REPEAL, REPLACE, AND EXPOSE: A CASE STUDY AND CALL FOR PUBLIC RECORDS TRANSPARENCY WITH POLICE RECORDS IN NEW YORK

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I. INTRODUCTION

The shocking epidemic of police brutality, highlighted by recent cases including the George Floyd killing, continues to inspire protests and efforts to reform police activity.[1] Reforms often encompass all branches of government—legislative, administrative and executive, and, of course, the courts. The Fourth Estate, the press, also plays an important role in serving as a check on government power and abuses, particularly in police brutality matters.

Opening up public records, specifically police disciplinary reports, misconduct complaints, and other records, has come to the forefront of efforts for police reform. Numerous recent cases of police brutality and police killings of citizens, often people of color, stopped by police, sometimes police with long records of prior abuses, helped incorporate public scrutiny into the public discussion on police abuses. Officers in several high-profile cases had a long paper trail of previous complaints and abuses. Had this information been publicized earlier, the

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1. Marina Villeneuve et al., *New York Passes Bill to Unveil Police Discipline Records*, ASSOCIATED PRESS (June 9, 2020, 9:25 PM), https://apnews.com/article/us-news-ap-top-news-laws-new-york-police-180a15ea069de36be58f9db6b97e1180 [https://perma.cc/B3EB-KU5W]. Fueled by recent protests following the George Floyd killing, legislators and the Governor overcame decades of attempts to reform police practices, particularly public scrutiny of police misconduct, which had been shielded from public scrutiny for decades. *Id.*

conventional wisdom is that perhaps they might not have been on the job to commit additional crimes under the color of law.

Thus, media organizations and individual journalists exercising their First Amendment rights delve into public records and use them as the backbone for disseminating information about important public issues. Police misconduct certainly falls within the ambit of important news coverage. One important outgrowth of these dramatic and life-and-death cases has been legislation intended to open up police misconduct records to public scrutiny, which in some states have been locked behind restrictive and anti-democratic laws aimed at keeping these public records from the people who need them the most: the public.

This Article will look at a series of laws and the subsequent legal challenges seeking to unlock police misconduct public records with a particular focus on New York Civil Rights Law section 50-a, which was repealed in January 2020 to lift the blanket shielding release of police disciplinary and misconduct files.[2] The law was initially enacted in the 1970s to prevent criminal defense attorneys from securing law enforcement disciplinary and complaint files to impeach police witnesses.[3] Over the decades, though, the blanket exemption also meant that journalists and media organizations could not employ public records requests to adequately and thoroughly cover police misconduct or other employment matters involving corrections officers, firefighters, and some other government officials who make life-and-death decisions, and those who should be subject to public scrutiny.[4] In addition to recent dramatic and life-and-death cases, a 2018 New York Court of Appeals decision strictly interpreted the statute to uphold withholding law enforcement disciplinary records in a far-reaching public records request.[5]

In the short time since the repeal, section 50-a has been the subject of nearly a dozen lawsuits. State trial courts have issued rulings on 50-a litigation in a dozen reported opinions, and in late 2022, two Appellate Division decisions offered the first word on the law from a higher court.

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2. N.Y. CIV. RIGHTS LAW § 50-a (McKinney 2022).

3. *See* N.Y.C.L. Union v. N.Y.C. Police Dep't, 118 N.E.3d 847, 853-54 (N.Y. 2018).

4. *See* Cynthia Conti-Cook, *Digging Out from Under Section 50-a: The Initial Impact of Public Access to Police Misconduct Records in New York State*, 18 U. ST. THOMAS L.J. 43, 60 & n.69 (2022) (citing Craig Campbell, *New York City Open Data: A Brief History*, DATA-SMART CITY SOLS. (Mar. 8, 2017), https://datasmart.hks.harvard.edu/news/article/new-york-city-open-data-a-brief-history-991 [https://perma.cc/34GG-MLBN]).

5. *N.Y.C.L. Union*, 118 N.E.3d at 852-53 (holding that a strict interpretation of 50-a meant law enforcement agencies could apply the law as a valid exercise of government authority to achieve and "implement its protective goals").

In one case, a municipality, the City of Rochester, signaled that it intended to appeal the ruling to the state high court, the Court of Appeals.[6]

Following the repeal, efforts to seek police misconduct records continue to make their way through the administrative process and the courts. In New York, challenges continue to flow through the system. Despite the two recent Appellate Division opinions, word from the state's high court, the Court of Appeals, may be needed to clarify how the 50-a repeal should be interpreted and what standards will apply to both lower courts and, more importantly, the police departments and municipalities holding those records. It is no surprise that those seeking the release of police disciplinary and misconduct records following the repeal have been stymied by government officials, buttressed by police unions and a general antipathy for public scrutiny.[7] Even in cases where courts have ordered agencies to comply with records requests, at least one municipality reported that it would likely take up to two years or more to comply or turn over documents.[8]

In one of the earliest cases, one trial court framed the issue and acknowledged the competing interests of this public issue:

> At the outset, this Court recognizes that strong lobbying by advocacy groups, coupled with recent nationwide protests in the name of racial equality and demanding massive reform, were the catalysts for the statutory repeal of [50-a]. Indeed, our nation's recent history is forever marked by anger and sorrow surrounding controversial arrests involving the use and degree of force, particularly against black men, women and children.[9]

As much as there might be efforts to withhold the release of public records to shield police misconduct from public scrutiny, bury bad apples, or obfuscate the truth,[10] there is also a practical reality that many

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6. *See* Douglass Dowty, *Court Orders Syracuse to Release Police Disciplinary Files: We'll Comply by 2025*, SYRACUSE.COM (Mar. 16, 2023, 12:34 PM), https://www.syracuse.com/news/2023/03/court-orders-syracuse-to-release-police-disciplinary-files-city-well-comply-by-2025.html [https://perma.cc/WS29-2JW4]. As of the writing of this Article, this case was docketed on the New York Court of Appeals' online docket.

7. *See* Uniformed Fire Officers Ass'n v. de Blasio, 846 F. App'x 25, 30 (2d Cir. 2021) (holding that unions' collective bargaining agreements and other records could not be withheld under section 50-a); Schenectady Police Benevolent Ass'n v. City of Schenectady, No. 2020-1411, slip. op. at 2-3 (N.Y. Sup. Ct. Schenectady Cnty. Dec. 29, 2020); Buffalo Police Benevolent Ass'n v. Brown, 134 N.Y.S.3d 150, 152-53 (Sup. Ct. Erie Cnty. 2020); *see also infra* notes 49-55 and accompanying text.

8. *See* Dowty, *supra* note 6.

9. *Schenectady Police Benevolent Ass'n*, slip op. at 2-3.

10. Conti-Cook, *supra* note 4, at 51 ("Hiding evidence of police violence in Black communities specifically also protects officers who intentionally veil their biases with their badges. Now that

government agencies are understaffed and do not have the appropriate personnel to process and fulfill the often extensive records requests.[11] Before releasing records, someone within the agency has to review each document and sometimes redact bona fide private information such as social security numbers, private medical records, and other legitimately private data. One court described that the New York City Police Department ("NYPD") faced a "Herculean task" following a newspaper's extensive Freedom of Information Law ("FOIL") request for records relating to 144 police officers.[12] In another case, a lawyer representing a municipality fighting against the release of records argued that the depth of the records request strained personnel and could require assigning a full-time employee for the task.[13]

Nevertheless, a practical balance must be struck. This Article will offer a substantive analysis of this issue as 50-a litigation continues to wend its way through other state trial and appellate courts and, ultimately, the New York Court of Appeals. This Article also seeks to highlight the important role the media plays in the open records and free flow of the information arena. Existing legal scholarship on 50-a analyzes the repeal as civil rights and criminal defendants' rights issues.[14] These are both legitimate and important subject matter areas, but previous scholarship does not amplify the media's interest here as the conduit for the larger public's understanding of the underlying issues. Additionally, existing scholarship pre-dates the two recent Appellate Division decisions. This Article seeks to fill these gaps and add the most recent case law to the continuing legal dispute.

Parties seeking police records under the 50-a repeal tend to fall into three groups: civil liberties advocates,[15] criminal defense lawyers,[16] and

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50-a is repealed, we have the opportunity to build on Ida B. Wells' faith in the power of publicity—to publish the details of every lynching . . . .") (footnote omitted).

11. *See* NYP Holdings, Inc. v. N.Y.C. Police Dep't, No. 159132/2021, 2022 WL 17492349, at *1, *3-4 (N.Y. Sup. Ct. N.Y. Cnty. Dec. 6, 2022), *aff'd*, 220 A.D.3d 487 (2023).

12. *Id.* at *3. Further, one author reported that the NYPD receives between 10,000 to 12,000 FOIL requests a year. BRETT ORZECHOWSKI, FOIL: THE LAW AND THE FUTURE OF PUBLIC INFORMATION IN NEW YORK 162 (2018) (ebook).

13. Email from Kristen Smith, Corp. Couns., City of Syracuse, to Michael Lacovara (Oct. 14, 2020, 2:02 PM), *in* Record on Appeal at 97, N.Y.C.L. Union v. City of Syracuse, No. 002602/21 (N.Y. App. Div. 2021), NYCEF Doc. No. 4.

14. Anjelica Hendricks, *Exposing Police Misconduct in Pre-Trial Criminal Proceedings*, 24 N.Y.U. J. LEGIS. & PUB. POL'Y 177, 180-84 (2021).

15. N.Y.C.L. Union v. City of Syracuse, 178 N.Y.S.3d 331, 334 (App. Div. 2022); N.Y.C.L. Union v. City of Rochester, 177 N.Y.S.3d 405, 406-07 (App. Div. 2022); *see infra* notes 111-29 and accompanying text.

16. *See* Rickner PLLC v. City of New York, No. 157876/2021, 2022 WL 1664298, at *1, *5 (N.Y. Sup. Ct. N.Y. Cnty. May 25, 2022) (ordering the release of requested documents to defense lawyer with appropriate redactions under FOIL); People v. Herrera, CR-004539-20NA, 2021 WL

the media.[17] While civil rights groups, such as the New York Civil Liberties Union ("NYCLU"), are well-financed and well-organized, and some individual criminal defendants seeking police misconduct or disciplinary records are empowered by constitutional safeguards,[18] courts may benefit from additional persuasive authority of the media's role in this matter.[19]

The NYCLU was the lead appellant in the two Appellate Division cases and the lead plaintiff in several reported opinions.[20] At least three 50-a court challenges have been brought by newspapers, including Gannett newspapers,[21] *The New York Post*,[22] and *Newsday*.[23] This Article seeks to provide additional persuasive support for the media's role in the collection, review, and dissemination of these important public records, under both Fourth Estate theory and the First Amendment.[24]

This Article will first introduce the issues behind the 50-a repeal and address the intersection with the FOIL.[25] Second, this Article will discuss freedom of information and the media's reliance on public records laws to help inform the public.[26] Third, this Article will look at New

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1247418, at *1, *6 (N.Y. Sup. Ct. Nassau Cnty. Apr. 5, 2021) (granting defense attorney's subpoena for arresting police officer's records over district attorney's and law enforcement's opposition); People v. Randolph, 132 N.Y.S.3d 726, 727 (Sup. Ct. Suffolk Cnty. 2020) (holding that unsubstantiated complaints are not required to be "automatic[ally]" discoverable).

17. *See* Newsday, LLC v. Nassau Cnty. Police Dep't, 201 N.Y.S.3d 88, 88 (App. Div. 2023); Gannett Co. v. Herkimer Police Dep't, 169 N.Y.S.3d 503, 503-04 (Sup. Ct. Oneida Cnty. 2022); *NYP Holdings*, 2022 WL 17492349, at *1.

18. *See* Puig v. City of Middletown, 147 N.Y.S.3d 348, 356 (Sup. Ct. Orange Cnty. 2021) (discussing the policy goals surrounding the state's decision to repeal 50-a); Hendricks, *supra* note 14, at 180-84 (discussing constitutional rights of defendants and 50-a); *see also infra* note 20 and accompanying text.

19. *See* Conti-Cook, *supra* note 4, at 66-72. NYCLU lawsuits through New York's FOIL have led to the development of a database for police misconduct records. *New York Police Transparency Database*, N.Y.C.L. UNION, https://www.nyclu.org/en/campaigns/new-york-police-transparency-database [https://perma.cc/L67B-YDMN] (last visited Apr. 15, 2024).

