

SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

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In the matter of the application of GWEN CARR,  
COMMUNITIES UNITED FOR POLICE REFORM, and  
JUSTICE COMMITTEE,

**VERIFIED PETITION**

Index Number:

Petitioners,

RJI No.:

For Judgment and Order Pursuant to Article 78 of the  
Civil Practice Law and Rules

- against -

THE NEW YORK CITY CIVILIAN COMPLAINT  
REVIEW BOARD,

Respondent.

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Petitioners GWEN CARR, COMMUNITIES UNITED FOR POLICE REFORM (“CPR”), and THE JUSTICE COMMITTEE (“JC”) (collectively, “Petitioners”), by their duly authorized attorneys, Gideon Orion Oliver and the New York Law School Racial Justice Project hereby make the following Verified Petition against Respondent Civilian Complaint Review Board (“CCRB” or “Respondent”):

**PRELIMINARY STATEMENT**

1. The origin of this Petition traces back to the death of Eric Garner after NYPD members, including former NYPD member Daniel Pantaleo, used force on him in the course of arresting him on July 17, 2014.

2. In spite of the substantial amount of publicity that Garner’s death has received since then, much of the information surrounding his death and the steps the City of New York did and did not take in response to it remains completely in the dark, especially information about the NYPD’s role in his death and subsequent measures taken by the City of New York and

City agents, including CCRB agents, to investigate and discipline involved NYPD members, or otherwise to prevent any further tragedy similar to Garner's death.

3. On August 27, 2019, Petitioners—Eric Garner's mother and members of the general public with commitments in the police reform issue—filed a request pursuant to New York Freedom of Information Law ("FOIL"), Article 6, §§ 84-90 of the New York State Public Officers Law, and the related regulations of the New York State Committee on Open Government ("COOG") at Chapter 21 of the New York Code of Rules and Regulations ("NYCRR") Part 1401 (the "COOG Regulations")<sup>1</sup> (the "Request"), in order to bring as much of that information as possible to light.

4. Also as part of their effort to bring the information surrounding Garner's death to light for their benefit as well as for the benefit of the general public, Petitioners, along with allies, filed on August 27, 2019, a litigation petition in New York State Supreme Court under New York City Charter § 1109 ("Section 1109"), seeking a judicial inquiry into the violations and neglect of duty by a number of individuals that are formerly or currently associated with the City of New York and the NYPD, in connection with Eric Garner's death. *See Matter of Carr, et al. v. de Blasio, et al.*, New York County Index No. 101332/19; 70 Misc 3d 418, 421 (Sup Ct, NY County Sept. 24, 2020), *aff'd*, \_\_\_AD3d\_\_\_, 2021 NY Slip Op 04412, \*13 (July 15, 2021).

5. When Petitioners filed the August 27, 2019 Request, Respondent had already gathered many of the records responsive to the Request before or in connection with the various investigations referred to in the Request as well as former NYPD member Daniel Pantaleo's

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<sup>1</sup> Under FOIL § 89(1), the COOG is charged with assisting agencies with implementing and complying with the FOIL and has enacted the COOG Regulations, which agencies must adhere to in implementing the FOIL. Under FOIL §89(1)(b)(ii), the COOG issues FOIL advisory opinions. FOIL §§ 89(1) and 89(1)(b)(1).

NYPD Departmental Trial, which had concluded earlier in August of 2019, prior to Petitioners' filing of the Request.

6. Given the FOIL's broad disclosure requirements and underlying legislative intent to promote public disclosure, Petitioners are presumably entitled to the records sought in the Request unless Respondent establishes the applicability of statutorily provided exemptions. Respondent has not. Far from it.

7. Rather, ever since the Request was filed, Respondent has failed to comply with numerous requirements under the FOIL and the Committee on Open Government ("COOG") Regulations in handling the Request. For example, on the sole occasion that Respondent provided a date certain, it failed to provide any further records or substantive information about its review until nearly seven months later, when it produced only seven additional pages with redactions. In all other correspondence, Respondent failed to provide a date certain and instead only provided estimated dates by which it would complete its response to the Request. Those estimated dates were not reasonable under the circumstances of the Request. Respondent repeatedly purported to "extend" those dates, without any authority or justification. And Respondent's untimely responses to the Request and Petitioners' appeal failed to sufficiently explain or justify Respondent's decisions to withhold or redact records.

8. Indeed, with regard to certain records, the Records Access Appeals Officer ("RAAO") agreed with Petitioners on appeal that Respondent had constructively denied Petitioners' Request and remanded that portion to the Records Access Officer "for immediate response." Respondent produced 583 pages of records with redactions and 5 recordings without issue on the same day.

9. Up until the final May 13, 2021 production, Respondent never provided any explanation as to which items in the Request the produced records responded. Moreover, Respondent redacted a substantial portion of the records without providing any specific justifications. With the final production, Respondent identified broad categories of responsive documents within its control that it opted not to produce because they were publicly available or because the NYPD also possessed copies of the documents. In doing so, Respondent failed to provide enough information to even identify the documents to which it referred.

10. Although Petitioners tried to resolve these issues through an administrative appeal, Respondent once again failed to handle the appeal in a manner consistent with the FOIL by remanding the case, and determined to withhold and/or redact many records and categories of records that should have been disclosed.

11. Given the Respondent's handling of the Request, Petitioners hereby submit this Petition to this Court to vindicate their rights under the FOIL with respect to the records sought in the Request.

12. Although Petitioners are pursuing a Section 1109 proceeding and this FOIL Petition with different objectives in mind, as Petitioners file this Petition, they have a pressing need to receive in the very near future the records that Petitioners are entitled to under the FOIL. Respondent has failed at every turn to comply with the Request and Petitioners have exhausted any administrative remedies to obtain the records to which Petitioners are entitled under the FOIL.

13. Hon. Erika M. Edwards, who is presiding over the Section 1109 case, recently scheduled a judicial inquiry hearing that is scheduled to begin on October 25, 2021. The Court has made it clear that the Court will not be addressing the propriety of Respondent's response to

the Request. For that reason, among others, Petitioners are not filing this matter as related to the Section 1109 judicial inquiry.

14. However, the Section 1109 judicial inquiry will include Petitioners and their allies' examinations of witnesses about Mr. Garner's death and its surroundings. Therefore, Petitioners' possession of the records sought in this Petition in advance of that hearing is critical for Petitioners to have meaningful opportunities to examine those witnesses at the hearing, and to shed light on the critical topics covered in the records Respondent has withheld or redacted. In other words, Petitioners have a serious, and urgent, need for *prompt* access to all of the records they have sought in the Request.

15. That said, under no circumstances do Petitioners wish to delay the scheduled beginning of the Section 1109 inquiry in order for the Court to determine this FOIL matter. Even if the records sought in the Request are disclosed near the conclusion of, or after, the Section 1109 Inquiry, Petitioners can, and intend to, publicize and otherwise use them to advance their goals of seeking transparency, accountability, and some measure of justice around Eric Garner's death.

16. For these reasons, Petitioners respectfully request that the Court grant Petitioners *prompt* access to all remaining documents that Respondent has not yet disclosed and are responsive to the Request and not subject to an applicable, properly invoked and justified exemption.

17. Finally, earlier today, also in New York County Supreme Court, Petitioners also filed *Carr, et al. v. New York City Police Department*, an Article 78 proceeding challenging the NYPD's handling of the identical FOIL request at issue in this case. Petitioners are now filing this matter as related to that matter. In handling the Request to the CCRB, for example, the

CCRB has in some cases withheld broad categories of records responsive to the Request that are in the CCRB's possession based on the position that they are the NYPD's records in the first instance so the NYPD should either disclose them or fight disclosure on them, but in any event the CCRB apparently will not.

### PARTIES

18. Petitioner GWEN CARR is Eric Garner's mother and the Administrator of Mr. Garner's estate. She has been fighting for transparency, justice, and the firing of officers responsible for killing her son and related misconduct for over 7 years.

19. Petitioner COMMUNITIES UNITED FOR POLICE REFORM ("CPR") is a self-described "unprecedented campaign that is working to end discriminatory policing in New York. .... advancing policies that protect the safety and rights of all New Yorkers to create true community safety. ... fighting to hold police accountable for violating New Yorkers' constitutional rights. ... training communities to know their rights and to observe and document police abuse. ... engag[ing] in strategic direct action, organizing and civic engagement to build the power of communities most impacted by abusive policing...[a]nd ... in Albany and at City Hall demanding law and policy changes that advance police accountability to improve safety for communities." See <http://changethenypd.org/>. A list of CPR member organizations can be found here: <http://changethenypd.org/campaign/intro-members>.

