563 [2018]). The legislature repealed Civil Rights Law § 50-a on June 12, 2020 (L 2020, ch 96, § 1), and made several related amendments to FOIL on the same date (L 2020, ch 96, §§ 2-4), stating that all of this legislation including the repeal of section 50-a "shall take effect immediately" (L 2020, ch 96, § 5). The "repeal of Civil Rights Law § 50-a . . . reflected a strong legislative policy promoting transparency of police disciplinary records and eliminated any claim of confidentiality in them" (*People v Castellanos*, 72 Misc 3d 371, 376 [Sup Ct, Bronx County 2021]).

In this case, the court should have addressed the merits of the arguments raised by intervenor Police Benevolent Association of the City of New York, Inc. (PBA) that the repeal of Civil Rights Law § 50-a did not apply retroactively. The court found that respondents waived those arguments, but section 50-a, prior to its repeal, "create[d] protected rights (for police officers)" (*Matter of Patrolmen's Benevolent Assn. of the City of N.Y. v de Blasio*, 171 AD3d 636, 636 [1st Dept 2019], *lv dismissed* 35 NY3d 979 [2020]), which "should not be deemed automatically waived by the inaction of [respondents]" (*Matter of Molloy v New York City Police Dept.*, 50 AD3d 98, 100 [1st Dept 2008]).

Turning to the merits, we hold that the repeal of Civil Rights Law § 50-a applies retroactively to records created prior to June 12, 2020 (*see Schenectady Police Benevolent Assn. v City of Schenectady*, 2020 WL 7978093, *14, 2020 NY Slip Op 34346[U], **14 [Sup Ct, Schenectady County 2020]). While "the legislature made no express statement in the repeal itself, or in the limited legislative history concerning the same, as to whether the repeal was to be applied retroactively" (*Matter of Puig v City of Middletown*, 71 Misc 3d 1098, 1108 [Sup Ct, Orange County 2021]), the repeal "went into effect immediately and, by its plain reading and intent, applies to records then existing and not simply to records created at a time subsequent to the enactment of the legislation" (*Cooper ex rel. Cooper v New York*, 2021 NY Misc LEXIS 5169, *10 [Ct Cl January 26, 2021]). The legislative history clarifies that the legislature "conveyed a sense of urgency" and intended for the legislation to be remedial (*see, e.g. Matter of Gleason [Michael Vee, Ltd.]*, 96 NY2d 117, 122 [2001] [CPLR 7502 (a) to be applied retroactively]).

While the characterization of a statute as remedial is not dispositive, as a general matter, "remedial legislation should be given retroactive effect in order to effectuate its beneficial purpose" (*id.*; *Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 585 [1998]). PBA's position that, given General Construction Law § 93, former Civil Rights Law § 50-a should continue to bar disclosure of police disciplinary records created before June 12, 2020 in response to FOIL requests, would run counter to the clear legislative purpose of providing public access to records that may contain information about actual or alleged police misconduct.

Since petitioner has substantially prevailed and respondents "had no reasonable basis for denying access" (Public Officers Law § 89[4][c][ii]) to most of the records

sought for more than one year, we remand the matter to Supreme Court for calculation of attorneys' fees and costs (*see Matter of Oustatcher v Clark*, 198 AD3d 420, 423 [1st Dept 2021]). While the requests for records pertaining to 144 police officers were certainly voluminous, the lengthy delay before respondents substantively responded to only a small fraction of the requests was unreasonable under the particular circumstances of this case.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: October 12, 2023

Susanna Molina Rojas
Clerk of the Court

EXHIBIT B

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE P. BLUTH** **PART** **14**

Justice

----------X

NYP HOLDINGS, INC.,CRAIG MCCARTHY,

Petitioners,

- v -

NEW YORK CITY POLICE DEPARTMENT, DERMOT F. SHEA, POLICE BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK,

Respondents.