20. According to the New York State Unified Court System docket, the NYCLU was the lead plaintiff in dozens of cases implicating 50-a challenges since the repeal. *See, e.g.*, *Rochester*, 177 N.Y.S.3d at 407; *Syracuse*, 178 N.Y.S.3d at 334.

21. *Gannett Co.*, 169 N.Y.S.3d at 503-04.

22. *NYP Holdings*, 2022 WL 17492349, at *1.

23. Newsday, LLC v. Nassau Cnty. Police Dep't, 201 N.Y.S.3d 88, 88 (App. Div. 2023); *see infra* notes 213-19 and accompanying text.

24. *See* Renelli v. State Comm'r of Mental Hygiene, 340 N.Y.S.2d 498, 502 (Sup. Ct. Richmond Cnty. 1973) ("In this instance the fourth estate functioned in the finest traditions of a free press, for they did an excellent job in exposing conditions at this institution. Especially to be commended are the *Staten Island Advance*, *New York Times*, WPIX-TV and WABC-TV, who not only revealed the situation but have refused to 'let it die.'").

25. *See infra* Part II.

26. *See infra* Part III.

York Civil Rights Law section 50-a.[27] Fourth, this Article will analyze the existing case law surrounding section 50-a.[28] Fifth, this Article will make specific arguments regarding key points for judicial interpretation: retroactivity and privacy.[29] Sixth, this Article will highlight the media's role in public information cases and conclude with recommendations.[30]

II. REPEAL AND REPLACE

The legal disputes at issue represent the intersection of public policy and police reform under 50-a's repeal and the long-standing issues of public scrutiny of public records, specifically documents relating to police misconduct and disciplinary matters, which should now be made available under public records laws.[31] In New York, the public records law carries the catchy acronym FOIL, for "Freedom of Information Law."[32] The law was intended to foster a culture of openness, declaring:

> The people's right to know the process of governmental decision-making and to review the documents and statistics leading to determinations is basic to our society. Access to such information should not be thwarted by shrouding it with the cloak of secrecy or confidentiality. The legislature therefore declares that government is the public's business and that the public, individually and collectively and represented by a free press, should have access to the records of government in accordance with the provisions of this article.[33]

In 1976, though, New York, like a number of other states, revised its public records access laws by passing New York Civil Rights Law section 50-a, which provided law enforcement and government agencies with a blanket exemption to withhold police and law enforcement disciplinary records.[34] The underlying purpose here was to keep disciplinary records, both substantiated and unsubstantiated reports, out of the hands of criminal defense lawyers intent on using these records to impeach, impugn, or otherwise embarrass police and law enforcement witnesses.[35]

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27. *See infra* Part IV.
28. *See infra* Part V.
29. *See infra* Part VI.
30. *See infra* Part VII.
31. *See infra* notes 111-29 and accompanying text.
32. *See* N.Y. PUB. OFF. LAW § 85 (McKinney 2022).
33. *Id.* § 84. The FOIL justification also stated: "The legislature hereby finds that a free society is maintained when government is responsive and responsible to the public, and when the public is aware of governmental actions. The more open a government is with its citizenry, the greater the understanding and participation of the public in government." *Id.*
34. N.Y. CIV. RIGHTS LAW § 50-a (McKinney 2019).
35. Hendricks, *supra* note 14, at 181-82.

The law also kept these records out of the hands of the media, and the public.[36] One court recently described the law's effect as making "*all* records of police conduct or misconduct essentially invulnerable."[37] The blanket exemption was anathema to New York's history of government transparency under FOIL.

But in recent years, high-profile examples of police misconduct and deadly encounters with police have made public scrutiny of police records a priority. Blanket exemptions of police misconduct records, some observers and scholars argue, have allowed some officers and law enforcement officials with histories of complaints against them to continue working under a cloak of secrecy.[38] In Minnesota, for example, after the George Floyd killing, information surfaced that Officer Derek Chauvin was the subject of numerous previous complaints that were filed with the Minneapolis Police Department.[39] Similar examples surfaced in Memphis following the January 2023 police killing of Tyre Nichols.[40]

Additionally, in recent years, the calls for police reform and opening up of police records, especially police disciplinary records, were loud and emotional.[41] Scholars such as Cynthia Conti-Cook consider the repeal and FOIL as "mechanism[s]" for "accountability."[42] Another scholar, Jonathan Abel, likened what he termed "cop tracing" to the epidemiological concept of "contact tracing."[43]

The public demands from civil rights and defendants' rights advocates were buttressed by a public campaign by media organizations. An extensive coalition of media organizations and media rights advocates sent Governor Andrew Cuomo and the Legislature a letter supporting the repeal.[44] Citing recent current events, including the video of George

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36. Conti-Cook, *supra* note 4, at 60-62, 66.

37. *See* Schenectady Police Benevolent Ass'n v. City of Schenectady, No. 2020-1411, slip. op. at 7 (N.Y. Sup. Ct. Schenectady Cnty. Dec. 29, 2020) (emphasis in original).

38. Zamir Ben-Dan, *Reimagining Justice:* People v. Charles *and the Myth of Justice Without Police Accountability in New York City*, 45 N.Y.U. REV. L. & SOC. CHANGE 509, 512-14 (2022).

39. Shaila Dewan & Serge F. Kovaleski, *Thousands of Complaints Do Little to Change Police Ways*, N.Y. TIMES (June 8, 2020), https://www.nytimes.com/2020/05/30/us/derek-chauvin-george-floyd.html [https://perma.cc/PBG7-R5WH].

40. Marlene Lenthang et al., *What We Know About the 5 Memphis Police Officers Charged with Beating Tyre Nichols to Death*, NBC NEWS (Jan. 27, 2023, 6:28 PM), https://www.nbcnews.com/news/us-news/what-we-know-about-memphis-police-officers-tyre-nichols-death-rcna67861 [https://perma.cc/J67C-R5HL].

41. Conti-Cook, *supra* note 4, at 49-50.

42. *Id.* at 50-51.

43. Jonathan Abel, *Cop Tracing*, 107 CORNELL L. REV. 927, 939-40 (2022) ("When an officer is discredited beyond a certain threshold, cop tracing would require a process for looking backward to identify the old cases that were handled by the officer.").

44. Letter from the Coal. in Support of § 50-a Repeal, to Andrew Cuomo, Governor, State of N.Y., and the N.Y. State Legislature (June 8, 2020) (letter on file with author). Signatories included

Floyd's killing, the letter noted how Chauvin had been the subject of eighteen previous civil rights complaints and the media would have had an interest in reporting on them and, thus, informing the public.[45]

But one of the most dramatic calls to repeal 50-a came from the mother of Eric Garner, a New York man who was killed after police officers with a history of misconduct complaints put Garner in a fatal chokehold in a confrontation over selling loose cigarettes on a street in New York City's Staten Island in 2014.[46] "We need to repeal and end the law that protects officers who kill our children and our loved ones," Gwen Carr told lawmakers at a public hearing in October 2019.[47] Another mother, Valerie Bell, whose son was shot by police, testified at a legislative hearing, "The public needs this information. This is about public safety . . . . Hiding this information means that officers who are repeat offenders are allowed to keep their jobs."[48]

Law enforcement agencies and police unions, however, dug in and argued that 50-a needs to remain in place because of the risk associated with so-called unsubstantiated complaints which could mischaracterize police action and allow for frivolous, unsubstantiated or dismissed, or even malicious complaints to malign officers and embarrass both officers and police departments.[49] While one court rejected the unions' arguments,[50] another embraced them.[51] A state court in *Buffalo Police Benevolent Ass'n v. Brown*[52] sided with the police union on the issue of unsubstantiated reports as a potential privacy matter but grudgingly

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Advance Publications, Inc., the Atlantic Monthly Group, Ballard Spahr LLP, the Cornell Law School First Amendment Clinic, Davis Wright Tremaine LLP, the Floyd Abrams Institute for Freedom of Expression at Yale Law School, Gannett Co., the Hachette Book Group, MacMillan Publishers, the Media Law Resource Center, the National Press Club, the National Press Photographers Association, the New Republic, the NYCLU, the New York News Publishers Association, Penguin Random House, the Radio Television Digital News Association, Simon & Schuster, the Society of Professional Journalists, the Deadline Club, and the Tully Center for Free Speech at Syracuse University. *Id.*

45. *Id.* ("When the only meaningful oversight comes in the form of viral videos, the inevitable result is playing out on the streets of every major American city at this very moment.").

46. Ryan Tarinelli, *Eric Garner's Mother Urges Repeal of NY Police Secrecy Law*, ASSOCIATED PRESS, https://apnews.com/general-news-80f1fa55d7404089b64304e84f2c8ae9 [https://perma.cc/Z5A8-ZYE4] (Oct. 17, 2019, 5:27 PM).

47. *Id.*

48. *Id.*

49. *See* Katherine J. Bies, Note, *Let the Sunshine In: Illuminating the Powerful Role Police Unions Play in Shielding Officer Misconduct*, 28 STAN. L. & POL'Y REV. 109, 123-24 (2017) (noting how states and police unions have clashed on the issue since the 1970s).

50. Uniformed Fire Officers Ass'n v. de Blasio, 846 F. App'x 25, 30-34 (2d Cir. 2021) (summary order).

51. Buffalo Police Benevolent Ass'n v. Brown, 134 N.Y.S.3d 150, 155-56 (Sup. Ct. Erie Cnty. 2020).

52. 134 N.Y.S.3d 150 (Sup. Ct. Erie Cnty. 2020).

acknowledged that applying FOIL would ultimately require the release of the information.[53] The court went as far as to describe both the repeal and the FOIL requests as exhibiting an "anti-law enforcement bias."[54]

As sympathetic as the court was to the law enforcement argument, the court wrote that it was resigned to follow the letter of the law:

> Regardless of one's thoughts about the wisdom of the statute, the anti-law enforcement bias of many of those who supported it, or its pernicious unintended consequences, the fact remains that it is the law of this state and it can only be set aside by a court when it clearly offends the Federal or State Constitutions. Gazing into a crystal ball to divine what municipalities and their FOIL officers might do in the absence of a 50-a is not a basis for the court to overturn a statute passed by both houses of the Legislature and enacted into law by the Governor. Indeed, it is well-settled that the acts of the Legislature are entitled to a strong presumption of constitutionality and that the Petitioners bear the ultimate burden of overcoming that presumption by demonstrating the amendment's constitutional invalidity beyond a reasonable doubt.[55]

It is important to recognize the power of a complaint against a police officer, especially an unfounded or erroneous complaint, but this also supports the argument that exposing even these types of reports deserves sunlight.[56] Clarifying and correcting rumors or erroneous information serves an important public purpose as well.

Despite the competing public campaigns and lobbying efforts, former New York Governor Andrew Cuomo signed the 50-a repeal in January 2020.[57] His successor, Kathy Hochul, has stated that she wants her administration to be the most transparent in New York history, charging the state's seventy-plus agencies with an ambitious transparency plan.[58] These mandates under two governors' administrations might be the most prominent effort for the free flow of information and government transparency since President Johnson signed the federal Freedom of Information Act ("FOIA") into law in 1966 and states moved for openness

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53. *Id.* at 154-56.

54. *Id.* at 155.

55. *Id.*

56. *See* Bies, *supra* note 49, at 117-20 (discussing the importance of transparency between the police and the public).

57. Act of June 12, 2020, ch. 96, § 1, 2020 N.Y. Laws 780, 780.

58. The Governor instructed agencies to streamline the FOIL process and facilitate accessibility, including in different languages. *See Government Transparency Initiative*, OFFS. OF THE N.Y.S. INSPECTOR GEN. (Oct. 2021), https://www.governor.ny.gov/sites/default/files/2021-10/InspectorGeneral_TransparencyPlan.pdf [https://perma.cc/W7JV-GCED].

following Watergate in the 1970s.[59] Though the governors set a tone at the state level, the 50-a challenges begin with FOIL requests at the local level, where case law has developed to show either reluctance or inability to comply with some records requests for police disciplinary and misconduct records.