20. Petitioner JUSTICE COMMITTEE ("JC") is a not-for-profit 501(c)(3) organization that is incorporated in New York State. JC is among the CPR member organizations. See <http://www.justicecommittee.org/>. JC is a grassroots organization dedicated to building a movement against police violence and systemic racism in New York City. JC's

membership is multi-racial, but majority Latino/a, and includes families who have lost loved ones to the police, as well as other members of impacted communities.

21. Petitioners CPR and JC have supported Ms. Carr in political organizing and public policy campaigns for justice and accountability related to Mr. Garner's killing for years.

22. Respondent CIVILIAN COMPLAINT REVIEW BOARD is a municipal agency subject to the FOIL and COOG Regulations at 21 NYCRR Part 1401.

23. Respondent's general offices are located at 100 Church Street, New York, NY 10007.

### VENUE

24. The acts and omissions complained of herein took place in New York County.

25. Respondent's offices are located in New York County.

26. Therefore, venue is proper in New York County pursuant to CPLR §§ 506(b) and 7804(b).

### FACTS

#### Petitioners' August 27, 2019 FOIL Request (Ex. 1)

27. On **August 27, 2019**, Petitioners, through counsel, submitted the Request to Respondent, addressed to Respondent's Record Access Officer ("RAO"), by mail and electronically through the NYC OpenRecords portal. A true and correct copy of the Request is attached hereto as Exhibit 1.

28. Through the Request, Petitioners sought disclosure of 62 reasonably described categories of records regarding, among other topics: the death of Eric Garner on July 17, 2014, including the events leading up to it; misconduct related to the killing; statements made to the NYPD, the media, and/or prosecutors related to the killing; investigations, disciplinary actions,

and/or prosecutions, if any, into and/or related to the killing and related events (including leaking confidential information to the media related to Garner and the killing); the outcome of those investigations, disciplinary proceedings, or prosecutions; and all of the transcripts, exhibits, motions, decisions, and other material related to the CCRB's prosecution and public administrative trial of Pantaleo, adjudicating whether his conduct that resulted in Garner's death on July 17, 2014 met the elements of a crime. *See* Ex. 1 at pp. 3–17 (Background); 17–29 (FOIL Request).

29. The Request asked that Respondent “produced the records demanded in electronic format, by e-mail” to Petitioners’ counsel “if electronic file size permits, or if it is possible to transmit the documents securely through links to cloud storage or other, similar means.” *See* Ex. 1 at p. 29.

30. The Request also stated:

The records sought are reasonably described below after the BACKGROUND section. If you disagree and find that the documents requested are not reasonably described, please contact us as soon as possible to begin the process of assisting us in identifying the requested records and, if necessary, in re-formulating the request “in a manner that will enable the agency to identify the records sought”, including by identifying to us “the manner in which the records” sought related to Mr. Garner’s killing, death, and related investigation(s), prosecution(s), and disciplinary action(s) “are filed, retrieved or generated.”

31. *See* Ex. 1 at p. 2 n. 1, citing, *inter alia*, 21 NYCRR § 1401.2(b)(2) (discussed below).

32. Additionally, the Request asked that Respondent provide “the name, **e-mail address**, mailing address, and facsimile number of the person or body to whom [Petitioners] should direct an administrative appeal in connection with this request” – Respondent’s Records Access Appeals Officer (“RAAO”). *See* Ex. 1 at p. 29 (emphasis in original).

**Respondent’s Receipt of the Request on September 4, 2019 (Ex. 2)**



33. On **September 4, 2019**, Respondent acknowledged its receipt of the Request in a letter (the “**Receipt Letter**”). A true copy of the Receipt Letter is attached hereto as Exhibit 2.

34. In the Receipt Letter, Respondent stated that “[f]urther review is necessary to locate the requested records and assess the potential applicability of exemptions” and that the CCRB “anticipate[d] responding to [the] request within the next sixty (60) business days of this letter.”

35. The Receipt Letter did not include the name and contact information of the RAAO.

**Respondent’s Response Letter and Partial Production on December 3, 2019 (Ex. 3)**

36. On **December 3, 2019**, 66 business days later, Respondent sent Petitioners a letter (the “**December 3, 2019 Letter**”), a true copy of which is attached hereto as Exhibit 3.

37. The December 3, 2019 Letter included a “partial production” consisting of 745 pages of records (in some cases containing redactions), 38 photos, and 33 video files, without any indication to which parts of the Request the records correspond.<sup>2</sup> Petitioners group the records in Respondent’s “**First Production**” roughly as follows:

- a. News articles about Garner’s death, produced as “Press\_bates” (Bates Nos. 200001–200300).
- b. Records related to NYPD policies and records we assume to relate to Respondent’s investigation into Garner’s death, produced as “Other\_bates” (Bates Nos. 200301–200479).
  - i. A substantial portion of this group is comprised of one document, a CCRB publication entitled, “A Mutated Rule: Lack of Enforcement in the Face of Persistent Chokehold Complaints in New York City” (Bates Nos. 200312–200466).

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<sup>2</sup> Petitioners are not including copies of the records produced in response to the Request as part of the Petition. However, Petitioners are prepared to submit all of the records Respondent has disclosed for *in camera* review, if the Court desires.

- ii. These documents also include a Google Maps printout; two Memoranda of Understanding between the CCRB and NYPD; a Notice of Claim filed by Petitioner Gwen Carr; a printout of N.Y. Tax Law § 1814 (regarding “Cigarette and tobacco products tax”); a printout of N.Y. Adc. Law § 19-176 (regarding “Bicycle operation on sidewalks prohibited”); and excerpts from a book entitled “Medicolegal Investigation of Death” regarding “Neck Holds.”
- c. Court documents regarding the investigation into Garner’s death, produced as “Legal\_bates” (Bates Nos. 200480–200745), including filings, orders, and/or transcripts in *James v. Donovan*, Index No. 080304/2014; *In the Matter of the Application of the District Attorney of Richmond County for an order Pursuant to C.P.L. 190.25(4)*, Index No. 80294/14; and *In the Matter of the Application of Police Officer Daniel Pantaleo*, Index No. 100641/19.
- d. Photographs of the incident and time immediately preceding the incident (Bates 200750–200778).
- e. Photographs of the location where the incident took place (Bates 200747–200749; 200779–200783).
- f. Videos of the incident, or of the time immediately before or after the incident (Bates 200784–200816). The videos originate from various media sources, individuals, and security cameras, and some contain edits.

38. The December 3, 2019 Letter stated that Respondent was “continuing to review a large number of records and would provide “other records responsive to [Petitioners’] request” as they become available, anticipating “a full and final determination on [Petitioners’] records request within the next sixty (60) business days.” *See* Ex. 3 at p. 2.

39. In the December 3, 2019 Letter, Respondent stated that, of the records that had been “reviewed and/or disclosed with this response, the CCRB is not releasing the following records for the reasons stated below.” The December 3, 2019 Letter enumerated ten categories of records that were being withheld<sup>3</sup> (at pp. 2–4). For each category, Respondent listed

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<sup>3</sup> The tenth category covers records that are duplicative of records covered in the prior nine categories. We are not seeking duplicates of records.

exemptions and, with the exception of the ninth category, only blanketly referenced the relevant statutory language as justification.

- a. Audio recordings, transcriptions, and associated documentation, withheld under FOIL § 87(2)(a) pursuant to Civil Rights Law § 50-a “because the records are exempt from disclosure under FOIL by state statute”; FOIL § 87(2)(b) because “disclosure would create an unwarranted invasion of privacy”; FOIL § 87(2)(f) because “disclosure could endanger the life and safety of any person”; and FOIL § 87(2)(g) because the records “are intra-agency or inter-agency materials that are not factual tabulations or data, instructions to staff that affect the public, or final agency policy or determinations.”
  - b. Correspondence between the CCRB and civilians under FOIL § 87(2)(a) pursuant to CRL § 50-a, FOIL § 87(2)(b), and FOIL § 87(2)(f).
  - c. CCRB complaint reports, closing reports, investigation logs, records documenting the actions of staff during investigation, investigator notes, transcriptions, investigator notes, subpoenas, and drafts under FOIL § 87(2)(a) pursuant to CRL § 50-a, and FOIL 87(2)(g).
  - d. Audio transcriptions of police personnel, withheld under FOIL § 87(2)(a) pursuant to CRL § 50-a, FOIL § 87(2)(b), and FOIL § 87(2)(f).
  - e. CCRB histories of civilians and police personnel and drafts, under FOIL § 87(2)(a) pursuant to CRL § 50-a, FOIL § 87(2)(b), FOIL § 87(2)(f), and FOIL § 87(2)(g).
  - f. Civilian Office of Court Administration (“OCA”) histories and drafts, under FOIL § 87(2)(a) pursuant to CPL § 160.50, et seq., FOIL § 87(2)(b), and FOIL § 87(2)(f).
  - g. Correspondence between CCRB personnel and other government agencies, under FOIL § 87(2)(a) pursuant to CRL § 50-a, attorney client privilege, and work product, and FOIL § 87(2)(2)
  - h. Photos or reports provided by the NYC Office of the Chief Medical Examiner (“OCME”) to the CCRB, under FOIL § 87(2)(b).
  - i. Records created or used in preparation for, during the course of, or as a result of the conclusion of the administrative prosecution of Pantaleo, under FOIL § 87(2)(a) pursuant to CPLR 3101(c), CRL § 50-a, attorney-client privilege, and confidential and privileged attorney work product, and FOIL § 87(2)(g).
40. At the end of the December 3, 2019 Letter, without any reference to the relevant

withheld records or the requests to which they would be responsive, Respondent provided further

explanation for the exemptions it claimed and for an additional exemption it did not raise, FOIL § 87(2)(e) (at pp. 4–5).