----------X

INDEX NO. 159132/2021

MOTION DATE 12/02/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 6, 7, 22, 23, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48

were read on this motion to/for ARTICLE 78 -FOIL.

The petition to direct respondents to produce the requested information pursuant to a Freedom of Information Law ("FOIL") request is granted as described below. The cross-motion to dismiss by the New York City Police Department ("NYPD") is denied.

Background

Petitioners contend that respondents ignored or refused to produce records in response to 144 separate FOIL requests seeking disclosure about police disciplinary records for certain police officers. Petitioners include the publisher of the *New York Post* and a reporter at the paper.

Petitioners contend that on June 12, 2020 (two and a half years ago), petitioner McCarthy filed 140 FOIL requests for all disciplinary records related to specific police officers for the NYPD. Respondent NYPD acknowledged the requests on June 17, 2020 and asserted it would respond by October 28, 2020. Petitioner McCarthy later submitted four more requests (three on June 18, 2020 and another on June 25, 2020).

Petitioners point out that these FOIL requests were made right after the State of New York repealed Civil Rights Law § 50-a (commonly referred to as Section 50-a), a statute that required that police officer personnel records be kept confidential. They also note that the U.S. Court of Appeals for the Second Circuit issued a stay in a related case and that put the underlying FOIL proceedings on hold in early 2021. However, in March 2021, the Second Circuit vacated the stay.

Petitioners allege that as of August 2021, the NYPD had only issued determinations for 17 of the 144 requests. With respect to the requests that were addressed, petitioners insist that the NYPD denied each in full on the ground that it would constitute an unwarranted invasion of personal privacy (an exemption to the disclosure presumption under FOIL). Petitioners admit that they received a single disciplinary record for a single officer in June 2021 that contained significant redactions.

Petitioners argue that because Section 50-a is repealed, now the NYPD has an obligation to produce the records sought in the subject FOIL requests. They insist that the NYPD has taken an impermissibly narrow view of the phrase "disciplinary record" to exclude complaints and records about unsubstantiated claims, which is contrary to Section 50-a's repeal. They argue that the records do not fall with the privacy exemption and that the failure by the NYPD to even address the remaining 116 FOIL requests constitutes a constructive denial sufficient to form the basis of this proceeding.

Respondent NYPD cross-moves to dismiss on the ground that it intends to produce only substantiated complaints against the 144 officers for which petitioner seeks records pursuant to a partial agreement with petitioner. It insists the instant proceeding is therefore moot. The NYPD asserts that it should not have to produce the remaining records for unsubstantiated disciplinary

records because it would constitute an unduly burdensome exercise. The NYPD stresses that it "takes no position in this cross motion on the issue of whether unsubstantiated complaints should be withheld on privacy grounds" (NYSCEF Doc. No. 36, ¶ 38).

Respondent the Police Benevolent Association of the City of New York ("PBA") submits opposition to the petition and similarly argues that the FOIL requests at issue are overly burdensome. It also argues that disclosure of unsubstantiated and pending complaints against police officers is not required under FOIL because certain exemptions apply. The PBA contends that a FOIL Committee (part of the State Committee on Open Government) opined that the repeal of Section 50-a does not require the disclosure of unsubstantiated or pending disciplinary records.

The PBA argues that the privacy exemption applies because to disclose these records would constitute an unwarranted invasion of officers' privacy. It points to *inter alia* a Supreme Court case in Onondaga County in which the court held that the repeal of 50-a did not require disclosure of unsubstantiated claims.[1] The PBA also cites to other exemptions including the safety exemption, the law enforcement exemption, as well as the inter-intra agency exemption.

In reply, petitioners point out that the NYPD's opposition asserts no FOIL exemptions, does not contest Section 50-a's retroactivity, and does not insist it conducted a diligent search. Petitioners maintain that the NYPD did not sufficiently justify its claim that disclosure would be unduly burdensome. However, they contend that they are willing to meet and confer about a mutually agreeable disclosure schedule. Petitioners claim that only the NYPD can assert FOIL exemptions and that the PBA cannot do so on their behalf. They also dispute the exemptions cited by the PBA.