When it comes to public records issues, the results could be compliance, which the public will read about in news outlets.[60] On the other hand, the reasons for denials could encompass a broad range of reasons, from a legitimate invocation of one of the statutory exemptions or the more nefarious of an overexpansive application of those exemptions or even a more nefarious denial intent on burying public information.[61]

However, it is important to acknowledge that there might be examples of public records or parts of records that would be legitimately withheld under the exemptions. Further, delays in compliance due to staffing and financial issues present both a real concern and an easy justification to withhold or hold off on complying.[62] It takes personnel to collect, vet, and turn over records, and government agencies are almost always understaffed. When a governing body has to choose between employing people in vital positions—public safety, police, fire, public works—or hiring a staffer who can go through files for records requests, common sense would probably dictate how that hiring decision would be made. In correspondence submitted as part of the appeal in the case involving the NYCLU and the City of Syracuse, the municipal counsel wrote, "It's no exaggeration to state that responding to this FOIL could occupy a full-time employee for months. We do not have the resources to assign a full-time employee exclusively to this FOIL request."[63]

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59. *See* MICHAEL SCHUDSON, THE RISE OF THE RIGHT TO KNOW: POLITICS AND THE CULTURE OF TRANSPARENCY 1945-1975, at 29-31 (2015) (ebook) (discussing the motivations behind passing FOIA).

60. *See, e.g.*, Kendall Taggart, *NYPD Discipline Needs More Transparency, a Panel of Experts Said*, BUZZFEED NEWS (Feb. 1, 2019, 3:53 PM), https://www.buzzfeednews.com/article/kendalltaggart/nypd-discipline-independent-panelreport [https://perma.cc/93T3-UGP2]; Kendall Taggart & Mike Hayes, *Here's Why BuzzFeed News Is Publishing Thousands of Secret NYPD Documents*, BUZZFEED NEWS (Apr. 16, 2018, 5:33 AM), https://www.buzzfeednews.com/article/kendalltaggart/nypd-police-misconduct-databaseexplainer [https://perma.cc/S5MN-7E3T].

61. Ben-Dan, *supra* note 38, at 512-13.

62. *See* Act of June 12, 2020 §§ 3–4 (including correspondence from law enforcement personnel and unions submitted into the legislative record).

63. Email from Kristen Smith to Michael Lacovara, *supra* note 13.

III. LEGISLATIVE HISTORY

When laws are challenged, advocates and the courts often point to the legislative history to ascertain what the law means.[64] Judges weighing the 50-a repeal have analyzed the legislative history on three key points: whether the law should be applied retroactively; how the law regards "unsubstantiated" reports and complaints; and whether they would otherwise constitute an unwarranted invasion of privacy.[65]

The bill's senate sponsor, Senator Jamaal Bailey, stated that the repeal's special purpose was intended to secure public scrutiny of police misconduct.[66] Similar arguments were made in the Assembly by sponsor Assemblyman Daniel O'Donnell.[67] The legislative justification concluded: "Repeal of [section] 50-a will help the public regain trust that law enforcement officers and agencies may be held accountable for misconduct."[68]

In addition to the lofty rhetoric, the justification explained that the repeal reestablishes the role FOIL exemptions play in balancing the public's right to know and a law enforcement agency's privacy interest.[69] The legislative justification also pointed to the Committee on Open Government's ("COOG") interpretation that 50-a's narrow exemption has been expanded by courts to encompass a broad swath of records, shielding them from public scrutiny under the auspices of personal privacy.[70] The COOG has been recommending 50-a reforms since 2014.[71]

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64. *See* ROBERT A. KATZMANN, JUDGING STATUTES 3-6, 12 (2014) (ebook).

65. *See infra* Part VI.A–B.

66. 243 N.Y. REG. SESS. REC. 1762-63 (2020) (statement of Sen. Bailey).

67. *See* Christopher Robbins, *New York State Legislature Votes to Repeal Law 50-a That Shields Police from Scrutiny*, GOTHAMIST (June 9, 2020), https://gothamist.com/news/new-york-state-legislature-votes-repeal-law-50-shieldspolice-scrunity [https://perma.cc/MPV8-8XK9]. The bill was part of a crime reform package, which included legislation. *Id.*

68. Memorandum in Support of Senate Bill S.8496 from Sen. Bailey to the N.Y. Senate and Assembly (June 6, 2020) [hereinafter Senator Bailey's 50-a Repeal Sponsor Memo] (justifying the release of section 50-a).

69. *Id.* ("FOIL already provides that agencies may redact or withhold information whose disclosure would constitute an unwarranted invasion of privacy. Recent changes to the Civil Service Law have created additional, non-discretionary protections against the release of certain sensitive information such as contact information. Furthermore, this bill adds additional safeguards in the FOIL statute. Finally, courts have the ability to protect against improper cross-examination and determine if police records are admissible in a trial, without the denial of public access to information regarding police activit[ies] . . . .").

70. *Id.* (citing N.Y. DEP'T OF STATE COMM. ON OPEN GOV'T, ANNUAL REPORT TO THE GOVERNOR AND STATE LEGISLATURE 6 (2014) [hereinafter 2014 COOG REPORT], https://opengovernment.ny.gov/system/files/documents/2021/12/2014-annual-report.pdf [https://perma.cc/QP48-N8LY]. "[T]he courts allow police departments to withhold from the public virtually any record that contains any information that could conceivably be used to evaluate the performance of a police officer." 2014 COOG REPORT, *supra*, at 3.

71. ORZECHOWSKI, *supra* note 12, at 163.

The legislative justification also pointed out that there are existing mechanisms under FOIL to preclude disclosure of legitimately private information, such as medical records, social security numbers, and other legitimately private information.[72] In addition to repealing 50-a, the Legislature amended FOIL language on the definition of law enforcement disciplinary record.[73] The Legislature also amended the privacy language under section 87.[74]

IV. THE REPEAL AND FOIL

On its face, the 50-a repeal was intended to open police disciplinary records to public scrutiny. With the floodgates potentially open, the repeal then triggered an analysis under New York's FOIL. Thus, a party seeking police disciplinary records would then be funneled through traditional FOIL standards and procedures.

FOIL operates under a bold pronouncement of presumed openness for public records.[75] This is, of course, unless the record fits into one of the narrow exemptions. It did not take long for law enforcement and municipal lawyers to point to the statutory exemptions to withhold documents under 50-a, arguing that the release of certain "unsubstantiated" police disciplinary complaints would be an invasion of privacy.[76] This, coupled with examples of some personal information that would have a valid privacy concern, such as medical records, home addresses, and social security information that might be contained in some records, stood as justification for withholding records altogether.

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72. *See* Senator Bailey's 50-a Repeal Sponsor Memo, *supra* note 68 (stating that the law already allowed agencies to redact information that could constitute a violation of privacy).

73. N.Y. PUB. OFF. LAW § 86(6) (McKinney 2021) ("'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."); Act of June 12, 2020, ch. 96, § 2, 2020 N.Y. Laws 780, 780.

74. N.Y. PUB. OFF. LAW § 87; Act of June 12, 2020 § 3.

75. ORZECHOWSKI, *supra* note 12, at 5-7; *see* § 87(2) (stating that each agency "shall . . . make available for public inspection and copying all records" subject to delineated exceptions).

76. N.Y. DEP'T OF STATE COMM. ON OPEN GOV'T, 2020 REPORT TO THE GOVERNOR AND STATE LEGISLATURE 8 (2020) [hereinafter 2020 COOG REPORT], https://opengovernment.ny.gov/system/files/documents/2021/01/2020-annual-report.pdf [https://perma.cc/H665-6R8R].

A recent post-repeal case, *Rickner PLLC v. City of New York*,[77] explained the nuanced process the repeal put in play.[78] There, a state judge ordered the NYPD to turn over internal affairs reports related to police officers involved in an arrest.[79] FOIL imposes a burden on the agency to justify denials.[80] The court described FOIL's three-step process: 1) after an agency receives a request it must either release the document or deny the request in writing; 2) upon appeal the denier must then explain in writing the grounds for that denial; 3) then, an appeal would go to an Article 78 proceeding.[81]

In ordering the release of the records, the court wrote:

> Here, NYPD has not met its burden to demonstrate that the requested material falls squarely within the exemptions relied on to justify withholding the records sought. As such, the court finds the IAB records at issue are subject to disclosure in furtherance of FOIL's underlying policy aims of promoting public inspection and government transparency.[82]

Thus, on its face the repeal would make a ton of police investigatory records available to the public had the COOG, citing early judicial opinions, not funneled them into one of the FOIL exceptions, section 87(2)(b)—the limited personal privacy exception—which states that the release of disciplinary records somehow violates police officers' right to personal privacy.[83] This was a huge step in obfuscating how FOIL decision-makers view these types of records and the notion of privacy itself. This categorization becomes vexing because courts have long acknowledged that public officials, by the nature of their employment and public duties, have a diminished expectation of privacy.[84]

FOIL exceptions do allow for reasonable redaction of bona fide private information such as private telephone numbers, medical information, and social security numbers, which makes perfect sense. But to

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77. No. 157876/2021, 2022 WL 1664298 (N.Y. Sup. Ct. N.Y. Cnty. May 25, 2022).

78. *Id.* at *2.

79. *Id.* at *3.

80. *Id.* at *2.

81. *Id.* An Article 78 hearing is an administrative proceeding challenging government action. It references New York's civil procedure rules. ORZECHOWSKI, *supra* note 12, at 59 ("An Article 78 filing challenges the activities of an administrative government agency or appeals the decision of a state or local agency to the courts. As an Article 78 proceeding applies to FOIL, the burden of proof falls not on the petitioner for the information but on the government to justify the denial.").

82. *Rickner PLLC*, 2022 WL 1664298, at *2.

83. *See supra* Part III.

84. *See* N.Y. Times Co. v. City of N.Y. Fire Dep't, 829 N.E.2d 266, 273 (N.Y. 2005) ("Thus, the best inference is that the Department intended, and the interviewees knew or should have known, that the words spoken in the interviews would become a public record.").

say that police officers or a department itself have a privacy right to keep these important public records out of sight is a huge breach of the public trust.

A. Committee on Open Government

The COOG has played an important advisory role in both the legislative history and the courts' wrestling with 50-a. New York is one of a handful of states with a government agency charged with providing administrative opinions on public records requests and government open meetings.[85] For decades, the COOG has been seen as a national and international model for advocating for public and media access to the public workings of state government.[86] Established in 1974, the COOG has published more than 25,000 opinions on FOIL requests and denials.[87] Led by an executive director and a small staff, the board consists of the Lieutenant Governor; the Secretary of State; and members appointed by the Governor, the Assembly, and the Senate.[88]

Though the opinions are extremely valuable, they offer no binding authority and are purely advisory to records seekers, government agencies, and, most importantly, courts weighing the issues in both Article 78 proceedings and subsequent appeals.[89] In his book on FOIL's history, Brett Orzechowski, then a journalism professor at Utica College in New York, lauded the COOG, though he was also realistic about the committee's ultimate power: "To close, each opinion is declarative in its purpose: this is only an opinion; the petitioner can take it or leave it. There is no enforcement, but the document carries strong, supporting weight."[90]

In its annual reports in 2020 and 2022, the COOG weighed in on 50-a, identifying concerns relating to whether the statute should be applied retroactively, whether the provisions should apply to

85. *See* ORZECHOWSKI, *supra* note 12, at 8, 73-74.

86. *See About Us*, N.Y. COMM. ON OPEN GOV'T, https://opengovernment.ny.gov/about-us [https://perma.cc/FC2W-VYFX] (last visited Apr. 15, 2024) ("The Committee is responsible for overseeing and advising with regard to the Freedom of Information Law, the Open Meetings Law and the Personal Privacy Protection Law . . . . Staff of the Committee gives advice by telephone, email, written advisory opinions, and training classes conducted throughout the state. Advice is offered to the government, the public and the news media.").

87. ORZECHOWSKI, *supra* note 12, at 5; *see Your Right to Know: New York State Open Government Laws*, N.Y. COMM. ON OPEN GOV'T (May 2022), https://opengovernment.ny.gov/system/files/documents/2022/06/your-right-to-know-0522.pdf [https://perma.cc/J2LS-LHF3].

88. *Your Right to Know: New York State Open Government Laws*, *supra* note 87.