41. Though Respondent did not specify the parts of the Request to which the produced records correspond, the records appear to correspond to paragraphs 13, 30, 37, 43, and 60.

#### **Respondent’s Letter on February 20, 2020 (Ex. 4)**

42. On **February 20, 2020**, Respondent sent Petitioners a letter (the “**February 20, 2020 Letter**”). A true copy of the February 20, 2020 Letter is attached hereto as Exhibit 4.

43. In the February 20, 2020 Letter, instead of providing any additional records, Respondent stated that it had extended its response time to the request because “[f]urther review is necessary to locate the requested records and assess the potential applicability of exemptions set forth in FOIL.” Respondent stated that it “anticipate[d] responding to [Petitioners’] request within the next sixty (90) [sic] business days.” Respondent did not provide an estimated date by which it would make a full and final determination.

#### **Respondent’s E-mail Correspondence on July 2, 2020 (Ex. 5)**

44. Ninety-four business days later, in a **July 2, 2020** e-mail (the “**July 2, 2020 E-mail**”), Respondent made Respondent’s “**Second Production**” in response to the Request. A true copy of the cover email is attached hereto as Exhibit 5. The July 2, 2020 E-mail stated that in light of “the recent repeal of Civil Rights Law § 50-a,” Respondent produced seven total pages: a summary of Pantaleo’s CCRB history and a copy of a CCRB Complaint Report, “redacted for material exempt from disclosure under FOIL (Public Officers Law § 87(2)(b)) as an unwarranted invasion of privacy.”

45. As with the First Production, Respondent did not indicate to which parts of the Request the records correspond. However, these two documents appear to correspond to paragraph 37 of the Request.

46. Though Respondent raised Civil Rights Law § 50-a as a basis for withholding seven out of nine categories of records in the December 3, 2019 Letter, these two documents were the only records provided as “previously withheld due to Civil Rights Law § 50-a.”<sup>4</sup> Although Respondent stated in the July 2, 2020 E-mail that it had “made an additional review of [Petitioners’] request,” it produced no other records.

47. Instead, Respondent used the repeal of Civil Rights Law § 50-a to justify the need for “[f]urther review . . . to determine whether any additional responsive records can be located and assess the potential applicability of exemptions set forth in FOIL.” Respondent unilaterally extended its response time and stated that it “anticipate[d] an additional response to [Petitioners’] request within sixty (60) business days.” Respondent again did not provide an estimated date by which it would make a full and final determination.

#### **Respondent’s E-mail Correspondence on September 30, 2020 (Ex. 6)**

48. On September 30, 2020 (the “September 30, 2020 E-mail”), 62 business days later, Respondent sent Petitioners an e-mail, a true copy of which is attached hereto as Exhibit 6. The September 30, 2020 Email again stated that Respondent had “made an additional review of [Petitioners’] request for records.” However, Respondent made no additional production with the e-mail.

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<sup>4</sup> Under Civil Rights Law § 50-a, the “personnel records” of police officers, firefighters and correction officers are “confidential and not subject to inspection or review” without the officer’s permission. The law was repealed on June 12, 2020.

49. Instead, Respondent unilaterally extended its response time, stating that “additional time [was] required to review the records and determine what information can be released” due to “the ongoing litigation in *Uniformed Fire Officers Association, et. al. v. Bill de Blasio, et. al.*, 20-cv-05441-KPF, Docket No. 20-2789.” As a result, Respondent stated that it “anticipate[d] an additional response to [Petitioners’] request within ninety (90) business days.” As with earlier responses, Respondent did not provide an estimated date by which it would make a full and final determination.

**Respondent’s E-mail Correspondence on February 11, 2021 (Ex. 7)**

50. On **February 11, 2021**, Respondent sent Petitioners an e-mail (the “**February 11, 2021 E-mail**”), a true copy of which is attached hereto as Exhibit 7, that was substantively identical to the September 30, 2020 E-mail including with respect to a lack of any production of additional documents. However, instead of anticipating another 90-business day delay, Respondent unilaterally extended its response time by even longer, stating that it anticipated “an additional response to [Petitioners’] request within one hundred and twenty (120) business days.”

51. Although 120 business days from the February 11, 2021 E-mail exceeds the anticipated “full and final determination” date Respondent set forth in the December 3, 2019 Letter by 415 business days, Respondent again did not provide any estimated date by which it would make a full and final determination.

**Petitioners’ April 29, 2021 Appeal of Respondent’s Handling of the Request (Ex. 8)**

52. On **April 29, 2021**, Petitioners’ counsel filed via e-mail an administrative appeal to Respondent’s RAAO (the “**Appeal**”), a true copy of which is attached as Exhibit 8 (except that the attachments to the Appeal are omitted as duplicative of prior exhibits attached hereto).

53. Petitioners incorporate by reference the facts and arguments in the April 29, 2021 Appeal as is fully stated herein.

54. In this Appeal, Petitioners provided Respondent with factual background on the request, as well as on the Section 1109 Inquiry, detailed explanations as to their understanding of the “Relevant Statutory Framework”, including “The FOIL’s Broad Presumption of Access”, “FOIL Responses : Timing and Substance”, “Withholding or Redacting Records Based on FOIL § 87(2) Exemptions”, “Denials, Appeals, and Appeal Determinations”, and “The Repeal of Civil Rights Law § 50-a and Subsequent, Related Litigation.” *See* Ex. 8.

55. Additionally, Petitioners appealed Respondent’s handling of the Request on various grounds, including, but not limited to, Respondent’s failures to comply with the FOIL and COOG Regulations, constructive denial of the request, and failure to establish its entitlement to rely on any exemption of the FOIL’s broad disclosure requirements as to records that had been withheld or redactions that had been made to records that had been produced by then. *See* Ex. 8. Some of these arguments are summarized below, and all of them are incorporated by reference.

**The Appeal argued Respondents failed to comply with the FOIL and COOG Regulations**

- a. Respondent failed to comply with the requirements of FOIL § 89(3)(a) and 21 NYCRR § 1401.5(c)(3) because Respondent failed to provide a “date certain” by which it will complete responding to the Request. Every single correspondence by Respondent in connection with the Request, however, provided only estimated dates—as opposed to a “date certain.”
- b. Even those estimated dates that Respondent provided were not “reasonable under the circumstances of the [R]equest” in violation of FOIL § 89(3)(a) and 21 NYCRR § 1401.5(c)(3).
- c. Every correspondence of Respondent in connection with the Request subsequent to its initial Receipt Letter did not comply with the applicable FOIL and COOG Regulations because Respondent continuously delayed the estimated date of completion. There are no provisions in the FOIL or COOG Regulations for such “repeated delays.” *See, e.g.*, FOIL § 89(3)(a); 21 NYCRR § 1401.5(c); 2/16/18 COOG Opinion.

- d. Respondent had not indicated to which parts of the Request the records it produced on September 4, 2019 and July 2, 2020 responded.
- e. Respondent withheld the records sought in the Request by asserting certain exemptions but failed to establish that its entitlement to withhold any records under those exemptions. Respondent did not provide any facts that explain how the requested records fall within the scope of the cited exemptions.
- f. Respondent improperly withheld certain categories of records sought in the Request without providing a justification. Notably, Respondent did not establish that no amount of redaction can make those records eligible for disclosure.
- g. Respondent's withholding of "[a]udio recordings (whether in the form of contacts or attempted contacts with civilians or other non-police personnel), transcriptions of those audio records created by CCRB staff or police personnel, and any other documentation created or associated with those audio recordings" on FOIL § 87(2)(b), (f), and (g) grounds was improper because Respondent failed to establish the applicability of the cited exemptions to those records.
- h. Respondent's withholding of correspondences between the CCRB and civilians on FOIL § 87(2)(b) and (f) grounds was improper because Respondent failed to establish the applicability of the cited exemptions to those records.
- i. Respondent's withholding of "CCRB complaint reports, CCRB closing reports, CCRB investigation logs, records which document the actions of CCRB staff during the course of the investigation, CCRB investigator notes, transcriptions (of video, field work or other documents) created by CCRB staff, investigator notes, subpoenas issued by the CCRB and drafts of the above listed records" on FOIL § 87(2)(g) grounds was improper because Respondent failed to establish the applicability of the cited exemptions to those records.
- j. Respondent's withholding of "audio transcriptions of police personnel" on FOIL § 87(2)(b), and (f) grounds was improper because Respondent failed to establish the applicability of the cited exemptions to those records.
- k. Respondent's withholding of CCRB histories of civilians and police personnel (and drafts of such documents) on FOIL § 87(2)(b), (f) and (g) grounds was improper because Respondent failed to establish the applicability of the cited exemptions to those records.
- l. Respondent's withholding of Civilian Office of Court Administration (OCA) histories (and draft(s)) on FOIL § 87(2)(a) ground, pursuant to New York Criminal Procedure Law ("CPL") § 160.50, *et seq.*, was improper because Respondent failed to establish that those records were actually sealed pursuant to CPL § 160.50, *et seq.*
- m. Respondent's withholding of Civilian Office of Court Administration (OCA) histories (and draft(s)) on FOIL § 87(2)(b) and (f) grounds was improper because



Respondent failed to establish the applicability of the cited exemptions to those records.