[1] *New York Civ. Liberties Union v City of Syracuse*, 72 Misc3d 458 [Sup Ct, Onondaga County 2021]). As will be discussed below, the Fourth Department reversed this decision.

Petitioners emphasize that they are willing to limit their FOIL requests "to substantiated and unsubstantiated claims, regardless of date or retirement status, against the 144 named police officers, but exclude 'technical infractions' as defined in POL § 86(9), records of complaints pending at the time of disclosure, or any personal private information ("PPI") as described in paragraph 12 of the NYPD's opposition" (NYSCEF Doc. No. 44 at 3).

Discussion

"To promote open government and public accountability, FOIL imposes a broad duty on government agencies to make their records available to the public. The statute is based on the policy that the public is vested with an inherent right to know and that official secrecy is anathematic to our form of government. Consistent with the legislative declaration in Public Officers Law § 84, FOIL is liberally construed and its statutory exemptions narrowly interpreted. All records are presumptively available for public inspection and copying, unless the agency satisfies its burden of demonstrating that the material requested falls squarely within the ambit of one of the statutory exemptions. While FOIL exemptions are to be narrowly read, they must of course be given their natural and obvious meaning where such interpretation is consistent with the legislative intent and with the general purpose and manifest policy underlying FOIL" (*Abdur-Rashid v New York City Police Dept.*, 31 NY3d 217, 224-25, 76 NYS3d 460 [2018] [internal quotations and citation omitted]).

As an initial matter, the Court observes that the NYPD only raises one objection to petitioner's requests in its cross-motion: that the disclosure of such records would be unduly burdensome. Although the Court permitted the PBA to intervene in this proceeding, that does not mean that the PBA may assert exemptions to FOIL that are not asserted by the NYPD. It is undoubtedly an agency's obligation to disclose or withhold records according to its view of the

request and justify why it may withhold certain records. For whatever reason, the NYPD expressly stated that it was *not* seeking a FOIL privacy exemption nor did it make arguments about other exemptions (or issues such as retroactivity). It would be wholly inappropriate for this Court to permit an intervenor to raise arguments not asserted by the agency. The PBA is certainly entitled to amplify the arguments raised by the NYPD but it cannot force petitioners to respond to arguments about issues that the NYPD waived or failed to assert altogether.

The Court finds that the NYPD failed to sufficiently justify its claim that the requested documents are so burdensome as to constitute a basis to deny petitioners' FOIL requests. Simply put, it did not meet its burden to show that it is wholly unable to disclose the records due to the volume of the records at issue. The fact is that petitioners want records for only 144 officers and agreed to limit their requests as indicated above.

The NYPD's assertion that Tax IDs are required is inapposite as petitioners observe that such identifying information is not publicly available. Plus, petitioners maintain that they are happy to work with the NYPD to identify a particular officer if an issue arises.

More broadly, the NYPD failed to submit any specific evidence for why locating these records would be so burdensome. There is no indication that the NYPD conducted a search for some of the records at issue and identified a substantial number of records that could justify a burdensome argument. Simply asserting that because records for 144 officers are sought it must be an undue burden is not a compelling argument. It could be that some officers have no (or very few) records to disclose.[2] Without a detailed explanation of the size of the disclosure, the Court cannot credit the NYPD's assertion that to respond would be a "Herculean task."

[2] However, the Court observes that petitioners contend that 127 of the officers included in the FOIL requests are listed in the New York City District Attorneys' Officers Police Adverse Credibility List.

Moreover, if petitioner had made 30 separate requests, each for five officers, and submitted each request once a week, NYPD would have a hard time claiming any of those individual requests were burdensome. Just because petitioner made the 144 individual requests in a short period of time does not magically transform it into a "Herculean task." Clearly, had NYPD started working on the requests, even if it started working on it after the March 2021 stay expired, the request would have been completely fulfilled long ago.