89. ORZECHOWSKI, *supra* note 12, at 5.

90. *Id.*

unsubstantiated misconduct reports, and whether there were privacy concerns.[91] In 2020, the COOG pointed to more questions than it answered, for instance, asking whether the repeal should be applied to former police officials; whether it should be applied retroactively to documents created before June 12, 2020; and whether it would cover "unsubstantiated, pending or dismissed charges or complaints[.]"[92]

Two years later, in its 2022 annual report, the COOG was more forceful in its recommendations and analysis when it recommended the repeal under the heading, "Need for Clarity Regarding Repeal of Civil Rights Law section 50-a."[93] The COOG explained that the repeal's interpretation must be channeled through Public Officers Law section 87(2)(b)-(r) to determine whether these types of law enforcement records can be withheld or released.[94]

On retroactivity, the COOG wrote of the importance of retroactive application "to promote transparency and accountability for law enforcement agencies."[95] Though retroactivity can be inferred through the legislative intent, the COOG noted the absence of explicit language in the statute and the conflict among the lower courts on the issue.[96] Thus, either a clear judicial opinion is in order or subsequent explicit legislation or amendments to the existing statute are needed.[97]

The issue of withholding "unsubstantiated" complaints, however, proved equally vexing for the COOG because two years earlier the committee first broached the notion that this could be a justification for withholding records under the FOIL exception as an unwarranted invasion of privacy.[98] Without the "blanket" exemption, the COOG described "intense disagreement" the repeal engenders.[99] The COOG was

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91. *See* 2020 COOG REPORT, *supra* note 76, at 7-8; N.Y. DEP'T OF STATE COMM. ON OPEN GOV'T, 2022 REPORT TO THE GOVERNOR AND STATE LEGISLATURE 5-9 (2022) [hereinafter 2022 COOG REPORT], https://opengovernment.ny.gov/system/files/documents/2022/12/2022-coog-annual-report-final.pdf [https://perma.cc/52EV-VP3W].

92. 2020 COOG REPORT, *supra* note 76, at 8 ("However, many law enforcement agencies have questioned whether there continues to be a blanket exemption protecting from disclosure *unsubstantiated* complaints as a distinct category of records.") (emphasis in original).

93. 2022 COOG REPORT, *supra* note 91, at 5.

94. *Id.* at 5-6.

95. *Id.* at 6.

96. *Id.* at 6-7.

97. *Id.* at 6. In its recitation of case law, the COOG noted that even the most recent Appellate Division decisions avoided ruling on retroactivity. *Id.*; *see infra* Part V (discussing post-repeal case law).

98. 2020 COOG REPORT, *supra* note 76, at 8.

99. 2022 COOG REPORT, *supra* note 91, at 7 ("[S]ince the repeal of [section] 50-a, FOIL privacy provisions have repeatedly been invoked to prevent disclosure of allegations concerning police misconduct unless those allegations have been both fully investigated and determined to be entirely

firm in describing that withholding unsubstantiated reports would be "clearly inappropriate because the circumstances of any given case will affect both the privacy interest and the public interest against which it must be balanced."[100]

Its analysis added that the narrow privacy exemption should be applied as a barrier to release in "extraordinary" cases where "there is a demonstrated privacy interest compelling enough to overcome the important principle that public employees have no substantial privacy interest in how they perform their public functions."[101]

In addition to its annual reports, the COOG issued two influential advisory opinions in 2020 and 2021. In its first post-repeal advisory opinion, the COOG stated that without any precedential authority or explicit legislative intent, a request for law enforcement disciplinary records, particularly unsubstantiated complaints, could legitimately be withheld under FOIL's "unwarranted invasion of privacy" exemption.[102] Citing several earlier advisory opinions, the COOG wrote:

> The new provisions of FOIL did not make changes to provisions concerning personal privacy as defined in [section] 87(2)(b). Based on our long-standing interpretation that requires an agency to determine if an unsubstantiated or unfounded complaint against an employee would, if disclosed, constitute an unwarranted invasion of personal privacy, and absent language expressing that the legislature intended that law enforcement disciplinary records should enjoy *less* protection than the disciplinary records of other government employees, we do not impute such an intent. Moreover, while no court has yet issued an opinion formally answering the question whether unsubstantiated complaints against law enforcement personnel must be disclosed pursuant to FOIL, at least two have recently temporarily enjoyed the disclosure of such complaints pending a final determination.[103]

In March 2021, the COOG issued a second advisory opinion on 50-a, this time supported by precedent in the *Buffalo Police Benevolent Ass'n v. Brown*[104] and *Schenectady Police Benevolent Ass'n v. City of*

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correct. This is an untenable situation that threatens to undermine the purpose for the repeal—to increase police transparency and accountability.").

100. *Id.* at 8.

101. *Id.*

102. N.Y. Comm. on Open Gov't, FOIL Advisory Opinion No. 19775 (July 27, 2020), https://docs.dos.ny.gov/coog/ftext/f19775.html [https://perma.cc/R5LU-82QK]. This opinion related to the FOIL request of the City of Syracuse, which was later the subject of the first Appellate Division ruling on the section 50-a repeal in November 2022. *See id.*

103. *Id.* (emphasis in original).

104. 134 N.Y.S.3d 150 (Sup. Ct. Erie Cnty. 2020).

Schenectady[105] opinions reiterating the unwarranted personal privacy exception denial.[106] The COOG also did not give much authority to the Second Circuit's opinion in *Uniformed Fire Officers Ass'n v. de Blasio*,[107] writing, "[W]e do not read it as a mandate to agencies to release all unsubstantiated complaints without a review for rights of access under FOIL."[108]

The COOG opinion concluded, "The basic FOIL principles continue to apply to these records, and therefore an agency that does not wish to proactively disclose the entire category of records (or waive exemptions that may apply) may still review such records and make determinations as to [those] rights of access."[109]

The advisory opinions, as the COOG acknowledges and Orzechowski reiterated, are just that: advisory. But they nevertheless provide important guidance for both government agencies handling FOIL requests and courts hearing the cases.[110]

V. POST-REPEAL CASE LAW

Since the repeal went into effect on June 12, 2020, New York Civil Rights Law section 50-a has been the subject of or referenced in 176 reported opinions.[111] Many of the citations are passing references or related to narrower or individualized criminal defense matters.[112] While civil rights groups, particularly the NYCLU, took the lead in the bulk of the litigation, media organizations played an important role in seeking records and challenging the post-repeal interpretations.

This Part will look at important, relevant recent cases and reported judicial opinions, highlighting those in which media organizations litigated. One theme emerging from the litigation hinges on New York FOIL's declaration that: "All government records are . . . presumptively

105. No. 2020-1411, slip op. (N.Y. Sup. Ct. Schenectady Cnty. Dec. 29, 2020).

106. N.Y. Comm. on Open Gov't, FOIL Advisory Opinion No. 19785 (Mar. 19, 2021), https://docs.dos.ny.gov/coog/ftext/f19785.html [https://perma.cc/Y9FK-NCG7] (first citing *Buffalo Police Benevolent Ass'n*, 134 N.Y.S.3d at 155-56; and then citing *Schenectady Police Benevolent Ass'n*, slip op. at 15).

107. 846 F. App'x 25 (2d Cir. 2021) (summary order).

108. *See* FOIL Advisory Opinion No. 19785, *supra* note 106 (citing *de Blasio*, 846 F. App'x at 32).

109. *Id.* The opinion also reiterated, "Again, this is precisely what we advised in 2020 before courts had opined." *Id.*

110. *See, e.g.*, N.Y.C.L. Union v. City of Syracuse, 148 N.Y.S.3d 866, 869 (Sup. Ct. Onondaga Cnty. 2021).

111. This data was compiled through the Shepard's citation service provided on the LexisNexis database. The report was last compiled on Feb. 23, 2024.

112. *See, e.g.*, People v. Barralaga, 153 N.Y.S.3d 808, 813 (Crim. Ct. 2021) (noting that the defendant argued that the repeal entitled him to additional police records for his criminal defense).

open for public inspection and copying unless they fall within one of the enumerated exemptions of Public Officers Law [section] 87(2)."[113] Courts consider this a "well settled" principle.[114]

New York's Appellate Division for the Fourth Department, which covers upstate, western, and central New York, was the first appellate court to issue opinions on records requests under the repealed statute. The cases involved similar public records requests by the NYCLU with police departments in Syracuse[115] and Rochester.[116] After back-to-back oral arguments in September 2022, the Appellate Division issued both opinions in November. These cases involved extensive records requests for police disciplinary records, some dating back twenty years under FOIL. Both requests were denied, and the cases went to separate Article 78 hearings and ultimately appeal.

In *New York Civil Liberties Union v. City of Syracuse*,[117] a unanimous panel of the Appellate Division held that the personal privacy exemption the city and police relied on to withhold the documents was too broadly applied and not in the spirit of the FOIL or its appropriate "narrow" exemptions.[118] The court wrote, "We agree with petitioner that the court erred in determining that the personal privacy exemption under Public Officers Law [section] 87(2)(b) allows respondents to categorically withhold the law enforcement disciplinary records at issue."[119]

The court acknowledged that the personal privacy exemption under FOIL is a qualified privilege, but the categorical "blanket" denial violated the law.[120] Valid or legitimate personal privacy information relating to individual police officers could and should be redacted to comply with records requests, the court instructed.[121]

The court added:

> In order to invoke the personal privacy exemption here, respondents must review each record responsive to petitioner's FOIL request and determine whether any portion of the specific record is exempt as an invasion of personal privacy and, to the extent that any portion of a law enforcement disciplinary record concerning an open or unsubstantiated complaint of SPD officer misconduct can be disclosed *without* resulting in an unwarranted invasion of personal privacy, respondents

113. Gould v. N.Y.C. Police Dep't, 675 N.E.2d 808, 811 (N.Y. 1996).
114. *See* N.Y.C.L. Union v. City of Syracuse, 178 N.Y.S.3d 331, 335 (App. Div. 2022).
115. *Id.* at 334.
116. N.Y.C.L. Union v. City of Rochester, 177 N.Y.S.3d 405, 407 (App. Div. 2022).
117. 178 N.Y.S.3d 331 (App. Div. 2022).
118. *Id.* at 335.
119. *Id.*
120. *Id.* at 336.
121. *Id.*

> must release the non-exempt, i.e., properly redacted portion of the record to petitioner.[122]

While *New York Civil Liberties Union v. City of Rochester*[123] offers a similar set of facts and rationale, this case is still active because the city filed a notice of appeal to the Court of Appeals, New York's high court.[124] The court cited its holding in the Syracuse case, reiterating its rationale for rejecting the blanket categorical rejection employed by the city here, too.[125]

The first issue the court addressed is the well-worn question of whether section 50-a's repeal should apply retroactively to police disciplinary records dating back before the June 2020 repeal.[126] A number of government agencies in the FOIL appeals and Article 78 proceedings argued that even if the records should be turned over, the law should not be interpreted to apply retroactively to records dating before the enactment of the repeal in June 2020.[127] Thus, the law should not be applied "retroactively."[128] The court also did not believe that attorneys' fees should be awarded to the petitioner.[129]

A. Two Media Petitioners

In *Gannett Co. v. Herkimer Police Dep't*,[130] a news organization sought and was denied police records from Herkimer Police Department.[131] The newspaper challenged an Article 78 proceeding and initially fought for both the records and attorneys' fees.[132] The police department argued against the release of unsubstantiated records. Its arguments hinged on a Monroe County decision and the COOG advisory opinion.[133] In addressing these arguments, the court weighed two issues:

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122. *Id.* (citations omitted).

123. 177 N.Y.S.3d 405 (App. Div. 2022).

124. Dowty, *supra* note 6.

125. *Rochester*, 177 N.Y.S.3d at 407 ("We conclude . . . that the court erred in concluding that the personal privacy exemption under Public Officers Law [section] 87(2)(b) creates a blanket exemption allowing respondents to categorically withhold the law enforcement disciplinary records at issue." (citing N.Y.C.L. Union v. City of Syracuse, 178 N.Y.S.3d 331 (App. Div. 2022))).

126. *Id.*

127. *See id.*

128. *Id.* The Second Department more recently held that both the retroactivity and privacy arguments lacked merit. *See infra* notes 213-17 and accompanying text.

129. *Rochester*, 177 N.Y.S.3d at 407.

130. 169 N.Y.S.3d 503 (Sup. Ct. Oneida Cnty. 2022).

131. *Id.* at 510.

132. *Id.* at 504. The petitioner withdrew the fees argument during oral argument. *Id.* at n.1.