- n. Respondent's withholding of "correspondence (whether in writing or audio) between CCRB personnel and other government agencies (including NYPD personnel)" on FOIL § 87(2)(g) ground was improper because Respondent failed to establish the applicability of the cited exemption to those records. Moreover, Respondent did not establish that no amount of redaction can make those records eligible for disclosure.
- o. Respondent's withholding of "photos or reports provided by the NYC Office of the Chief Medical Examiner to the CCRB on FOIL § 87(2)(b) ground was improper because Respondent failed to establish the applicability of the cited exemption to those records.
- p. Respondent's withholding of records related to Pantaleo's administrative trial on FOIL § 87(2)(a) ground, pursuant to New York Civil Practice Law and Rule ("CPLR") § 3101(c), claiming that those records are excluded due to "attorney-client privilege, and confidential and privileged attorney work product," was improper because Respondent failed to establish that attorney-client privilege applies to those records or that those records constitute the types of attorney work product that are excluded from disclosure under FOIL.
- q. Respondent's withholding of records related to Pantaleo's administrative trial on FOIL § 87(2)(g) ground was improper because Respondent failed to establish the applicability of the cited exemption to those records.<sup>5</sup>

56. The arguments in the Appeal concluded:

The Requesters now make this appeal to challenge the CCRB's handling of the Request in its entirety, including on constructive denial grounds, and because the CCRB has not established its entitlement to redact or withhold records.

...

Should the CCRB deny any portion of the Request based on a determination that it is legally exempt from the disclosure requirement with respect to a portion of a record, a record, or a category of records, please provide a written explanation specifically citing the FOIL § 87(2) category into which you allege that each such portion, record, or category allegedly exempt from

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<sup>5</sup> Petitioners also argued that Respondent's withholding of certain records under FOIL § 87(2)(a) (pursuant to Civil Rights Law § 50-a) was inappropriate because Civil Rights Law § 50-a was repealed. In the May 13, 2021 Appeal Determination, the RAO acknowledged that the Respondent's withholding of records on that ground was improper and granted that part of the Petitioners' Appeal.

disclosure falls. Those exemptions are to be narrowly construed, and the burden to demonstrate that the requested material indeed qualifies for exemption is yours. Accordingly, please articulate particularized and specific justifications for withholding in each case.

**Respondent's May 13, 2021 Appeal Determination (Ex. 9)**

57. On May 13, 2021, the RAAO sent via e-mail Respondent's determination of the Appeal (the "**Appeal Determination**"), a true copy of which is attached hereto as Exhibit 9.

58. The Appeal Determination granted Petitioners' appeal "in part, with respect to the constructive denial, and remand[ed] that portion to the Records Access Officer for immediate response." *See* Ex. 9 at p. 1.

59. However, "[f]or the remaining records," the RAAO found that Respondent "adher[ed] to the reasons provided for withholding or redacting in full or in part of [sic] records responsive to [Petitioners'] FOIL request, except to the extent that records were withheld on the grounds that disclosure was prohibited pursuant to Civil Rights Law § 50-a."

60. To justify the large categories of records withheld to date, the RAAO made the following arguments (Ex. 9 pp. 1–3):

- a. The December 3, 2019 Letter provided sufficient explanation for withholding or redacting records. "The explanations of [sic] were not boilerplate" since the letter "separately detail[ed] the records that were being withheld from disclosure and the applicable FOIL exemption" and "provided a detailed explanation of the legal basis for withholding the records pursuant to those exemptions."
- b. After the repeal of Civil Rights Law § 50-a, all records that previously were previously withheld and are without other reasons for nondisclosure have been disclosed.
- c. FOIL § 87(2)(b) was a proper basis for withholding or redacting
  - i. "1) audio recordings, transcriptions of those recordings created by CCRB staff or police personnel, and any other documentation created or associated with those audio recordings; 2) correspondence between the CCRB and civilians; 4) audio transcription of police personnel; 5) CCRB histories of civilians and police personnel (and drafts of those

- documents); and 6) civilian Office of Court Administration histories (and drafts of those records)”;
- ii. names and personal identifying information of civilians who participated in the CCRB investigation under FOIL § 87(2)(b), as further supported by the passage of New York City’s Identifying Information Law under N.Y.C. Admin. Code § 23-1201 et seq. and the “balancing competing interests of public access and individual privacy”;
  - iii. CCRB complaint histories and complaint reports for cases other than Garner’s; and
  - iv. information about a civilian’s criminal history, even if not sealed. If these records were sealed, CPL § 160.50 et seq. would also prevent disclosure.
- d. FOIL § 87(2)(g)(iii) was a proper basis for denying access to closing reports, CCRB investigation logs, and records that document the actions of CCRB staff during the course of the investigation, CCRB investigator notes, transcriptions created by the CCRB, investigator notes, subpoenas issued by the CCRB, correspondence with civilians, and drafts of the above records . . . as all parts of these records constituted intra-agency materials that reflect the deliberative process.
- e. FOIL § 87(2)(a) pursuant to CPLR § 3101(c) and FOIL § 87(2)(g)(iii) were proper bases for denying access to records created or used in preparation for, during the course of, or as a result of the conclusion of the administrative prosecution of Police Officer Daniel Pantaleo, to the extent those records constituted attorney work-product, were protected by the attorney-client privilege, and reflected the CCRB’s deliberative process, including, but not limited to, drafts and attorney notes, impressions, and strategy.

**Respondent’s May 13, 2021 Response and Production on Remand (Ex. 10)**

61. On **May 13, 2021**, after the RAAO remanded to the Records Access Officer “for immediate response,” Respondent sent Petitioners a letter via e-mail (the “**May 13, 2021 Letter**”), a true copy of which is attached hereto as Exhibit 10.

62. The May 13, 2021 Letter included seven sets of additional records, comprising 559 pages and 5 recordings. For the first time, Respondent indicated the parts of the Request to which the records correspond. Respondent's "**Third Production**" included:

- a. the CCRB closing report and case correspondence;
- b. recordings of five interviews conducted by the CCRB and transcriptions where available;
- c. correspondence with the Richmond County District Attorney and US Department of Justice regarding holds on the CCRB case and a timeline of those holds
- d. complaint reports of CCRB allegations from 2005 to 2015 for Daniel Pantaleo, Justin D'Amico, Kizzy Adonis, William Meems, Dhanan Saminath, Christopher Bannon, Craig Furlani, and Mark Ramos;
- e. CCRB record requests to the NYPD and OCME;
- f. the CCRB Investigative Actions, including the CCRB investigators' summaries of the officers IAB interviews and the content of text messages between officers; and
- g. the motion to renew application to unseal grand jury records and related documents.

63. Portions of five of these record sets were redacted:

- a. The CCRB closing report and case were redacted under one or more bases:
  - i. Under FOIL § 87(2)(g)(iii) as "inter-agency or intra-agency materials which are not . . . final agency policy" because the substance of "potential other misconduct [uncovered] by officers that is outside of the CCRB's jurisdiction" was included in the report without "findings or determinations" for the purposes of "identif[ying] and refer[ing] this potential misconduct to the NYPD";
  - ii. under FOIL § 87(2)(b) regarding "the names and addresses of civilian witnesses that have not otherwise been made public have been redacted, as well as the CCRB histories and criminal conviction histories of civilians involved in this CCRB case," since these are "personal identifying information under N.Y.C. Admin. Code § 23-1201"; and/or
  - iii. under FOIL § 87(2)(a) pursuant to § 160.50, et seq., for criminal conviction information that has been sealed.
- b. The CCRB interviews, complaint reports for cases not pertaining to Garner's death, and CCRB investigative actions were similarly redacted under FOIL §

87(2)(b) in reference to the definition of “personal identifying information” in N.Y.C. Admin. Code § 23-1201.