As noted above, it is the NYPD who has the burden to establish that an exemption applies. Here, for instance, nothing was submitted from a records officer to explain how the request would be so burdensome. Instead, the NYPD claimed, without any support for how that number was reached, that it would take eight months to retrieve the documents and include the proper redactions. Even if that were the case, that is not a reason to deny the request. If it were, an agency would be permitted to arbitrarily claim it would take too long to produce records and avoid its obligations entirely under FOIL.

To be sure, petitioners seek records for 144 specific officers. The disclosure of the files for those officers will not be a same-day task. And the Court recognizes that Section 50-a was only repealed a few years ago, which means that the NYPD has not previously had to routinely disclose these types of records. But that does not mean the NYPD can simply choose which records it can disclose (here, it suggests it should only be directed to provide substantiated complaints). Petitioners have expressed a willingness to work with the NYPD on a mutually agreeable schedule for disclosure and to narrow the disciplinary records they seek. As the NYPD suggests in its opposition, disclosure should be on a rolling basis.

The Court recognizes that the NYPD cites record resignations and the COVID-19 pandemic as reasons for why it will likely take a long time to fully respond. Certainly, that

assertion suggests that the NYPD be afforded ample time to fully respond. But that argument does not justify a blanket denial of records that must ordinarily be disclosed under FOIL. Therefore, the petition is granted to the extent that the NYPD must disclose all substantiated and unsubstantiated disciplinary records for the 144 officers (in accordance with petitioners' narrowed request) on a schedule to be worked out by the parties. Given the parties' apparent willingness to cooperate, the Court declines to arbitrarily set a schedule for disclosure. However, either party may make a future application if necessary.

Remaining Issues

As noted above, the Court finds that the PBA is not permitted to raise arguments that were abandoned by the NYPD. It is anathema to a FOIL proceeding where a Court must only evaluate the administrative record below and the arguments raised by an agency based on that record in the subsequent Article 78 litigation.

However, the Court observes that the Fourth Department recently reversed (in part) a lower court case cited by the PBA.[3] In *New York Civ. Liberties Union v City of Syracuse* (2022 NY Slip Op 06348 [4th Dept 2022]), the Fourth Department found that the asserted FOIL exemptions, including the personal privacy exemption, did not justify a categorical withholding of unsubstantiated law enforcement disciplinary records (*id*. at *2). In other words, although the PBA cites to various trial courts in support of its claims that certain FOIL exemptions apply here, an appellate court has now rejected those assertions.

Aside from the fact that it is binding on this Court, the above-cited decision employs a straightforward application of the law. "The bill repealing former Civil Rights Law § 50-a also made several amendments to FOIL concerning disciplinary records of law enforcement agencies.

[3] The Court stresses that the lower court case was still good law when it was cited by the PBA.

Of particular relevance here, Public Officers Law § 86 was amended by adding subdivisions (6) and (7), defining law enforcement disciplinary records and a law enforcement disciplinary proceeding" (*id*.) [internal quotations and citations omitted]). Public Officers Law § 86(6) provides that:

> "'Law enforcement disciplinary records' means any record created in furtherance of a law enforcement disciplinary proceeding, including, but not limited to:
> (a) the complaints, allegations, and charges against an employee;
> (b) the name of the employee complained of or charged;
> (c) the transcript of any disciplinary trial or hearing, including any exhibits introduced at such trial or hearing;
> (d) the disposition of any disciplinary proceeding; and
> (e) the final written opinion or memorandum supporting the disposition and discipline imposed including the agency's complete factual findings and its analysis of the conduct and appropriate discipline of the covered employee."

"'Law enforcement disciplinary proceeding' means the commencement of any investigation and any subsequent hearing or disciplinary action conducted by a law enforcement agency" (Public Officers Law § 86[7]).