133. *Id.* at 505 (first citing People v. Francis, 164 N.Y.S.3d 358 (Sup. Ct. Monroe Cnty. 2022); then citing FOIL Advisory Opinion No. 19775, *supra* note 102; and then citing FOIL Advisory Opinion No. 19785, *supra* note 106).

substantiated reports versus unsubstantiated reports and whether the statute should be applied retroactively.[134]

First, the court described the denial as based on "sufficiently clear" legal standards surrounding the privacy exception.[135] The court declined to follow precedent from two earlier cases because the term "unsubstantiated" is not expressly used in the underlying statute.[136] Second, the court also rejected arguments regarding legislative history on unsubstantiated reports and retroactivity.[137] "[T]he disclosure of records related to unsubstantiated claims would constitute an unwarranted invasion of personal privacy," the court wrote.[138]

The court added, "Public Officers Law [section] 87(2)(b) may indeed be invoked to withhold records related to unsubstantiated claims of misconduct."[139] The court also rejected the retroactive application because the language was not part of the law.[140] Even as a remedial law, retroactivity is not a given.[141]

The first media case following the Fourth Department's rulings in the *Rochester* and *Syracuse* cases involved an extensive FOIL request by *The New York Post* newspaper seeking disciplinary records of 144 city police officers, in *NYP Holdings v. New York City Police Dep't*.[142] A New York City Supreme Court described the "Herculean task" facing the police department as it attempted to fulfill the request and redact personal privacy and financial information from the documents.[143]

The court found that the parties were more or less cooperating, but it noted that because the FOIL request came almost immediately after the repeal, the NYPD was not accustomed to fulfilling such requests.[144] More importantly, the court felt that the records should be released regardless of whether they were "substantiated or unsubstantiated."[145]

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134. *Id.* at 505-06.

135. *Id.* at 506.

136. *Id.* at 506. The court rejected rulings in the *Schenectady* case and the Second Circuit ruling in *de Blasio*, writing, "This Court remains unconvinced by these cases and respectfully declines to follow the reasoning advanced by them." *Id.* at 506 (first citing Uniformed Fire Officers Ass'n v. de Blasio, 846 F. App'x 25 (2d Cir. 2021); and then citing Schenectady Police Benevolent Ass'n v. City of Schenectady, No. 2020-1411, slip op. (N.Y. Sup. Ct. Schenectady Cnty. Dec. 29, 2020)).

137. *Id.* at 506-07.

138. *Id.* at 507.

139. *Id.* at 508.

140. *See id.* at 509.

141. *Id.* at 510 ("[T]his Court unequivocally concludes that the repeal of Civil Rights Law [section] 50-a must not be given retroactive effect.").

142. No. 159132/2021, 2022 WL 17492349, at *1-2 (N.Y. Sup. Ct. N.Y. Cnty. Dec. 6, 2022), *aff'd*, 220 A.D.3d 487 (App. Div. 2023).

143. *Id.* at *8-9.

144. *Id.* at *2, *10.

145. *Id.* at *12-13.

The court wrote:

> [T]he 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.[146]

VI. DISCUSSION

As 50-a FOIL cases carry on, courts will need guidance on two particular issues: whether the statute should be applied retroactively and whether the law enforcement records at issue can be withheld on privacy grounds. This Part will discuss these issues in more depth.

A. Retroactivity: Looking Back and Going Forward

Whether the repeal of 50-a covers older records and how far back those records would go is another major issue for debate and resolution. Despite the declaration of opening up public review of police disciplinary records, the statute is silent on retroactive application, which has become an important element of the courts' review and holdings.

Essentially, the retroactivity issue focuses on whether the 50-a repeal would apply only to police disciplinary records created after the June 12, 2020 enactment date. One court called retroactivity a "threshold issue . . . ."[147] The COOG has recommended retroactive application,[148] and two courts supported this in the *Schenectady*[149] and *Puig v. City of*

146. *Id.* at *7.

147. Puig v. City of Middletown, 147 N.Y.S.3d 348, 354 (Sup. Ct. Orange Cnty. 2021).

148. 2022 COOG REPORT, *supra* note 91, at 6 ("The Committee believes that the repeal must be applied retroactively to fulfill the expressed intent of the Legislature to promote transparency and accountability for law enforcement agencies. In light of the conflicting court decisions listed below, and a great deal of ongoing litigation, the Committee recommends that the Legislature moot existing litigation by clarifying its intention that the repeal have retroactive application, and all law enforcement personnel records—whenever created—are subject to disclosure under FOIL unless they come within one of its statutory exemptions.").

149. Schenectady Police Benevolent Ass'n v. City of Schenectady, No. 2020-1411, slip. op. at 14 (N.Y. Sup. Ct. Schenectady Cnty. Dec. 29, 2020).

Middletown[150] cases. However, the court in *Gannett*[151] was adamant about only applying the law prospectively.[152]

Additionally, in *Abbatoy v. Baxter*,[153] a Monroe County trial court held that 50-a should not be applied retroactively.[154] The court held that the petitioner, a lawyer seeking police disciplinary records, should not be afforded retroactive application for his request.[155] The *Abbatoy* court also held that the 50-a repeal was not a "remedial statute" designed to relieve an aggrieved party or serve to remedy a past wrong.[156] Instead, the court held that retroactive application would impair the "vested" rights of the respondents and their confidentiality.[157] The court added: "Words in a statute ought not to have a retrospective operation, unless they are so clear, strong, and imperative, that no other meaning can be annexed to them, or unless the intention of the legislature cannot otherwise be satisfied."[158]

Although the Fourth Department did not fully address retroactivity, an interesting argument was raised by NYCLU attorneys during oral arguments in the Rochester case: retroactive application is an academic legal argument if the FOIL statute is read to include records "held" by the law enforcement agency that were not subject to exclusion.[159]

This is an argument supported by the federal FOIA and decades of precedent.[160] Though the Act itself does not expressly refer to retroactivity earlier than 1966, it does require agencies to turn over records held within the agency at the time of the request, unless the documents fit into

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150. *Puig*, 147 N.Y.S.3d at 356 ("[T]he Court finds that the repeal of Civil Rights Law should be applied retroactively to reach all disciplinary reports, not just those created on or after June 12, 2020.").

151. Gannett Co. v. Herkimer Police Dep't, 169 N.Y.S.3d 503 (Sup. Ct. Oneida Cnty. 2022).

152. *Id.* at 509; *see* People v. Francis, 164 N.Y.S.3d 358, 367 (Sup. Ct. Monroe Cnty. 2022) (applying the law prospectively); Brighton Police Patrolman Ass'n v. Catholdi, No. I2020002814, 2021 WL 7287668, at *4-5 (N.Y. Sup. Ct. Monroe Cnty. Apr. 16, 2021) (same).

153. 178 N.Y.S.3d 412 (Sup. Ct. Monroe Cnty. 2022).

154. *Id.* at 419-20.

155. *Id.* at 418-20; *see* Addiss v. Selig, 190 N.E. 490, 492 (N.Y. 1934) ("Statutes dealing with other matters than those of procedure will not be interpreted as retroactive unless such intent of the Legislature clearly appears from its terms." (quoting Orinoco Realty Co. v. Bandler, 134 N.E. 823, 824 (N.Y. 1922))).

156. *Abbatoy*, 178 N.Y.S.3d at 419-20.

157. *Id.* at 420 ("As the statute repealing [section] 50-a, and its legislative history, is silent as to retroactivity, it is not remedial in nature, and it impairs significant, vested rights of Respondents, it is not retroactive in operation. Thus, Petitioner is not entitled to the disclosure of the Respondents' disciplinary records as requested in Petitioner's FOIL requests.").

158. *Id.* at 419 (quoting United States v. Heth, 7 U.S. 399, 413 (1806)).

159. Brief for Petitioner-Appellant at 26-27, N.Y.C.L. Union v. City of Rochester, No. CA 21-01191 (N.Y. Sup. Ct. Feb. 22, 2022) (citing Gould v. N.Y.C. Police Dep't, 675 N.E.2d 808, 811 (N.Y. 1996)).

160. *See* 5 U.S.C. § 552.

one of the statutory exceptions.[161] The Act requires the production of records held by the agency, regardless of format.[162] The FOIA statutory exceptions do not include timing or retroactivity as grounds for denial, either.[163]

An agency's possession of records, even those created before 1966, was presumed to be open for public scrutiny or release, the United States Supreme Court ruled in *United States Dep't of Justice v. Tax Analysts*.[164] In this case, a tax analyst publication sought public records relating to tax enforcement cases that were held by the Department of Justice's Tax Division.[165] In determining whether the FOIA request was valid, the Court applied a two-prong analysis: 1) did the agency create the record or information being requested and was it part of the agency's duties and responsibilities; and 2) was the agency in possession or "control" of the documents at the time of the request.[166] In a footnote, the Court added, "Because requested materials ordinarily will be in the agency's possession at the time the FOIA request is made, disputes over control should be infrequent."[167]

The broad definition of records, intended to facilitate openness of government operations, was integral to the Court's analysis ordering the release of former Secretary of State Henry Kissinger's telephone transcripts in a FOIA challenge in *Kissinger v. Reporters Committee for Freedom of the Press*.[168] This is an important case because it speaks to the legal requirements to create, retain, and release documents, even if the agency is not in possession of those records at the time of the request.[169]

In *Kissinger*, Chief Justice Rehnquist links the discussion to the Federal Records Act, quoting, at length, the legislative history:

> It is well to emphasize that records come into existence, or should do so, not in order to fill filing cabinets or occupy floor space, or even to

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161. *Id.* § 552(a)(3); *see* U.S. Dep't of Just. v. Tax Analysts, 492 U.S. 136, 150-51 (1989); FBI v. Abramson, 456 U.S. 615, 630-31 (1982) (applying a narrow definition and "explicitly ma[king] exclusive" the statutory exemptions (quoting EPA v. Mink, 410 U.S. 73, 79 (1973))); *see also* NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 136 (1975) ("As the Act is structured, virtually every document generated by an agency is available to the public in one form or another, unless it falls within one of the Act's nine exemptions.").

162. § 552(a)(3)(B).

163. *See id.* § 552(b)(1)–(9).

164. *Tax Analysts*, 492 U.S. at 142.

165. *Id.* at 140.

166. *Id.* at 144-45 ("By control we mean that the materials have come into the agency's possession in the legitimate conduct of its official duties.").

167. *Id.* at 146 n.6.

168. 445 U.S. 136 (1980).

169. *See id.* at 139, 150-52.

> satisfy the archival needs of this and future generations, but first of all to serve the administrative and executive purposes of the organization that creates them. There is danger of this simple, self-evident fact being lost for lack of emphasis.[170]

The legislative history adds that in addition to keeping important records to benefit the agency or the executive, a reasonable interpretation would also be to extend that interest to the public and, perhaps even, the media.

Nevertheless, the doctrine of retroactivity is critical to fulfilling the repeal's goal of facilitating public review of police misconduct and disciplinary cases. However, a number of agencies, supported by police unions, argued that if the law is valid, only police disciplinary records following its June 2020 enactment would be reviewable. This interpretation would render the 50-a repeal relatively impotent.

One scholar suggested that the retroactivity issue would be ripe for subsequent analysis and consideration.[171] Even though the retroactive application of 50-a is important, the NYCLU and some courts acknowledge that a judicial finding under the doctrine of retroactivity might not be necessary because the law's language defines police records that are held by the agency, which should be sufficient under traditional statutory interpretation standards.[172] Even the COOG previously interpreted FOIL to apply to documents "maintained" by the agency, which could render the retroactivity application irrelevant or academic.[173]

Further persuasive guidance can be gleaned from California's handling of a similar repeal in 2018.[174] The California modification to its access laws with California Penal Code section 832.7(b)(1) made police records involving discharge of weapons, unreasonable use of force, or other misconduct open to the public and provided that such records "shall not be confidential" unless they fit into a narrow area of

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170. *Id.* at 149 (quoting S. REP. NO. 81-2140, at 4 (1950)).

171. Conti-Cook, *supra* note 4, at 60 n.69 ("It is worth a deeper dive and a separate article about all the attempts at obstructing access to records, even after 50-a's repeal, i.e., charging thousands of dollars, claiming repeal only applies retroactively, claiming repeal only applies going forward, claiming the scope of disclosure is narrowly limited to substantiated records, etc. . . . .").

172. *See* N.Y.C.L. Union v. City of Rochester, 177 N.Y.S.3d 405, 407 (App. Div. 2022).

173. *See* N.Y. Comm. on Open Gov't, FOIL Advisory Opinion No. 14890 (Sept. 10, 2004) ("[I]t pertains to requests for and rights of access to existing records maintained by a government agency."); N.Y. Comm. on Open Gov't, FOIL Advisory Opinion No. 12179 (June 28, 2000) (asserting that FOIL pertains to records "kept, held, filed, produced, reproduced by, with or for an agency").