- c. The CCRB investigative actions were additionally redacted under § 87(2)(g)(iii) because they “contain investigator notes and impressions that are non-final agency decisions and are part of the deliberative process.”
- d. Drafts of the motion to renew application to unseal grand jury records and related documents were withheld as work-product under FOIL § 87(2)(a) and as reflecting the deliberative process of CCRB investigators and attorneys under § FOIL 87(2)(g)(iii).

64. Respondent stated that these produced documents were responsive to paragraphs 14, 21, 28, 29, 35, 37, 38, 41, and 60 of the Request (at pp. 2–3). Respondent did not clarify whether these records fulfilled the entirety of the paragraphs to which they were responsive.

65. Without identifying the specific documents or docket numbers, Respondent also indicated that records responsive to “paragraphs 3, 14, 21, 24, 26, 28, 35, 36, 43, 44, 57, 58, 59, and 60, are publicly available on the court docket in the *Pantaleo v. O’Neill* matter pending in New York County, Case Index #101662/2019, Appellate Case No. 2020-02629” (at p. 2). The reference to paragraphs 14, 21, 28, 35, and 60 in both the produced documents and the publicly available documents not produced indicates that the documents Respondent produced did not entirely fulfill the records requested in each paragraph.

66. When taken alongside the first two productions, Respondent did not appear to provide any records responsive to 50 of the 62 items the Request. Even taking into account the publicly available documents Respondent referenced, 42 of the items in the Request were unmet.

67. In fact, Respondent indicated that it possessed “[s]everal records potentially responsive to [Petitioners’] request, in particular, paragraphs 2-14, 16-21, 24-30, 35, and 43-44,” which “the CCRB received from the NYPD,” but that it opted not to produce these documents.

The May 13, 2021 Letter stated,

As the NYPD is responding to an identical FOIL request, the CCRB's disclosure of these records would be duplicative of the records the NYPD will be disclosing. Because the NYPD is in the best position to protect its own interests, the NYPD will disclose these records as it determines is appropriate and, therefore, the CCRB does not include these records in its production.

68. Respondent concluded, "We believe that we are not in possession of any responsive records other than those previously disclosed, enclosed herewith, or identical records in the possession of the NYPD and, upon information and belief, will be disclosed and/or addressed by the NYPD in response to your FOIL request."

**Some Relevant CCRB Regulations and Parts of the CCRB Investigative Manual (Ex. 11)**

69. As seen above, in the Appeal Determination, Respondent has determined to withhold CCRB witness "names, addresses, dates of birth, and information pertaining to employment of civilians participating in the investigation," claiming, among other things, that disclosing them "would constitute an unwarranted invasion of privacy." *See* Ex. 9 at p. 2.

70. To be clear, Petitioners *do* seek disclosure of the *names* of civilian witnesses who participated in the CCRB investigation, but *do not* seek the disclosure of personal identifying information such as "addresses, dates of birth, and information pertaining to [their] employment."

71. That said, Respondent has not established its entitlement to withhold civilian witness names based on the privacy exemption in FOIL § 87(2)(b) or otherwise.

72. In the Appeal Determination, Respondent claimed: "Civilians who participate in CCRB investigations complete a 'Confidential Witness Information Sheet,' which collects personal identifying information, and thus would reasonably presume that their personal information would not be publicly disclosed." *See* Ex. 9 at p. 2.

73. As stated in the Appeal:

With respect to complainant and witness identities and related records, the real issue is not whether the complainant or witness consents to their disclosure, but whether the CCRB assured them that their identities and/or statements would be kept confidential. *See, e.g., Friedman v. Rice*, 30 NY3d 461 (2017) (Under FOIL § 87(2)(e)(iii), “sources and information may be withheld only upon a specific showing of an express promise of confidentiality to the source”). Statements and identifying information of complainants and witnesses are typically subject to disclosure unless they were given to investigators, police, or prosecutors under explicit guarantees of confidentiality, and where there is no explicit guarantee of confidentiality, or where a “witness later testified,” the information is not considered confidential within the meaning of the FOIL. *Laureano v. Grimes*, 179 A.D.2d 602, 604 (1<sup>st</sup> Dept. 1992) (internal citations omitted); *see also, e.g., Friedman v. Rice*, 134 A.D.3d 826, 831-36 (2<sup>nd</sup> Dept. 2015) (Barros, J., dissenting) (citing cases at 834 in support of the argument that “an agency invoking the confidentiality exemption under FOIL must show facts and circumstances indicative of either an express or implied promise of confidentiality to the witnesses whose statements are being requested,” including *Matter of Exoneration Initiative v. NYPD*, 114 A.D.3d 436, 440 (1<sup>st</sup> Dept. 2014)).

In that connection, by way of one example showing that complainant and witness identities and statements and related records are not and should not be presumptively confidential, the CCRB’s own regulations under Title 38-A of the Rules of the City of New York – specifically, 38-A RCNY §§ 1-24(f) and 1-47(f) – demonstrate that the CCRB does not treat witness identities or statements as presumptively confidential, or make express promises of confidentiality to witnesses. 38-A RCNY § 1-24(f) provides:

The interviewer will inform a member of the Police Department of the name and position of the person in charge of the investigation, the name and position of the interviewer, the identity of all persons present at the interview, whether the member is a subject or witness in the investigation, the nature of the complaint and information concerning all allegations, and the identity of witnesses and Complainants, except that addresses need not be disclosed and confidential sources need not be identified unless they are witnesses to the alleged incident. Clearly, those provisions not just contemplate, but require, the disclosure of complainant and witness identities and allegations – though not truly private information such as their “addresses” – in connection with CCRB investigations. In contrast, 38-A RCNY § 1-47(f) provides that “[a]ll information discussed or statements made at a Mediation session must be held in confidence by the mediator, and the parties must also agree in writing to maintain such confidentiality” as well as that “[n]o records of any kind, including, but not limited to, stenographic, video, or audio, may be made by any party.”

*See* Ex. 8 at pp. 23-24.

74. Particularly against the backdrop of the CCRB regulations that require the interviewer to provide NYPD members who are the subject of CCRB complaints with the “identity of witnesses and complainants” quoted in the Appeal, the short and self-serving reference to and characterization of the CCRB “Confidential Witness Information Sheet” in the Appeal Determination do not establish that civilian witnesses are expressly promised confidentiality. In fact, the opposite is true.

75. By way of offer of proof, attached as Exhibit 11 are true excerpts from what is, upon information and belief, a true copy of the May 2019 CCRB Investigative Manual (specifically, pages 42-44, 94-95, and 98-99 thereof), except that counsel has added those page numbers to the exhibit for the sake of convenience.

76. Pages 42-44 of the CCRB Investigative Manual include excerpts of certain CCRB 38-A RCNY provisions, including, in § 1-47(l) at pp. 43-44, an interview script to be read to each witness who is interviewed by the CCRB. Notably, the script does not state that the contents of the interview or other information the interviewer records will be kept confidential. To the contrary, the script says:

Mr./Ms. [ENTER NAME], you are being asked to provide a statement pursuant to an official CCRB investigation under the authority granted the CCRB pursuant to Section 440 of the New York City Charter. All statements made become part of the official investigative file and may be disclosed pursuant to subpoena or other document request to the extent permitted by law and in furtherance of criminal, administrative or civil litigation.

*See Ex. 11 at p. 34.*

77. Page 86 of the CCRB Investigative Manual, which relates to “GETTING ORGANIZED: MATERIALS NECESSARY FOR CONDUCTING THE INTERVIEW,” has this to say about the Confidential Witness Information sheet:

**Confidential witness information sheet**



As discussed more fully below, before commencing the formal interview, the investigator must obtain contact information from each civilian witness he/she interviews. The investigator records this information in the confidential witness information sheet and ultimately in the CTS database and the interview report.

*See* Ex. 11 at p. 86.

78. Pages 94-95 of the CCRB Investigative Manual describe the first steps an investigator should take in interviewing a civilian witness, from introducing themselves to the civilian witness, to obtaining contact information from the witness. It is in connection with obtaining contact information from the witness that this section of the CCRB Investigative Manual discusses the Confidential Witness Information Sheet and its role:

Before beginning the substantive interview and turning on the recording device, the investigator must obtain from the civilian witness the contact and statistical information specified in the confidential witness information sheet under “personal,” “employment” and/or “school,” “family” and/or “other contacts,” “attorney” (if appropriate), and —future plans.¶ The sheet’s purpose is to provide a checklist of information the investigator should obtain from the witness and to provide an easy place upon which to note such information. The investigator should ask the witness questions from the sheet, and the investigator should fill out the form. This helps set the tone for the rest of the interview.