The clear definitions provided above suggest only one interpretation. That all disciplinary records, whether they are substantiated or unsubstantiated, are subject to disclosure under FOIL and respondents cannot categorially withhold these records. The statute does not make a distinction between substantiated and unsubstantiated disciplinary records and, in fact, expressly included examples of records that would be part of both a substantiated and an unsubstantiated claim. This Court cannot rewrite a clear and unambiguous statute to create an exception for unsubstantiated records. The legislature was more than capable of excluding certain categories of records from disclosure under FOIL and it did not.

The Court also finds that petitioners are not entitled to legal fees or costs. As the Fourth Department observed in the case cited above "Inasmuch as this proceeding at this stage concerns

a novel interpretation of legislation that both repealed a statute and enacted new provisions to a longstanding statutory scheme, it cannot be said that respondents had no reasonable basis for denying access to the records at issue" (*NYCLU*, 2022 NY Slip Op 06348 at *4).

Summary

The Court observes that the issues in this proceeding were significantly narrowed by the NYPD's opposition. It agreed to provide disciplinary records for the 144 officers in situations where the complaints were substantiated and raised only a burdensome argument with respect to the unsubstantiated disciplinary records. The Court finds that the NYPD did not meet its burden for that exemption and must turn over those records on a rolling basis, preferably on a mutually agreeable schedule with petitioners.

While the PBA was certainly entitled to intervene—its members have an interest in this case—that does not mean that it was permitted to cite exemptions on behalf of the NYPD and it did not cite any binding case law for that proposition.

To the extent that the NYPD attempted to "reserve its right" to file an answer, the Court finds that there is little reason to permit it to file an answer. "[W]here a respondent moves to dismiss a CPLR article 78 petition and the motion is denied, the court shall permit the respondent to answer, upon such terms as may be just. We have indicated, however, that a court need not do so if the facts are so fully presented in the papers of the respective parties that it is clear that no dispute as to the facts exists and no prejudice will result from the failure to require an answer" (*Matter of Kickertz v New York Univ.*, 25 NY3d 942, 944 [2015]).

Here, there is no question that the facts are fully presented in the numerous filings and lengthy briefs submitted by the parties. There is no dispute over the facts: petitioner submitted certain FOIL requests, the NYPD denied the requests and now cross-moves to dismiss on the

ground that to respond would be unduly burdensome. Moreover, the NYPD observed that it was aware of the personal privacy exemption argument and expressly chose to take no position on it or cite to any other FOIL exemption in support of the cross-motion to dismiss. On this record, it is unclear what permitting the NYPD to answer would accomplish other than drag out this case even further. The Court observes that this special proceeding was commenced in October 2021 but was delayed month after month due largely to the NYPD's repeated assertion that it had key personnel out (*see e.g.*, NYSCEF Doc. No. 30). The Court declines to let this proceeding drag out even longer.

Accordingly, it is hereby

ORDERED that the petition is granted to the extent that respondent the New York City Police Department must disclose substantiated and unsubstantiated disciplinary records for the 144 police officers identified in the subject FOIL requests; and it is further

ORDERED that the parties are directed to meet and confer to determinate a reasonable disclosure schedule and, if a schedule cannot be agreed to, then a future motion may be made; and it is further

ORDERED that petitioners are not entitled to legal fees at this time; if another application is necessary, then attorney fees may be awarded.

12/6/2022
DATE

ARLENE P. BLUTH, J.S.C.

CHECK ONE:	[X]	**CASE DISPOSED**		[ ]	**NON-FINAL DISPOSITION**		
	[ ]	**GRANTED**	[ ] **DENIED**	[X]	**GRANTED IN PART**	[ ]	**OTHER**
APPLICATION:	[ ]	**SETTLE ORDER**		[ ]	**SUBMIT ORDER**		
CHECK IF APPROPRIATE:	[ ]	**INCLUDES TRANSFER/REASSIGN**		[ ]	**FIDUCIARY APPOINTMENT**	[ ]	**REFERENCE**