174. *See* CAL. PENAL CODE § 832.7 (West 2020).

privacy.[175] Though a potentially difficult concept, an appellate court ruled that the retroactive application of the public records law would not impose any additional liabilities on government agencies or the public officials and servants affected because the government already holds or maintains the underlying records in the first place.[176] In *Ventura County Deputy Sheriffs' Ass'n v. County of Ventura*,[177] the appellate court wrote:

> Although the records may have been created prior to 2019, the event necessary to "trigger application" of the new law—a request for records maintained by an agency—necessarily occurs after the law's effective date. The new law also does not change the legal consequences for peace officer conduct described in pre-2019 records. Rather, the new law changes only the public's right to access peace officer records.[178]

It is important to note, though, subdivision 6 lays out the specific pieces of information that officials can legitimately redact, including home addresses, telephone numbers, and identities of family members; preservation of anonymous whistleblowers, complainants, victims, and witnesses; and confidential medical, financial, or other information.[179] Transparency and public scrutiny of police records were meshed with the underlying purpose of government transparency under the California Public Records Act, as a California appellate court noted in *Becerra v. Superior Court of the City & County of San Francisco*.[180]

Historically, prohibitions on retroactively applying laws involved debtor relief, contractual obligations, and state police powers under the Constitution.[181] Retroactivity is more of a concern for criminal justice or

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175. *Id.* § 832.7(b)(1).

176. *See* Ventura Cnty. Deputy Sheriffs' Ass'n v. Cnty. of Ventura, 275 Cal. Rptr. 3d 842, 848 (Ct. App. 2021).

177. 275 Cal. Rptr. 3d 842 (Ct. App. 2021).

178. *Id.* at 846 (quoting Walnut Creek Police Officers' Ass'n v. City of Walnut Creek, 245 Cal. Rptr. 3d 398, 399 (Ct. App. 2019) (internal citations and parentheticals omitted)).

179. § 832.7(b)(6); *see* Bondgraham v. Superior Ct. of Alameda Cnty., 313 Cal. Rptr. 3d 348, 354, 359 (Ct. App. 2023) (holding redactions of police records were improper).

180. 257 Cal. Rptr. 3d 897, 909-10 (Ct. App. 2020) ("More recently, in acknowledgment of the extraordinary authority vested in peace officers and the serious harms occasioned by misuse of that authority, the Legislature amended Penal Code section 832.7 to recognize the right of the public to know about incidents involving shootings by an officer or the use of force by an officer that results in death or great bodily injury, as well as sustained findings of sexual assault or dishonesty by an officer. . . . As amended, section 832.7 specifies that records pertaining to such incidents and findings are not confidential and must be made available for public inspection pursuant to the CPRA.").

181. *See* RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE 461 (2d ed. 1992).

constitutional decisions on criminal law or criminal procedure.[182] In *Linkletter v. Walker*,[183] considered a "seminal" case, the Supreme Court rejected retroactivity to cases not yet final.[184] Subsequently, the Supreme Court held non-retroactivity in a series of criminal process cases.[185]

The Supreme Court regards retroactive decisions as a state court issue.[186] The Supreme Court offers guidance on retroactivity from the criminal law and criminal procedure arena:

> While application of the principles of retroactivity may have remedial effects, they are not themselves remedial principles. Any judicial decision will affect the relief available to one of the parties before the court; even an evidentiary ruling may have some remedial effect. However, rules regarding retroactivity, like decisions regarding the mechanics of procedure, are distinct from remedial decisions which govern what a court "may do *for* the plaintiff and conversely what it can do *to* the defendant."[187]

In the criminal law arena, *Stovall v. Denno*[188] involved a federal habeas corpus appeal for a defendant convicted of murdering a doctor and stabbing his wife eleven times in New York in 1961.[189] After multiple appeals were rejected, the petitioner challenged a hospital identification

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182. *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE 49 (2d ed. 1996). *See generally* Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1733-34 (1991) (observing that retroactive relief was litigated many times in the 1960s and 1970s).

183. 381 U.S. 618 (1965).

184. DRESSLER, *supra* note 182, at 51.

185. Chevron Oil Co. v. Huson, 404 U.S. 97, 105-06 (1971) (first citing Mackey v. United States, 401 U.S. 667 (1971); then citing Hill v. California, 401 U.S. 797 (1971); then citing Desist v. United States, 394 U.S. 244 (1969); and then citing Linkletter v. Walker, 381 U.S. 618 (1965)).

186. *See* Am. Trucking Ass'n v. Smith, 496 U.S. 167, 178 (1990) (requiring states to adhere to the Court's retroactivity decisions in order to ensure uniform application and "prevent States from denying or curtailing federally protected rights" (first citing Michigan v. Payne, 412 U.S. 47 (1973); and then citing Arsenault v. Massachusetts, 393 U.S. 5 (1968) (per curiam))); *see also id.* at 179 (applying a three-prong test, which weighed whether a state tax law should be applied retroactively by considering: 1) whether there was a new rule established; 2) whether prospective application would effectuate the state purpose; and 3) whether retroactive application would be inequitable).

187. *Id.* at 195 (emphasis in original) (quoting KENNETH H. YORK & JOHN A. BAUMAN, REMEDIES 1 (2d ed. 1973)).

188. 388 U.S. 293 (1967).

189. *Id.* at 294-95; *see* Johnson v. New Jersey, 384 U.S. 719, 728 (1966) ("[T]he retroactivity or nonretroactivity of a rule is not automatically determined by the provision of the Constitution on which the dictate is based. Each constitutional rule of criminal procedure has its own distinct functions, its own background of precedent, and its own impact on the administration of justice, and the way in which these factors combine must inevitably vary with the dictate involved.").

by the victim, which was constitutionally questionable under subsequent precedent.[190]

The *Stovall* Court applied a three-prong analysis for retroactivity in criminal cases, requiring a court to consider: 1) "the purpose to be served by the new standards"; 2) "the extent of the reliance by law enforcement authorities on the old standard"; and 3) "the effect on the administration of justice of a retroactive application of the new standards."[191]

In another case involving a tort challenge, *Chevron Oil Co. v. Huson*,[192] the Supreme Court refused to apply a Louisiana tort statute of limitations retroactively on equitability grounds but still allowed the underlying tort action to go forward.[193] This case confronted complicated issues of conflict between state, federal, and admiralty law in a personal injury case involving a man injured on an oil rig.[194]

Similar to *Stovall*, the *Huson* Court applied a three-prong test for retroactivity through the lens of "nonretroactivity": nonretroactivity requires a 1) finding of a new principle of law through overruling "clear past precedent" upon which litigants relied; 2) weighing the merits or demerits coupled with prior history, its purpose and effect, and "whether retrospective operation will further or retard its operation"; and 3) weighing the inequity of retroactive application.[195]

Professors Fallon and Meltzer note that retroactive application may require courts to look at the remedial nature of the law and "look[] to such additional factors as a rule's purpose, the extent of reliance by officials on the older rule, and the effect of retroactive application on the administration of justice."[196] *Black's Law Dictionary* defines remedial laws or statutes as "[l]egislation providing means or method whereby

190. *Stovall*, 388 U.S. at 294-96 (first citing United States v. Wade, 388 U.S. 218 (1967); and then citing Gilbert v. California, 388 U.S. 263 (1967)). Both *Wade* and *Gilbert* involved constitutional questions of police lineups, and the New York Attorney General filed an amicus arguing against retroactive application of their standards. *Id.* at 294 (first citing *Wade*, 388 U.S.; and then citing *Gilbert*, 388 U.S.).

191. *Id.* at 297.

192. 404 U.S. 97 (1971).

193. *Id.* at 107-09 (quoting Cipriano v. City of Houma, 395 U.S. 701, 706 (1969) (per curiam)).

194. *Id.* at 98; *see also id.* at 106 (noting that the retroactivity doctrine traces back to the U.S. Supreme Court's decision in Gelpcke v. City of Dubuque, 68 U.S. 175 (1863)).

195. *Id.* at 106-07 (quoting Linkletter v. Walker, 381 U.S. 618, 629 (1965)) (holding that retroactive application of the statute of limitations in a personal injury case would upset a long line of precedent).

196. Fallon & Meltzer, *supra* note 182, at 1766. In the absence of a retroactive statement in the legislation, there are strong public policy considerations for retroactive application.

causes of action may be effectuated, wrongs redressed and relief obtained . . . ."[197]

Applying these concepts to the 50-a repeal also would require a court to look beyond the absence of a legislative statement and perhaps even beyond the legislative intent, though the legislative intent would suggest that the law should be applied retroactively to satisfy its intended purpose. Police misconduct did not suddenly begin after the repeal was enacted on June 12, 2020. Further, one Appellate Division opinion, in an employment discrimination case, held that remedial statutes should be given retroactive application to "correct imperfections in prior law . . . ."[198]

Police disciplinary records obviously predate the January 2020 repeal of 50-a. Likewise, to give this law full force and fulfill its legislative intent, the public must be granted access to relevant records that existed before the repeal. This delves into the question of whether 50-a should be applied retroactively. This is an issue some law enforcement agencies, municipalities, and police unions argued against.[199]

Repealed statutes silent on retroactivity should only be applied prospectively under New York General Construction Law section 93.[200] A long-standing Court of Appeals decision, *People v. Roper*,[201] denied a defendant's petition for retroactive application for sentencing revisions.[202] Under the title "Effect of repealing statute upon existing rights," the section reads:

> 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.[203]

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197. *Remedial Laws or Statutes*, BLACK'S LAW DICTIONARY 1293 (6th ed. 1990) (defining remedial laws or statutes as "[s]tatutes which afford a remedy, or improve or facilitate remedies already existing for enforcement of rights and redress of injuries").

198. *See* Nelson v. HSBC Bank USA, 929 N.Y.S.2d 259, 263 (App. Div. 2011) (quoting Coffman v. Coffman, 400 N.Y.S.2d 833, 837 (App. Div. 2011)).

199. *See, e.g.*, Gannett Co. v. Herkimer Police Dep't, 169 N.Y.S.3d 503, 505-06 (Sup. Ct. Oneida Cnty. 2022).

200. N.Y. GEN. CONSTR. LAW § 93 (McKinney 2018).

201. 182 N.E. 213 (N.Y. 1932) (per curiam).

202. *Id.* at 213 ("In the absence of evidence of contrary intent, such legislation is not to be given retroactive effect. They apply with special force to statutes which otherwise would be ex post facto or would deprive persons of substantial rights.") (citation omitted).

203. § 93.

Holding this firm line with 50-a is clearly out of place. This statute does not have the same effect that a revision to a criminal sentence would. Further, the constitutional bar on ex post facto laws really falls into a due process and even a Sixth Amendment fairness area. The rights being applied in 50-a cases do not require the same adherence to the constitutional rights of criminal defendants or those convicted of crimes. Even the court's arguments in *Herkimer* fall short of protecting the criminal justice system or preserving constitutional rights.[204]

Applying the *Stovall* and *Huson* prongs, the analysis would suggest that: 1) the 50-a repeal is not really a new rule or overruling any clear precedent upon which litigants rely; 2) the merits of the prior history would clearly be outweighed in light of contemporary public affairs with regard to police reform and public scrutiny of law enforcement agencies; and 3) there would not be an unequal or inequitable burden by applying the law retroactively. This third prong would point to the fact that all the records being sought have already been created and are already held by the appropriate law enforcement agencies, police departments, and municipalities. Reasonable redactions of bona fide private information, such as social security numbers and medical records, would not create an overpowering burden, much like the federal FOIA.

Even if these arguments are not persuasive, common sense should prevail based on both the legislative intent and the practical fact that these records already exist and the agencies have them.

B. Unsubstantiated and Private

As straightforward as the 50-a repeal appears on paper, fulfilling public records requests involving law enforcement disciplinary records has not been immediate or smooth. Many of the post-repeal public records requests have been channeled into a statutory labyrinth under FOIL exemptions which mandate withholding documents under a privacy exemption. Courts, through administrative hearings under Article 78 of the Civil Practice Law and Rules and later appeals, support denials under the murky and expansive invocation and definition of privacy.

After the repeal, law enforcement agencies and municipalities quickly reacted to the repeal with arguments that records of "unsubstantiated" complaints or mere accusations that were incomplete or not fully investigated should be withheld because they would constitute an unwarranted invasion of privacy. Seizing on the statutory silence on how to view or define "unsubstantiated," law enforcement officials and their

204. *See Gannett Co.*, 169 N.Y.S.3d at 509-10.

powerful unions vociferously embraced the privacy argument.[205] The privacy argument was also partially crafted by the COOG in both its 2020 annual report and its early advisory opinions.