The investigator should advise the witness that the purpose in asking the questions to obtain the information required by the confidential witness information sheet is threefold: 1) the CCRB may have to contact the witness in the future; 2) if the complaint is substantiated, the prosecutor may need to contact the witness in the future; and 3) some of the information the CCRB uses for statistical reports that it is required to publish.

79. Beyond that, page 98 of the CCRB Investigative Manual describe how an investigator should begin a civilian interview – with the Civilian Witness Interview Script described above, from 38-A RCNY § 1-47(l), which does not mention or promise confidentiality in any way.

80. Finally in this connection, page 99 of the CCRB Investigate Manual includes instructions regarding how an investigator should respond to a witness who asks questions

regarding the confidentiality of CCRB files (before the repeal of CRL § 50-a and related amendments to the FOIL):

As the civilian interview script indicates, witness statements become part of the official CCRB investigative file. Under New York State Civil Rights Law section 50-a, CCRB investigative files arguably constitute police personnel records that by statute are deemed confidential and not subject to inspection or review without the express written consent of the police officer. However, the statute permits prosecutors, the Law Department of the City of New York (Corporation Counsel), a grand jury and other agencies of government which require the records, e.g., the New York City Comptroller and the NYPD, to obtain personnel records without the authorization of the officer. As further provided by the statute, the CCRB will release to the courts investigative files pursuant to New York State court orders; the CCRB also releases its files pursuant to federal subpoenas.

Pursuant to Freedom of Information Act Law (FOIL) requests, it is the policy of the agency to invoke certain exemptions from the FOIL that limit the agency's disclosure of both open and closed cases.

In responding to a witness who questions the confidentiality of his/her statement, it is essential that the investigator provide honest answers; the investigator should never employ subterfuge in order to obtain the statement. Simply put, the investigator should tell the witness that the CCRB releases its files pursuant to lawfully issued subpoenas and upon request to prosecutors and other governmental agencies.

The investigator should also make the witness aware that should the case be substantiated, the CCRB provides the police department with the entire investigative file; the police department may contact the witness and may require the witness to testify at an administrative hearing, so that the department can discipline the police officer(s).

Pursuant to the agency policies described above, civilian witnesses and police officers are not permitted to record their interviews or obtain any other documents regarding the investigation during the pendency of the case. Once the case is completed, any individual is entitled to submit a request for all or part of the investigative file under the FOIL.

Ex. 11 at p. 99.

81. There is no mention or promise of confidentiality with respect to civilian witness names or the Confidential Witness Information Sheet anywhere in those pages of the CCRB Investigative Manual.

82. Particularly against that backdrop, Respondent has not established its entitlement to withhold or redact civilian witness names on personal privacy or other grounds.

### **Some Relevant COOG Opinions (Exs. 12–16)**

83. A true copy of the **February 16, 2018** Advisory Opinion from the COOG ([FOIL-AO-fl9646](#), the “**2/16/18 COOG Opinion**”), which Petitioners referred to in the Appeal, is attached hereto as Exhibit 12.

84. As seen above, the 2/16/18 COOG Opinion outlined an agency’s obligations under the FOIL and COOG Regulations to respond to a FOIL requester in certain authorized ways within certain specified time periods, including by providing estimated response date(s) and/or a “date certain” that are reasonable under the circumstances of the FOIL request; that “[t]here is no provision” in the FOIL “that permits repeated delays” and/or extensions of time to respond to a FOIL request, particularly not without an appropriate and articulated justification.

85. Beyond that, in the case that led to the 2/16/18 COOG Opinion, as here, the requester had filed an administrative appeal on constructive denial grounds after the NYPD had engaged in repeated and unjustified delays, purporting to extend its time to respond to the FOIL request at issue.

86. A true copy of the **September 21, 2020** Advisory Opinion ([FOIL-AO-19780](#), the “**9/21/20 COOG Opinion**”), which Petitioners referred to in the Appeal is attached hereto as Exhibit 13.

87. A true copy of the **January 4, 2005** COOG Advisory Opinion ([FOIL-AO-15096](#), the “**1/4/05 COOG Opinion**”) is attached hereto as Exhibit 14.

88. A true copy of the **December 20, 2017** COOG Advisory Opinion ([FOIL-AO-19639](#), the “**12/20/17 COOG Opinion**”) is attached hereto as Exhibit 15.

89. In each of the COOG Opinions included as Exs. 12–15, the COOG concluded that, under FOIL § 89(4)(a), “there is nothing in the FOIL that authorizes a FOIL appeal officer to ‘remand’ a FOIL request back to the records access officer for further review.” Rather, “[t]he FOIL states that the appeal officer is obligated to either fully explain in writing the reasons for further denial ‘or provide access to the record sought.’” And, an “appeal determination ‘remanding’ [a] request to the FOIL officer for processing is not sufficient to comply with law.” *See* Exs. 12–15.

90. Although Respondent was aware of these legal principles, as articulated in the above-referenced COOG Opinions, including, but not limited to, because Petitioners raised them in the Appeal, Respondent simply ignored them and failed to comply with the FOIL and the COOG Regulations in Respondent’s handling of the Request.

**The June 12, 2020 repeal of New York Civil Rights Law § 50-a and FOIL amendments**

91. The June 12, 2020 repeal of New York Civil Rights Law § 50-a and simultaneous amendments to the FOIL caused a sea change in the public disclosure laws’ treatment of law enforcement disciplinary records. As explained in the Appeal:

On June 12, 2020, New York’s legislature simultaneously repealed New York Civil Rights Law (“CRL”) § 50-a and enacted sweeping revisions to the FOIL, making all records related to law enforcement disciplinary investigations and proceedings presumptively available under the FOIL, subject to specific, enumerated redactions designed to protect truly private information such as home addresses, personal phone numbers, medical information, and the like. *See* S. 8496, 243<sup>rd</sup> Leg., Reg. Sess. (N.Y. 2020) (available online at

<https://www.nysenate.gov/legislation/bills/2019/s8496>); NY Pub. Off. L. §§ 86(6) through 86(9), 87(4-a), 87(4-b), 89(2-b), and 89(2-c).

As a result of the sweeping changes in the applicable provisions of New York law that took effect on June 12, 2020, all “law enforcement disciplinary records” within the meaning of FOIL § 86(6), including records of “law enforcement disciplinary proceedings” within the meaning of FOIL § 86(7), are now presumptively subject to disclosure under the FOIL. *See* FOIL §§ 86(6) and 86(7); *see also, e.g., Schenectady Police Benevolent Assn v. City of Schenectady*, 2020 NY Misc. LEXIS 10947, 2020 NY Slip Op 34346[U], at 8-11 (Sup. Ct., Schenectady County 2020) (“*Schenectady PBA*”) (“with the repeal of CRL §50-a, FOIL requests for law enforcement personnel records are now to be considered in a light that makes them available unless a particular record, or portion thereof, falls within a recently enacted statutory exception or a pre-existing one which the legislature left unaltered”); *Buffalo Police Benevolent Association, Inc. v. Brown*, 69 Misc.3d 998, 1001, 1004 (Sup. Ct., Erie County 2020) (“*Buffalo PBA*”) (“What petitioners find objectionable is specifically authorized by statute.” “Public Officers Law §86(6)(a), now provides law enforcement disciplinary records that must presumptively be disclosed include ‘any record created in furtherance of a law enforcement disciplinary proceeding [including] complaints, allegations, and charges against an employee’”)....

*See* Ex. 8 at pp. 10–14.

92. Attached as Exhibit 16 is a true copy of the Bill Text of S. 8496, 243<sup>rd</sup> Leg., Reg. Sess. (N.Y. 2020) (available online at <https://www.nysenate.gov/legislation/bills/2019/s8496>)).

93. Attached as Exhibit 17 is a true copy of the text of the Sponsor Memo related to S. 8496, 243<sup>rd</sup> Leg., Reg. Sess. (N.Y. 2020) (available online at <https://www.nysenate.gov/legislation/bills/2019/s8496>)).

94. As a result of the repeal of CRL § 50-a and the related amendments to the FOIL, FOIL §§ 86(6) through 86(9) now provide:

6. “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.

7. "Law enforcement disciplinary proceeding" means the commencement of any investigation and any subsequent hearing or disciplinary action conducted by a law enforcement agency.

8. "Law enforcement agency" means a police agency or department of the state or any political subdivision thereof, including authorities or agencies maintaining police forces of individuals defined as police officers in section 1.20 of the criminal procedure law, a sheriff's department, the department of corrections and community supervision, a local department of correction, a local probation department, a fire department, or force of individuals employed as firefighters or firefighter/paramedics.

9. "Technical infraction" means a minor rule violation by a person employed by a law enforcement agency as defined in this section as a police officer, peace officer, or firefighter or firefighter/paramedic, solely related to the enforcement of administrative departmental rules that (a) do not involve interactions with members of the public, (b) are not of public concern, and (c) are not otherwise connected to such person's investigative, enforcement, training, supervision, or reporting responsibilities.

