Testimony

By Valerie Bell, mother of Sean Bell

Submitted to the New York State Senate Standing Committee on Codes
Hearing the Need to Repeal Civil Rights Law 50-a

My name is Valerie Bell. I'm the mother of Sean Bell, who was killed in a hail of 50 bullets on Nov. 25, 2016, on the morning of his wedding.

I'm here today to say very clearly to our New York State Senators that 50-a must be repealed. This police secrecy law is used time and time again to shield abusive officers and when there is no transparency and accountability, police killings and brutality continue. No one knows the devastating impact of this better than we families who have lost loved ones to the police.

13 years ago, my son was killed by five officers from a NYPD "Club Enforcement Initiative" in Jamaica, Queens. They boxed my son's car in and shot at him and his friends 50 times. They said they thought my son had a gun, but he and his friends were unarmed.

It's been over a decade, but I remember all too well the trauma that his murder put me and my family through. Part of what was so terrible was not being able to get our questions about what happened to Sean and who his killers were answered.

We couldn't get any information from the NYPD or the Queens District Attorney's Office. I knew my son had been at his bachelor's party and was leaving a club in his car with his friends when officers opened fire, but I didn't get any details about who these officers were or the fact that they were not even supposed to be at that club until I sat through the criminal trial two years later. I didn't even know there was a fifth officer involved in my son's murder until it came out in the paper five years later.

Not being able to get answers was like losing Sean over and over again. You cannot imagine the pain this causes parents and family members, unless you go through it.

That's why I'm here today and why I have been fighting to repeal 50-a. People of color continue to be killed by the police and I understand what it's like for their families to have to fight tooth and nail for transparency. Today, because 50-a has been expanded through politics and case law, families cannot get even the most basic details about the officers who have killed their loved ones, like their names and if they are still patrolling our streets. Police departments are ready to leak information about our children and loved ones to try to criminalize them and blame them for their own deaths, but we families cannot get basic information.

As you'll hear, 50-a was used to try to withhold information from Ramarley Graham and Eric Garner's families. Victoria Davis may never know the outcome of the CCRB investigation of Officer Wayne Isaacs, who murdered her brother, Delrawn Small.

These are just a few examples. 50-a is a wall that every new family will run up against, when trying to uncover the truth about their loved ones' deaths.

Families who lose loved ones to the police deserve to know the truth. Across the state, the names and misconduct records of officers who kill and abuse New Yorkers, what discipline these officers receive, are all hidden from survivors, families and communities. 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, business as usual, and the violence continues.

It's been 13 years since Sean's death and, every year, we meet new families and go to more funerals. Each and every one of these families wants and deserves transparency and the truth about what happened to their loved ones. The public deserves transparency. We are at risk without it.

In 2015, I was one of 12 family members of New Yorkers killed by the police who came together to force Governor Cuomo to sign a special prosecutor executive order. We were able to do this because we understand firsthand what change is needed and because we are unified. For the families, repealing 50-a, as well as strengthening and expanding that special prosecutor by making it law, is a top priority. It is a matter of life and death and it need to get done. We, the families, want you to understand that we're coming together to make sure it happens in the 2020 session.

Testimony Submitted By Gwen Carr, Mother of Eric Garner

Submitted to New York State Senate Committee on Codes
In Support of S.3695-Bailey/A. 2513-O'Donnell, Repealing CRL Section 50-a

October 17, 2019

My name is Gwen Carr, and I am the mother of Eric Garner.

I'd like to start by thanking Senator Bailey for convening this important hearing and for sponsoring the bill to repeal the police secrecy law, 50-a.

The whole world saw my son Eric Garner murdered 5 years ago on video, by Officer Daniel Pantaleo, who used a chokehold that the NYPD had banned for over 20 years. We saw multiple officers use force and pounce on Eric – as Eric pleaded "I can't breathe" 11 times.

It's been over 5 years since my son Eric was murdered and there has been a widespread cover-up related to the scope of misconduct in my son's murder. Pantaleo is the only officer who has been fired from the NYPD – and that was only because I kept fighting for 5 years along with others to make sure he was fired – it was not because the system worked.

I am here today because the New York state police secrecy law – "50-a" – is still harming me, my family and endangering New Yorkers – and we need you and your colleagues in the state legislature to make sure it is repealed in 2020.