This argument hinges on two provisions within the FOIL, which is housed in New York's Public Officers Law. The first step is to invoke the FOIL's exemption under section 87(2)(b), which allows an agency to withhold records or data if it would pose an unwarranted invasion of privacy to a government official.[206] This exemption then channels the analysis to a second section of the Public Officers Law, section 89(2)(b), and an eight-point list of what constitutes an unwarranted invasion of privacy, which specifically introduces the categories as "includ[ing], but . . . not . . . limited to[.]"[207] The categories include:

> i. disclosure of employment, medical or credit histories or personal references of applicants for employment;
> ii. disclosure of items involving the medical or personal records of a client or patient in a medical facility;
> iii. sale or release of lists of names and addresses if such lists would be used for solicitation or fund-raising purposes;
> iv. disclosure of information of a personal nature when disclosure would result in economic or personal hardship to the subject party and such information is not relevant to the work of the agency requesting or maintaining it;
> v. disclosure of information of a personal nature reported in confidence to an agency and not relevant to the ordinary work of such agency;
> vi. information of a personal nature contained in a workers' compensation record . . . ;
> vii. disclosure of electronic contact information, such as an e-mail address or a social network username, that has been collected from a taxpayer under section one hundred four of the real property tax law; or
> viii. disclosure of law enforcement arrest or booking photographs of an individual, unless public release of such photographs will

205. *See* Memorandum of Support for S.8496/A.10611 from Citizens Union et al. to Daniel O'Donnell, Member, N.Y.S. Assemb., https://reinventalbany.org/wp-content/uploads/2020/06/Support-Civil-Rights-Law-50-a-Group-Memo.pdf [https://perma.cc/ES5L-8AHA] (last visited Apr. 15, 2024) (describing how a "series of court cases" . . . transformed . . . a limited exception to the state policy favoring disclosure to a nearly impenetrable shield").

206. N.Y. PUB. OFF. LAW § 87(2)(b) (McKinney 2021) (allowing agencies to withhold records that "if disclosed would constitute an unwarranted invasion of personal privacy").

207. *Id.* § 89(2)(b).

> serve a specific law enforcement purpose and disclosure is not precluded by any state or federal laws.[208]

As much as this Article seeks to advocate for transparency of government actors, particularly law enforcement officials accused of misconduct or disciplined for misconduct, it is important to acknowledge that some elements of personal privacy are legitimate concerns for law enforcement personnel or any other government official, employee, or citizen. For example, law enforcement officials and other government personnel have a reasonable expectation of privacy regarding medical records, personal medical information, and personal financial information.[209] Surely, an official's social security number should legitimately be redacted from a public record. Likewise, the prohibition on withholding these public records from solicitors also satisfies a legitimate government interest.[210] Similarly, medical records would be legitimately withheld.[211]

Courts have noted that the privacy exemption should be extremely narrow.[212] Nevertheless, even after the Fourth Department decisions, courts continue to wrestle with the "blanket" exemption that the unwarranted invasion of privacy exemption has empowered agencies to withhold these records. The ease and facility with which agencies have embraced the privacy exemption are troubling and also reflective of both the malleability of and overenthusiastic use of the term "invasion of privacy."

Most recently, the Second Department explicitly addressed both the retroactivity and privacy issues in *Newsday, LLC v. Nassau County*

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208. *Id.*

209. *See id.* § 89(2)(b)(i)–(ii), (v), (vii).

210. *See* Fed'n of N.Y. State Rifle & Pistol Clubs, Inc. v. N.Y.C. Police Dep't, 535 N.E.2d 279, 279-81 (N.Y. 1989) (holding that the addresses of shotgun and rifle permit holders was considered a matter of privacy in a FOIL case by a public interest and gun rights group that sought the data for fundraising and mailing purposes).

211. In *Hanig v. State Dep't of Motor Vehicles*, a FOIL request in a personal injury case sought medical and disability information noted on driver license applications. 588 N.E.2d 750, 751-53 (N.Y. 1992). The court wrote:

> Thus, the structure, sense and purpose of the FOIL exemption lead us to conclude that "medical histories" are not confined to employment applications. The unwarranted invasion of privacy derives from the private nature of information contained in a medical history, not the fortuity of its inclusion in an employment application. Significantly, the analogous provision of the Freedom of Information Act, on which FOIL was modeled, contains no reference to employment applications.

Id. at 753-54 (citation omitted).

212. 2022 COOG REPORT, *supra* note 91, at 9 (first citing Uniformed Fire Officers Ass'n v. de Blasio, 846 F. App'x 25 (2d Cir. 2021); and then citing Schenectady Police Benevolent Ass'n v. City of Schenectady, No. 2020-1411 slip op. (N.Y. Sup. Ct. Schenectady Cnty. Dec. 29, 2020)).

Police Dep't,[213] rejecting the police department's unwarranted invasion of personal privacy argument in a newspaper's records request.[214] The court wrote:

> We hold that records concerning unsubstantiated complaints or allegations of misconduct are not categorically exempt from disclosure as an unwarranted invasion of personal privacy, and the [Nassau County Police Department "(NCPD")] is required to disclose the requested records, subject to redactions with particularized and specific justification under Public Officers Law [section] 87(2), as mandated by section 87(4-a), or as permitted by section 87(4-b).[215]

With regard to retroactivity, the court rejected the argument that records created prior to the repeal's enactment should be withheld as "without merit."[216] Specially, the court wrote:

> To the extent that the NCPD contends that the Legislature intended to exclude from disclosure any law enforcement disciplinary records that were created prior to June 12, 2020, it has offered no support for this proposition. By their nature, FOIL requests seek records that were generated prior to the request date. In amending the Public Officers Law to provide for the disclosure of records relating to law enforcement disciplinary proceedings, the Legislature did not limit disclosure under FOIL to records generated after June 12, 2020, and we will not impose such a limitation ourselves . . . .[217]

Further, the Second Department ventured into the legislative intent regarding unsubstantiated reports as a matter of privacy, writing that if the legislature intended to exclude unsubstantiated reports, it would have explicitly excluded reports from the repeal provisions.[218] On the privacy argument, the court added:

> The NCPD also failed to sustain its burden of proving that the personal privacy exemption applied to the material redacted from the substantiated complaints. Its conclusory assertions that the material fell within the exemption were not supported by any facts and were

213. 201 N.Y.S.3d 88 (App. Div. 2023).
214. *Id.* at 91.
215. *Id.*
216. *Id.* at 95.
217. *Id.* (citation omitted).
218. *Id.* (citing Friedman v. Rice, 90 N.E.3d 800 (N.Y. 2017)); *see Friedman*, 90 N.E.3d at 811 ("Given that 'the Legislature established a general policy of disclosure by enacting the Freedom of Information Law[,]' we cannot undermine that policy by exempting a large category of information from FOIL in a manner inconsistent with the plain language of the statute." (citation omitted) (quoting Fink v. Lefkowitz, 393 N.E.2d 463, 465 (N.Y. 1979))).

> insufficient to meet its burden of proving that the statutory exemption applied.[219]

Privacy has become an important part of our body of law. Privacy statutory law and precedent have come a long way in the more than 100 years since the seminal Sam Warren and Louis Brandeis law review article[220] or Abigail Roberson's portrait became the face for a flour box company in Rochester, New York.[221] Equating an unsubstantiated complaint of police misconduct to a bona fide invasion of privacy is inappropriate and undercuts both privacy law and the intended purpose of FOIL and 50-a.

Even under 50-a, invoking the personal privacy exemption was not a guarantee that records would automatically be withheld. In one case in 1986, *Capital Newspapers Division of the Hearst Corp. v. Burns*,[222] the Court of Appeals ruled that police sick leave records were not exempted under FOIL.[223] There, a newspaper investigating police department finances used FOIL and faced an intervening action by a police officer invoking 50-a to block the release.[224] The intervening officer was unable to prove that the release of the information would be an unwarranted invasion of privacy.[225]

On the other hand, the addresses of shotgun and rifle permit holders were considered a matter of privacy in a FOIL case by a public interest/gun rights group that sought the data for fundraising and mailing purposes, the Court of Appeals held.[226]

One relatively recent FOIL case illustrates the difficulty and seemingly arbitrary invocation of the privacy exemption, *Harbatkin v. New*

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219. *Newsday, LLC*, 201 N.Y.S.3d at 94 (citations omitted).

220. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 213 (1890) ("If the invasion of privacy constitutes a legal *injuria*, the elements for demanding redress exist, since already the value of mental suffering, caused by an act wrongful in itself, is recognized as a basis for compensation. The right of one who has remained a private individual, to prevent his public portraiture, presents the simplest case for such extension[]; the right to protect one's self from pen portraiture, from a discussion by the press of one's private affairs, would be a more important and far-reaching one.") (emphasis in original).

221. *See* Roberson v. Rochester Folding Box Co., 64 N.E. 442, 447-48 (N.Y. 1902) (holding that even though some might find the unauthorized use of the photograph an invasion, there was no statutory basis for the invasion of privacy lawsuit and encouraging the legislature to take action).

222. 496 N.E.2d 665 (N.Y. 1986).

223. *Id.* at 670.

224. *Id.* at 666.

225. *Id.* at 670 ("In sum, Officer Tuffey has failed to demonstrate that the material requested by investigative reporter Cipriano comes squarely within a FOIL exemption such that the police department would be justified in barring access to the information by the public or the press.").

226. *See* Fed'n of N.Y. State Rifle & Pistol Clubs, Inc. v. N.Y.C. Police Dep't, 535 N.E.2d 279, 281-82 (N.Y. 1989).

York City Dep't of Records & Information Services.[227] In this case, Lisa Harbatkin, a historian investigating the Red Scare in the 1940s and 1950s infiltrating New York City's public schools, sought transcripts of interviews identifying people who were granted confidentiality decades earlier by the New York City Board of Education's Anti-Communist Investigations unit.[228] Her FOIL request was denied under the unwarranted personal privacy exemption.[229] The redaction of names and other identifying information to interviewees who were granted confidentiality to facilitate naming suspected communists in the public schools was also at issue in the case.[230]

The Court of Appeals wrote that "the diminished claims of privacy must be weighed against the claims of history" but still ruled against Harbatkin because it believed the government's decades-old promise of confidentiality should still be maintained.[231]

One additional wrinkle to the invasion of privacy in New York rests in the state's definition under a different part of the New York Civil Rights Law, sections 50 to 51, which only recognize commercial appropriation.[232] A tort law analysis may be mixing topics, but it helps illustrate the inappropriateness of a broad definition of "unwarranted invasion of privacy" in a state that has a narrow definition of the term under tort law and a broad definition of the newsworthy defense.[233]

Perhaps no case illustrates the tension and difficulties of invasion of privacy, particularly the intersection of the First Amendment and the press, like *Florida Star v. B.J.F.*[234] The facts of this case are well-known: a newspaper mistakenly named a rape victim in its police briefs, contravening both a state law and its own internal policies.[235] The most relevant point here is that this case involved a legitimate matter of

227. 971 N.E.2d 350 (N.Y. 2012).

228. *Id.* at 351-52 (explaining the author's family connection to Red Scare investigations in the 1940s and 1950s).

229. *Id.* at 352.

230. *Id.* at 353.

231. *Id.* ("We conclude that today, more than half a century after the interviews took place, the disclosure of the deleted information would not be an unwarranted invasion of personal privacy. Certainly, this was not always true. At the time of the investigations, and for some years thereafter, public knowledge that people were named as present or former Communists would have subjected them to enormous embarrassment, or worse. But that embarrassment would be much diminished today—both because the activity of which they were accused took place so long ago, and because the label 'Communist' carries far less emotional power than it did in the 1950s.").

232. N.Y. CIV. RIGHTS LAW §§ 50–51 (McKinney 2019).

233. *See* Messenger v. Gruner + Jahr Printing & Publ'g, 727 N.E.2d 549, 553, 556 (N.Y. 2000).

234. 491 U.S. 524 (1989).

235. *Id.* at 526-28.

privacy that was exposed to the public through reporting and publishing.[236]

The Court held:

> At a time in which we are daily reminded of the tragic reality of rape, it is undeniable that these are highly significant interests, a fact underscored by the Florida Legislature's explicit attempt to protect these interests by enacting a criminal statute prohibiting much dissemination of victim identities. . . . [H]owever, imposing liability for publication under the circumstances of this case is too precipitous a means of advancing these interests . . . .[237]

If the Supreme Court could rule that the First Amendment interest outweighed the privacy interests of a rape victim in *Florida Star* more than three decades ago, how could a contemporary court justify categorizing police disciplinary records, even unsubstantiated reports or complaints, as legitimate matters of privacy that should be withheld from the public?