See FOIL §§ 86(6) through 86(9).

95. "Relatedly," as the Appeal explained, "in recognition of officers' privacy concerns related to certain information contained in such records, the legislature modified relevant privacy provisions of the FOIL, so that the FOIL now requires the redaction of certain specific information prior to disclosing such records, *see* FOIL §§ 87(4-a) and 89(2-b)." *See* Ex. 8 at p. 12.

96. And so, by operation of FOIL § 87(4-a), FOIL § 89(2-b) now requires redaction of:

- (a) items involving the medical history of a person employed by a law enforcement agency as defined in section eighty-six of this article as a police officer, peace officer, or firefighter or firefighter/paramedic, not including records obtained during the course of an agency's investigation of such person's misconduct that are relevant to the disposition of such investigation;
- (b) the home addresses, personal telephone numbers, personal cell phone numbers, personal e-mail addresses of a person employed by a law enforcement agency as defined in section eighty-six of this article as a police officer, peace officer, or firefighter or firefighter/paramedic, or a family member of such a person, a complainant or any other person named in a law enforcement disciplinary record, except where required pursuant to article fourteen of the civil service law, or in accordance with subdivision four of section two hundred eight of the civil service law, or as otherwise required by law. This paragraph shall not prohibit other provisions of law regarding work-related, publicly available information such as title, salary, and dates of employment;
- (c) any social security numbers; or
- (d) disclosure of the use of an employee assistance program, mental health service, or substance abuse assistance service by a person employed by a law enforcement agency as defined in section eighty-six of this article as a police officer, peace officer, or firefighter or firefighter/paramedic, unless such use is mandated by a law enforcement disciplinary proceeding that may otherwise be disclosed pursuant to this article."

FOIL § 89(2-b).

97. "In addition to those mandatory redactions," as explained in the Appeal, "the new FOIL provisions permit the withholding or redaction of *only* such records related to "minor, technical infractions that do not involve interactions with the public, are not of public concern, and are not connected to the officer's investigative, enforcement, training, supervision, or reporting responsibilities." See FOIL §§ 86(9); 87(4-b); and 89(2-c), cited in Ex. 8 at p. 13.

98. "In determining that all law enforcement disciplinary records should be public, with the exception of certain narrow, enumerated redactions that may be made on privacy

grounds consistent with FOIL §§ 86(9), 87(4-a), 87(4-b), 89(2-b), and 89(2-c),” as the Appeal further explained:

...the New York legislature explicitly, and carefully, balanced law enforcement officers’ privacy interests in protecting such records from disclosure, including under the exemptions in FOIL §§ 87(2)(b) and 87(2)(f) regarding privacy and safety, against the strong public interest in disclosure of such law enforcement personnel and disciplinary records, and determined that continuing the regime of secrecy created by former CRL § 50-a would be “contrary to public policy.” S. 8496, 243<sup>rd</sup> Leg., Reg. Sess. (N.Y. 2020). “In the balance between the public’s right of access and the impact of disclosure upon the officer, the legislature has now made clear that the latter (the impact upon the officer) must bow to the former (the public’s right of access).” *Schenectady PBA*, 2020 NY Misc. LEXIS 10947 at \*12-14, 17-18.

See Ex. 8 at p. 13.

**The Uniformed Fire Officers Association, et al. v. de Blasio, et al. (“UFOA”) litigation**

99. In a substantial, early challenge to the sea change with respect to public disclosure of law enforcement disciplinary records described above, in *Uniformed Fire Officers Association v. de Blasio*, 20 Civ. 05441 (KPF) (“UFOA”), police and other unions sought to bar the release of police disciplinary records sought through the FOIL –including, and especially, records related to non-final, unproven, and unsubstantiated matters.

100. On July 14, 2020, New York police, firefighter, and correction officer unions sued the City of New York, New York City Mayor Bill de Blasio, and various other officials in New York State Supreme Court, winning a temporary restraining order blocking the public disclosure of “any records concerning Unsubstantiated and Non-Final Allegations or settlement agreements as defined in the . . . Petition.” See *Uniformed Fire Officers Assn. v De Blasio*, 2020 NY Slip Op 32313[U], \*2 (Sup Ct, NY County 2020); *Uniformed Fire Officers Assn. v De Blasio*, 973 F3d 41, 45 (2d Cir 2020).



101. On July 16, 2020, the *UFOA* matter was subsequently removed from New York State Supreme Court to the U.S. District Court for the Southern District of New York. *See Uniformed Fire Officers Association v. de Blasio*, No. 20-cv-05441 (KPF)(RWL) (SDNY), Dkt. 5 (Notice of Removal).

102. On July 22, 2020, the District Court in substance extended the limited temporary restraining order the New York Supreme Court had issued. *See, e.g., Uniformed Fire Officers Assn. v De Blasio*, 973 F3d at 45-46; *Uniformed Fire Officers Association v. de Blasio*, No. 20-cv-05441 (KPF)(RWL) (SDNY), Dkt. 91 (July 22, 2020 transcript).

103. The Defendants in the *UFOA* litigation included the New York City Police Department and the Civilian Complaint Review Board. They were represented by the Office of the Corporation Counsel.

104. In a **July 17, 2020** letter submitted to the *UFOA* Court by the Law Department on behalf of the NYPD, CCRB, and other New York City agency and individual defendants (the “**July 17, 2020 UFOA Letter**”), Respondent, through counsel, took a very different position than Respondent is now taking with respect to the disclosure of law enforcement disciplinary records, including such records related to “unsubstantiated, exonerated, and unfounded allegations.” A true copy of the July 17, 2020 *UFOA* Letter is attached as Exhibit 18 hereto.

105. As Respondent then explained, through counsel:

On June 12, 2020, the New York State Legislature and the Governor repealed Civil Rights Law § 50-a. The Plaintiffs are attempting to subvert the clear intent of that legislative action, which was to increase transparency by permitting the disclosure of the very disciplinary records (unsubstantiated, exonerated, and unfounded allegations) that the Plaintiff’s now seek to enjoin. The law enforcement unions, including Plaintiffs, attempted to lobby the legislature to exclude unsubstantiated, exonerated and unfounded allegations from disclosure. Had the legislature wanted to categorically exempt these records from disclosure, it would have done so in the legislation repealing § 50-a. Plaintiffs should not be permitted to contravene the legislature’s purpose in repealing § 50-a through this litigation....

The types of records Plaintiffs seek to prevent from disclosure – Unsubstantiated and Non-Final Allegations ... – have, for years, already been released for other public employees. Despite this, Plaintiffs fail to identify any examples where the release of the exact same disciplinary files has resulted in irreparable harm to any employee. For example, the Report and Recommendations of the New York City Office of Trials and Administrative Hearings (“OATH”) which include disciplinary determinations of firefighters and correction officers have been public for many years. Notably, these decisions detail allegations against individuals and include whether the allegations are unsubstantiated or otherwise unfounded.<sup>1</sup> Given that this type of material has long been publically available, and Plaintiffs failure to point to even one instance where the public disclosure resulted in harm to other individuals, it is clear that the release of the records Plaintiffs seek to prevent disclosure of, will not cause irreparable harm...

Since the repeal of Civil Rights Law §50-a on June 12, 2020, CCRB has been releasing records, including of complaints unfounded, unsubstantiated or exonerated, in response to FOIL requests.

See Ex. 18 at pp. 1-3.

106. Following extensive briefing and argument, in an **August 21, 2020** Decision denying the unions’ request for a preliminary injunction (“the **August 21, 2020 UFOA Decision**”), the District Court addressed the unions’ arguments that their members would suffer irreparable harm in terms of “[r]eputational harm and loss of privacy.” August 21, 2020 *UFOA* Decision at pp. 4, 11-16, 34-37, and 41-42, *affirmed*, *Uniformed Fire Officers Association v. de Blasio*, Nos. 20-2789-cv(L), 20-3177-cv(XAP), 2021 U.S. App. LEXIS 4266, at 14 (2<sup>nd</sup> Cir. Feb. 16, 2021) (Summary Order). A true copy of the transcript of the August 21, 2021 *UFOA* Decision is attached as Exhibit 19 hereto.

107. *Inter alia*, in *UFOA*, the Southern District noted that there was no “generalize[d] privacy right inherent in the disciplinary records of public employees,” see Ex. 18 at p. 15, and explained:

[P]laintiffs work in law enforcement, and the very nature of their roles, vis-à-vis the public, is very different from other City employees. They are not similarly situated. ... Officers patrol the streets with firearms and are authorized to use force under the aegis of state power. . . . As the city and the state legislature articulated [in repealing 50-a and amending the FOIL] there are strong

governmental interests in accountability and transparency. And the role of police officers in society, the unique responsibilities they carry, the harms they are capable of inflicting on the public, also explain why the City might choose to release records about investigations into allegations of misconduct, but might not proactively release similar records by other city employees, such as teachers or sanitation workers, who do not have similar powers.