Because of Pantaleo's discipline trial and media reports, we know that multiple officers lied in official statements related to Eric's killing, including Officer Justin D'Amico who claimed there was no force used in his official report. D'Amico also filed false felony charges on my son – after he knew he was already dead.
D'Amico – who has already been caught in major lies that constitute misconduct – is also the only person who has ever claimed to have seen Eric allegedly selling cigarettes before Eric was killed. Multiple witnesses testified to different courts that not only was Eric not selling cigarettes, but that Eric had just broken up a fight before Pantaleo and D'Amico approached him.

In other words, D'Amico lied about the reason he stopped Eric in the first place, and my son should be alive and D'Amico should be fired.

In spite of all of this misconduct, D'Amico is still being paid by your and my family's taxpayer dollars. He is still NYPD – and **I'm not allowed to know about what other kind of wrongdoing D'Amico has done because of 50-a.**

D'Amico isn't the only one that should be fired for their misconduct related to Eric's murder. All of the other officers who engaged in misconduct are still NYPD, being paid by your and my family's tax payer monies – and **we don't even know the names of some of them or the extent of misconduct because of 50-a.** The only reason we know some of what D'Amico did is because he testified in the Pantaleo hearing and because the administrative judge's report was leaked to the press.

Because of 50-a, if the judge's report hadn't been leaked, we wouldn't even know that D'Amico had lied in his official report about whether force was used in killing Eric. Over 5 years later, because of 50a – I still don't have full information about the role, misconduct or names of many of the other officers involved.

50-a makes it close to impossible for me to fully fight for justice for Eric. It makes it harder for other families to fight for justice for their loved ones. And it is dangerous for all New Yorkers because people like Justin D'Amico should not be carrying a gun and should not be in our communities as police. **Because of 50a, I can't even get the full transcript to the Pantaleo discipline trial** – even though the trial was open to the public.

Because of 50a, I can't find out the misconduct or discipline histories of other officers involved in killing Eric and covering it up – including Sgt. Adonis who stood by and did nothing while Eric was being choked – all she got was some vacation days taken away --- or **Lt. Christopher Bannon**, who texted "Not a big deal" to another officer after hearing that Eric might be DOA.

Because of 50-a, the public was not aware that before Pantaleo killed my son, he was already the subject of 7 disciplinary complaints and 14 allegations made against him to the Civilian Complaint Review Board – "amongst the worst on the force". 4 of those allegations were substantiated and the CCRB had recommended the most serious charges be brought against Pantaleo but the NYPD refused to follow those recommendations so Pantaleo got a slap on the wrist.

If Pantaleo had been disciplined the right way earlier, maybe he would not have still been NYPD and maybe my son would be alive today. 50-a prevented my family and New Yorkers from even knowing about Pantaleo.

It was almost 3 years after my son was killed that we even found out about some of Pantaleo's discipline history – and that is only because a whistleblower leaked it to the press.

We need you to repeal 50-a because mothers like me shouldn't have to rely on whistleblowers risking their job to find out about the misconduct record of a public employee – a police officer -- who killed our children.

I don't know if you know this, but **because of 50-a, we were not even supposed to know if Pantaleo was fired** – the de Blasio administration and the NYPD made an exception in my son's case because we made it politically impossible for them to keep it secret.

I have 2 legal actions winding their way through processes right now to demand transparency that 50-a may block unless you repeal 50-a this year – and all I'm trying to do is to make sure that other officers who did wrong related to my son and who are a danger to New Yorkers are fired from their positions.

Families like mine – and New Yorkers -- shouldn't have to rely on media leaks, or international political pressure, and have to organize for over half a decade to get crumbs of information about the killings of our loved ones.

Many people want to move on and congratulate me on achieving justice for the killing of my son. Let me be clear – we have not achieved full justice. Eric is still gone. And NYPD officers who helped to kill Eric and helped to cover it up are still being paid with my taxpayer monies – and yours.

Senators – I am saying to you and everyone -- **anyone who has stood with me to fight for my son, must continue to stand with me** and all families whose loved ones have been killed by police to **make sure that this police secrecy law, 50a, be repealed as soon as the 2020 state legislative session starts.**

I am calling on all state legislators to prioritize repeal of 50-a in January 2020. We are not waiting anymore.