VII. THE MEDIA AND FREEDOM OF INFORMATION LAW

Freedom of information laws were created to facilitate the public's understanding of the workings of government. Though the public is the intended beneficiary of these laws, freedom of information efforts are usually facilitated by media.[238] The use of public records helps the media fulfill its constitutionally protected function of serving as a watchdog or occupying the Fourth Estate, the unofficial fourth branch of government. In a letter to legislators and the Governor, the Reporters Committee for Freedom of the Press wrote: "New York is one of only two states that specifically makes records of police misconduct confidential, shielding from disclosure under the state's public records law."[239]

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236. *Id.* at 527.

237. *Id.* at 537.

238. *See* ORZECHOWSKI, *supra* note 12, at 25-33.

239. Letter from Katie Townsend, Legal Dir., Reps. Comm. for Freedom of the Press, to Andrew Cuomo, Governor, State of N.Y., et al. (June 7, 2020) (on file with author). The letter stated:

> Not only does Section 50-a make New York an outlier, lagging behind other states in law enforcement transparency, it is unnecessary. Legitimate concerns regarding the privacy of police officers are adequately addressed by other, existing exceptions to the Freedom of Information Law (FOIL), including, for example New York Public Officers Law section 87(2)(b). That law exempts from disclosure records that, if released, would, among other things, constitute an unwarranted invasion of personal privacy or endanger the life or safety of any person.

Id.

Thus, media entities have been at the forefront of many of the most significant free flow of information cases.[240] Facilitating the public's access to information under the First Amendment could even have roots as deep as James Madison, who famously wrote: "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives."[241]

One of the Supreme Court's most recent freedom of information cases, *Food Marketing Institute v. Argus Leader Media*,[242] involved a petition by a newspaper.[243] Here, the Court upheld denial of Department of Agriculture food stamp data under Exception 4 to the FOIA as "confidential commercial information."[244] The decision raises serious questions for the overexpansive definition of "confidential" and how the government regards trade secrets.[245] But Justice Breyer, in dissent, wrote: "I fear the majority's reading will deprive the public of information for reasons no better than convenience, skittishness, or bureaucratic inertia."[246] He added that "[t]he whole point of FOIA is to give the public access to information it cannot otherwise obtain."[247]

Journalism and FOIA experts often vest their scholarship in the theory that the media fulfills its important obligation by using public records as the backbone for news reporting. In their book, Cuillier and

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240. Throughout the legislative process, a coalition of media leaders wrote to legislators and the Governor supporting the repeal:

> Moreover, disciplinary actions against law enforcement officers should be proactively disclosed online, rather than placing the burden on the media and members of the public to file FOIL requests. Existing law already provides for common-sense protections for the privacy of government employees; therefore, repeal comes at no risk to the privacy or safety of law enforcement.
>
> Now is not the time to nibble at the edges. Anything less than a solution on the scale of the crisis will result in greater decline of trust in government, at a time when we cannot afford further tearing of our social fabric. [Section] 50-a has been a black mark on New York for too long, and it is past time to repeal it.

Letter from the Coal. to Andrew Cuomo, *supra* note 44.

241. Letter from James Madison, to W.T. Barry (Aug. 4, 1822), *in* 9 THE WRITINGS OF JAMES MADISON 1819-1836, at 71, 71 (Gaillard Hunt ed., 1910).

242. 588 U.S. 427 (2019).

243. *Id.* at 430-32. Since *Argus Leader*, the Court has ruled on two cases with FOIA implications. *See* United States v. Zubaydah, 595 U.S. 195, 210 (2022) (holding FOIA's state secrets exemption was an "imperfect analogy" for an accused terrorist's discovery litigation); U.S. Fish & Wildlife Serv. v. Sierra Club, Inc., 592 U.S. 261, 266-67 (2021) (upholding an agency's denial of records under the draft and working papers or the deliberative process exception).

244. *Argus Leader*, 588 U.S. at 438.

245. *Id.* at 433-36.

246. *Id.* at 444 (Breyer, J., concurring in part and dissenting in part).

247. *Id.* at 443.

Davis call FOIA "an all-American value."[248] They add, "Our founding fathers firmly opposed tyranny and wanted to make sure that the people stayed in control of their government by staying informed—through a good education system, libraries and open access to information."[249]

Investigative Reporters and Editors ("IRE") issued a stronger call for the media's use of public records, especially in matters involving police.[250] The third edition of IRE's investigative reporting handbook devotes an entire chapter to covering and investigating law enforcement and leveraging public records.[251] The book states: "As in most occupations, the majority of law enforcement officers and civilian employees are honest and efficient. When a significant minority are not, however, the consequences can be devastating for individual citizens, neighborhoods or entire cities."[252]

Describing covering law enforcement as a "conundrum," the handbooks highlight investigations and stories uncovering police abuse through use of disciplinary and internal affairs investigations by reporters at *The Palm Beach Post*, *The Chicago Reporter*, *Sun Sentinel* (of Fort Lauderdale), *Dayton Daily News*, and *San Francisco Chronicle*, as well as several authors.[253]

The media's role in the 50-a repeal illustrates both the public's and the media's interests in law enforcement disciplinary records. Media and media rights advocates supported the repeal during the legislative process, and media organizations have gone to court to open up access to these records.[254] Even before the repeal, media entities including *The New York Times* litigated, unsuccessfully, for media and public

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248. DAVID CUILLIER & CHARLES N. DAVIS, THE ART OF ACCESS: STRATEGIES FOR ACQUIRING PUBLIC RECORDS 21 (2011).

249. *Id.* at 22.

250. STEVE WEINBERG, THE REPORTER'S HANDBOOK: AN INVESTIGATOR'S GUIDE TO DOCUMENTS AND TECHNIQUES 183-216 (Suzanne Phelps Weir ed., 3d ed. 1996); BRANT HOUSTON, THE INVESTIGATIVE REPORTER'S HANDBOOK: A GUIDE TO DOCUMENTS, DATABASES AND TECHNIQUES 218-27 (Erika Gutierrez et al. eds., 5th ed. 2009).

251. WEINBERG, *supra* note 250, at 183-216.

252. *Id.* at 186 ("It is not easy for a journalist to determine how good a police officer or department is. . . . Journalists should be monitoring police officers from recruitment to retirement. Techniques include direct observation, studying arrest (and eventual conviction) rates, tracking day-to-day prevention efforts, talking regularly to sources in neighborhoods, knowing leaders of the police union, reading personnel files, checking for investigations by the police department's Internal Affairs Unit, and following lawsuits in the local courts.").

253. *Id.* at 185-90; HOUSTON, *supra* note 250, at 218-25.

254. *See* Gannett Co. v. Herkimer Police Dep't, 169 N.Y.S.3d 503, 504 (Sup. Ct. Oneida Cnty. 2022) (seeking records related to unsubstantiated claims and records created prior to the repeal of 50-a); NYP Holdings, Inc. v. N.Y.C. Police Dep't, No. 159132/2021, 2022 WL 17492349, at *1-3 (Sup. Ct. N.Y. Cnty. Dec. 6, 2022), *aff'd*, 220 A.D.3d 487 (App. Div. 2023) (seeking records related to specific police officers for the NYPD).

access.[255] The scholars and journalists are persuasive, but so are the courts. The media's role in facilitating the public's understanding of public issues is embedded in some of the most important Supreme Court cases involving media.[256]

More locally, almost forty years ago, a New York trial court lauded reporters and multiple news outlets for covering and exposing a range of corruption and abuses at a state-run mental hospital.[257] The court wrote:

> In this instance the fourth estate functioned in the finest traditions of a free press, for they did an excellent job in exposing conditions at this institution. Especially to be commended are the *Staten Island Advance*, *New York Times*, WPIX-TV and WABC-TV, who not only revealed the situation but have refused to "let it die."[258]

The courts hearing future FOIL cases should consider the vital role the press plays in facilitating the public's understanding of government operation and public affairs and the information the public gains from public records, such as police disciplinary and misconduct records.

VIII. CONCLUSION

Historian Michael Schudson argues that government transparency and public access to government records and information transcends politics and partisanship.[259] In his book on the history of the FOIA, Schudson wrote, "Openness in a democracy is not an absolute value but a kind of secondary or procedural morality. If honesty means not 'not lying' but

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255. *See, e.g.*, N.Y. Times Co. v. City of N.Y. Fire Dep't, 829 N.E.2d 266, 268 (N.Y. 2005) (seeking a broad range of records including 911 emergency recordings of Sept. 11, 2001); Newsday, Inc. v. Empire State Dev. Corp., 774 N.E.2d 1187, 1188, 1190 (N.Y. 2002) (seeking subpoenas and other records from governmental development agency); Buffalo News, Inc. v. Buffalo Enter. Dev. Corp., 644 N.E.2d 277, 278-80 (N.Y. 1994) (seeking business development data); Capital Newspapers Div. of the Hearst Corp. v. Whalen, 505 N.E.2d 932, 933-34 (N.Y. 1987) (seeking papers held by the mayor of Albany); Washington Post Co. v. N.Y. State Ins. Dep't, 463 N.E.2d 604, 605-06 (N.Y. 1984) (seeking department of insurance documents and data); Newsday, Inc. v. Sise, 518 N.E.2d 930, 931 (N.Y. 1987) (seeking files related to a high-profile murder); N.Y. Times Co. v. N.Y. State Dep't of Health, 674 N.Y.S.2d 826, 827 (App. Div. 1998) (seeking statewide health department data on surgeries).

256. *See, e.g.*, N.Y. Times Co. v. Sullivan, 376 U.S. 254, 275-78 (1964); Houchins v. KQED, Inc., 438 U.S. 1, 14-15 (1978) ("The public's interest in knowing about its government is protected by the guarantee of a Free Press, but the protection is indirect. The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act." (quoting Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 636 (1975))).

257. Renelli v. State Comm'r of Mental Hygiene, 340 N.Y.S.2d 498, 502-03 (Sup. Ct. Richmond Cnty. 1973).

258. *Id.* at 502.

259. SCHUDSON, *supra* note 59, at 4.

'disclosing everything to everybody,' it is not invariably the best policy for individuals, organizations, or governments."[260]

The 50-a repeal has been in place for almost four years. And the legal challenges have piled up. Despite the two Appellate Division rulings, the trial courts will continue to issue a variety of rulings on the release of law enforcement disciplinary records. The questions of how far back agencies will have to go to release these records and how quickly and efficiently they will have to respond are also questions that need resolution.

These legal questions seem destined for the New York Court of Appeals. This Article should offer additional analysis and persuasive thoughts on the openness of public records and a call for government transparency. This call is within the spirit of both the 50-a repeal and the underlying FOIL, as well as basic democratic principles. The legislative intent supports transparency. The COOG advises on transparency, too.

Additional guidance may be gleaned from the COOG's annual reports, which often begin with an introducing quote from Justice Louis Brandeis: "Sunlight is said to be the best of disinfectants; electric light the most efficient policeman."[261]

Additional persuasive authority can be found in Justice William O. Douglas's famous concurring opinion in *New York Times Co. v. United States*,[262] the Pentagon Papers case: "Secrecy in government is fundamentally anti-democratic, perpetuating bureaucratic errors. Open debate and discussion of public issues are vital to our national health. On public questions there should be 'uninhibited, robust and wide-open' debate."[263]

The uninhibited debate in the Pentagon Papers involved the biggest public policy issue of the 1960s and early 1970s: the Vietnam War. Today, one of the biggest public policy debates involves police reform and seemingly widespread police brutality and violence. If New York wants to adhere to these democratic principles and fulfill the full purpose of the 50-a repeal, then it must make police and law enforcement records available under the public records law. Of course, redactions for legitimate

260. *Id.* at 14-15.

261. LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 92 (1914); N.Y. COMM. ON OPEN GOV'T, REPORT TO THE GOVERNOR AND STATE LEGISLATURE 1 (2012), https://opengovernment.ny.gov/system/files/documents/2021/12/2012-annual-report.pdf [https://perma.cc/922H-UDEJ].

262. 403 U.S. 713 (1971) (per curiam).

263. *Id.* at 724 (Douglas, J., concurring) (citing N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

private information would be appropriate. But they have to make them available, both before and after June 2020.