*Id.* at 36.

108. On a related Article 78 state claim over which the District Court had jurisdiction, the District Court further held that “the legislature [had] thoroughly and considered rejected” the unions’ “arguments for exempting unsubstantiated, unfounded, and exonerated allegations from disclosure,” reasoning:

...as evidence that the legislature considered plaintiffs’ concerns about privacy and safety, they made a reasoned determination to enact the provisions additional to the New York Public Officers’ Law, which requires the redaction of certain information in law enforcement disciplinary histories,....

[T]he decision to amend Section 50-a was not made haphazardly. It was designed to promote transparency and accountability, to improve relations between New York’s law enforcement communities and their first-responders and the actual communities of people that they serve, to aid law makers in arriving at policy-making decisions, to aid underserved elements of New York’s population and ultimately, to better protect the officers themselves. The decision to amend was also made with due regard for the safety and privacy interests of the affected officers. Amendments were made to the Public Officers Law that mandated the redaction of certain categories of information that permitted the withholding of other categories of information.

Ex. 18 at pp. 37, 41–42.

109. The United States Court of Appeals for the Second Circuit heard oral argument on January 19, 2021 and then, on February 16, 2021, upheld the District Court’s decision in its entirety, reasoning, *inter alia*:

Even the Unions recognize that “the unique responsibilities of law enforcement officers set them apart.” Unions Br. 56. Because the public has a stronger legitimate interest in the disciplinary records of law enforcement officers than in those of other public employees, the District Court correctly determined

that there was a rational, nondiscriminatory basis for treating the two sets of records differently.

*Uniformed Fire Officers Assn. v. de Blasio*, 2021 U.S. App. LEXIS 4266, at \*10-11.

110. On April 13, 2021, the *UFOA* plaintiffs voluntarily dismissed the litigation in its entirety.

111. Particularly against that backdrop, Respondent's determinations to withhold law enforcement disciplinary records responsive to the Request fly in the face of the legislative intent behind, as well as the plain letter of, the repeal of CRL § 50-a and amendments to the FOIL, as well as decisions by multiple courts that recently have ruled that it is now improper to withhold such law enforcement disciplinary records as Respondent has done here.

### **CAUSE OF ACTION**

#### **CPLR § 7803(3) REVIEW OF RESPONDENT'S HANDLING OF THE REQUEST**

112. Respondent's handling of the Request and the Appeal have violated the FOIL and the COOG Regulations.

113. CPLR Article 78 is the proper means to review Respondent's handling of the Request and violations of the FOIL and the COOG Regulations with respect to Respondent's handling of the Request.

114. The applicable standard of review under CPLR § 7803(3) is whether the Respondent's handling of the Request was "affected by an error of law."

115. This action is timely commenced with the applicable statute of limitations, including CPLR § 217(1).

116. No prior application has been made for the relief requested herein.

117. The Request reasonably described the requested records sought.

118. Petitioners had the right under the FOIL and the COOG Regulations to those records.

119. Respondent did not commence or conduct diligence searches for the records responsive to the Request in a timely manner, as required by the FOIL and COOG Regulations.

120. Respondent failed in its obligations under the FOIL and the COOG Regulations to respond to the Request within the required time periods.

121. Respondent has failed to justify Respondent's failures and refusals to produce records responsive to the Request.

122. Respondent has failed to justify Respondent's redactions in the produced records.

123. Respondent has not established its entitlement to rely on, and cannot rely on, the exemptions it has claimed in support of its determinations to withhold and redact records responsive to the Request.

124. Respondent's handling of the Request has otherwise violated the FOIL and the COOG Regulations, including, but not limited to, as argued in Petitioner's April 29, 2021 Appeal.

125. Petitioners respectfully refer to the Exhibits attached hereto as well as to the arguments in Petitioners' Appeal, the facts and arguments contained in which Petitioners incorporate by reference herein for the Court's consideration in determining whether Respondent's handling of the Request violated the FOIL and the COOG Regulations. Although some of those facts and arguments are repeated elsewhere herein, this Petition does not reiterate each and every argument contained therein.

126. Respondent's handling of Petitioners' August 27, 2019 FOIL Request (Ex. 1) and April 29, 2021 Appeal (Ex. 8) violated the FOIL and the COOG Regulations.

127. Respondent's handling of Petitioners' Request between August 29, 2019 and April 29, 2021, when Petitioners filed the Appeal, violated the FOIL and applicable COOG Regulations, including FOIL § 89(3)(a) and 21 NYCRR § 1401.5(c).

128. For example, Respondent failed to provide a "date certain" by which the Request would be responded.

129. Additionally, Respondent's subsequent correspondences in the December 3, 2019 Letter (Ex. 3), Response (Ex. 3); 2/20/20 E-mail (Ex. 4); July 2, 2020 E-mail (Ex. 5); September 30, 2020 E-mail (Ex. 6); and February 11, 2021 E-mail (Ex. 7) did not provide any of the substantive responses authorized by FOIL § 89(3)(a) and 21 NYCRR § 1401.5(c), notwithstanding partial productions.

130. For example, in those correspondence, Respondent unilaterally extended its response time, which is not one of the authorized responses to the Request under the FOIL and the COOG Regulations.

131. Moreover, none of the later dates that Respondent provided in those correspondences was reasonable under the circumstances of the Request in violation of FOIL § 89(3)(a) and 21 NYCRR § 1401.5(c)(3).

132. Additionally, Respondent failed to "provid[e] a statement in writing about the reason for the inability to grant the [R]equest" within 20 business days—or even by the dates it specified by itself—in violation of FOIL § 89(a)(3) and 21 NYCRR § 1401.5(c)(3).

133. Further, Respondent failed to comply with its obligations under the FOIL and the COOG Regulations with respect to the records it has produced.

134. Respondent has not provided any indication of to which parts in the Request the records it has produced in the first two productions correspond.

135. Moreover, Respondent has redacted a substantial portion of the records it has produced so far without providing any justification.

136. Respondent's May 13, 2020 Appeal Determination (Ex. 9) and Production (Ex. 10) further violated the FOIL and applicable COOG Regulations.

137. Respondent should produce all remaining documents that Respondent has not yet disclosed that are responsive to the Request and not subject to an applicable exemption that Respondent has properly invoked and justified.

138. The Court should award Petitioners attorney's fees, costs, and expenses under FOIL § 89(4)(c).

139. Finally, particularly given that Petitioners have been seeking the records described in the Request since August, 27, 2019 for more than 20 months and the 1109 Judicial Inquiry is currently scheduled to commence on October 25, 2021, Petitioners respectfully submit that it is long past time for Respondent to provide the records they have sought, and that there are strong public interests weighing against further delays and in favor of this Court's ordering *prompt* disclosure of those records.

### CONCLUSION

**WHEREFORE**, Petitioners respectfully requests that this Court grant Petitioners a final judgment and order pursuant to CPLR Article 78 containing the following relief:

- (a) Pursuant to CPLR § 7806, annulling Respondent's final determination and ordering Respondent to comply with Respondent's duties under the FOIL and the COOG Regulations by granting Petitioners *prompt* access to non-exempt responsive documents, or appropriate certifications as to the disposition of the requested records or Respondent's inability to locate them, along with the required, appropriately particularized, written explanations justifying any documents or information redacted or withheld, within a *prompt* date certain;

- (b) Pursuant to FOIL § 89(4)(c), ordering Respondent to pay reasonable litigation costs and attorney's fees; and
- (c) Such other and further relief as the Court may deem just and proper.

Dated: September 13, 2021  
Brooklyn, New York



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*Co-counsel for Petitioners*



**ATTORNEY VERIFICATION**

STATE OF NEW YORK    )  
                                   ) ss.:  
 KINGS COUNTY           )

GIDEON ORION OLIVER, an attorney admitted to practice in the courts of New York State, under penalty of perjury, affirms:

I have read the foregoing Verified Petition and know the contents thereof, and the same is true to my own knowledge, except as to matters therein state to be alleged on information and belief, and that as to those matters I believe them to be true.

Where based upon information and belief, the source of the information is apparent from the context or set forth parenthetically.

This Verification is made by me and not Petitioners on the basis of CPLR § 3020(d)(3). Petitioners are not within the county where I have my office.

**PART 130 CERTIFICATION**

To the best of my knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, the presentation of these papers or the contentions therein are not frivolous as defined in subsection (c) of section 130-1.1 of the Rules of the Chief Administrator (22 NYCRR).

Dated: Brooklyn, New York  
 September 13, 2021

  
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 GIDEON ORION OLIVER