As my son said in his last words: "This stops today". I need you to repeal 50-a. We need you to Repeal 50-a, and end this law that protects officers who kill.

Thank you for listening – I hope you really take in my words and that you take action to repeal 50-a as soon as the session begins in January.

Testimony

By Victoria Davis
Justice Committee Member and Sister of Delrawn Small

Submitted to the New York State Senate Standing Committee on Codes
Hearing the Need to Repeal Civil Rights Law 50-a

My name is Victoria Davis. I'm the sister of Delrawn Small, who was murdered by NYPD Officer Wayne Isaacs on July 4, 2016.

On July 3, 2016, just before midnight, my brother was driving home in East New York with his girlfriend, their 3-month-old son, and her 14-year-old daughter.

NYPD Officer Wayne Isaacs, who had just gotten off his shift, was driving recklessly down the same road and cut Delrawn off multiple times, endangering his family. My brother got out of his car to talk to Isaacs. During Isaacs' murder trial, he testified that he upholstered his weapon simply because he saw Delrawn crossing the street.

As soon as Delrawn approached Isaacs' car window, Isaacs shot him not one or two, but three times. Then he left Delrawn to bleed out and die in the street. He didn't try to provide emergency aid or help my brother in any way. Instead, Isaacs called 911 for himself and lied to them saying that he had been attacked. On the 911 call, Isaacs chose not to mention that he had just shot someone and that Delrawn was bleeding out on the ground. Isaacs and the NYPD continued to lie about what happened, trying to cover my brother's murder up. Thankfully, video surfaced about a week later, contradicting Isaacs' lies, but a harmful public narrative had already been set by the NYPD.

Isaacs murdered my brother in cold blood, plain and simple. Outrageously, in spite of clear evidence that Isaacs murdered Delrawn, the jury found him not guilty. Isaacs is still a police officer, collecting an inflated NYPD paycheck at the expense of tax payers.

I filed a Civilian Complaint Review Board complaint against Isaacs because the NYPD has been clear that they're not planning to hold Isaacs accountable. This is a matter of public safety. Isaacs need to be fired from them NYPD. Our communities are not safe with him as an officer. It is dangerous for Mayor de Blasio to allow NYPD officers to be treated as if they are above the law.

If the CCRB process moves forward and there are disciplinary proceedings against Isaacs, I may not even get to know the outcome of that process, because of 50-a. This is terrifying to me and it should be terrifying to you. I am fighting to make sure that Isaacs does not murder anyone else and I may never know if I am successful. New Yorkers may never know if I'm successful in getting Isaacs out of our communities.

I'm here today to call for the repeal of 50-a because family members and the public have the right to know basic information about officers that kill and brutalize us and we have a right to know if those officers are ever disciplined.

We know because of what's come out in the press and from information we're able to get from leaks and whistleblowers that abusive cops are often repeat offenders. However, 50-a keeps us from knowing the extent to which the NYPD and other New York police departments are failing to discipline officers that are killing, beating, and harassing us and letting them keep their jobs.

50-a must be repealed. There cannot be any accountability without transparency and 50-a means no transparency. Without accountability and transparency, officers continue to act as if they're above the law.

I'm here today with the mothers of Eric Garner, Sean Bell and Constance Malcolm because repealing 50-a is a top priority for us and we want to make sure you understand that. We work with many other families who've lost loved ones to the police who all know all too well how dangerous 50-a is. Our message to you is, you have to get this done. 50-a must be repealed during the 2020 session.

Testimony Submitted By Constance Malcolm, Mother of Ramarley Graham

Submitted to New York State Senate Committee on Codes
In Support of S.3695-Bailey/A. 2513-O'Donnell, Repealing NYS CRL Section 50-a

October 17, 2019

My name is Constance Malcolm and I am the mother of Ramarley Graham, who was killed by NYPD Officer Richard Haste in 2012.

Thank you Senator Bailey for holding this hearing on the need to repeal 50-a and for having me and other families whose loved ones have been killed by police speak today.

As you know, my son Ramarley was killed in our home, in front of his grandmother and his 6 year old brother. Richard Haste and other officers broke down the door to our home, without a warrant, without warning and without cause.

These officers murdered Ramarley in my home on February 2, 2012. And then the NYPD murdered Ramarley again in the media by lying about the killing, falsely criminalizing my son in the media and then trying to cover-up the whole thing.

There was so much misconduct surrounding the murder of my son that I don't even know where to start. My son's body was lost for 4 days by the police – we had to ask Carl Heastie to help us find his body so we could bury him. My mother – Ramarley's grandmother -- was interrogated for over 7 hours by police and she wasn't even allowed to talk to her lawyer. They were trying to get my mother to lie about Ramarley.

There's more, but I'm going to stop there for now because the reason I'm here today is to tell you that we need you to repeal 50-a as soon as the legislative session starts in January 2020. Not in February or in March or in another year.

50-a needs to be repealed now because it hurts families like mine, like Ms. Carr's, like Delrawn Small's family and so many others.

50-a is dangerous for all New Yorkers because it protects officers who kill, officers who rape and sexually assault, officers who disrespect and brutalize us. It lets them hide behind secrecy that the government shouldn't allow.

When my son Ramarley was murdered, it took us 3 years to find out the misconduct history of Richard Haste, the officer who shot and killed him – and that was **only because a whistleblower leaked it to the media.**

We found out Haste had 6 CCRB complaints & 10 allegations in just 13 months – less than 9% of the NYPD had that many complaints in their entire career[1] – and almost none of them have so many complaints in such a short time-frame. Ramarley was killed just 15 months after the last complaint that we know about from the leak. The only reason we found out that there had been prior CCRB complaints against Haste is because the information was leaked in 2017 – 3 years after my son was murdered. **Families like mine shouldn't have to rely on leaks to the media to get this kind of basic information.**

It took me almost 6 years to get Haste and Sgt Scott Morris off the force. Other officers who also should be gone are still there – some of them, like whoever in the NYPD illegally leaked Ramarley's sealed records -- I don't even know their names because of 50-a.

Because of 50-a I still don't know the misconduct history of Morris or Officer John McLoughlin – one of the officers involved who is still on the force. McLoughlin was put on a 1 year dismissal probation. Because of 50-a I don't even know if he did other misconduct during that year of probation and whether he had a long history of past misconduct like Haste.

While Haste & Morris are not NYPD anymore, I need you to understand that I had to fight every day for almost 6 years to organize political pressure to force them out of the NYPD. I lost pay from my job because I had to do rallies and press conferences. I had sleepless nights. I still worry every day about my other son who was only 6 years old when he watched his brother be murdered by officers – in what should have been the safety of our home.

Families shouldn't have to be going through this – and not every family can do what I was able to do.

50-a makes it harder for all of us families – in some ways it makes it impossible for us to really fight for justice because so much information stays hidden from us. This is not fair.

50-a is dangerous for everyone because there's no transparency so these officers who are dangerous and who abuse their authority are allowed to continue to patrol our neighborhoods – and we don't even know who they are.

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[1] According to 2016-2017 Civilian Complaint Review Board data
https://thinkprogress.org/richard-haste-disciplinary-record-474f77eb8d19/

We know that the police departments in New York state don't discipline officers who kill and brutalize us unless we organize and build major campaigns.

Even in the case of Ramarley, Haste & Morris weren't fired – they resigned.

50-a is a horrible law that is dangerous for New Yorkers.

It took me over 6 years to get additional information about the killing of my son – and that was only because I filed a FOIL with Communities United for Police Reform (CPR) and Justice Committee (JC). And we didn't get all the information we asked for.

The City tried to argue that I couldn't get information about the killing of my son because of 50-a – this is ridiculous and painful.

1 of the many 50-a arguments the City tried to use was that because I had called for the firing of Haste and other officers who were part of the cover-up, that releasing information about the incident and officers would lead to safety concerns for the officers.

This is garbage. We all know it's lies.

And it's dangerous because they are basically telling mothers like me that if we call for the firing of officers who murder our children – that the City will lie and say that we are putting officers at risk.

50-a needs to be fully repealed. The only purpose it serves is to protect abusive cops and cover-ups.

I am asking you today to think about my son Ramarley. I need you to think about Ms. Carr's son Eric. To think about Valerie's son Sean. To think about Delrawn Small and Kawaski Trawick and Saheed Vassell and so many others who have been killed unjustly by the police.

I need you to think about us and our loved ones and I need you to repeal 50-a for us as soon as possible. I need you and the other Senators and Assemblymembers to repeal 50-a in January.

We can not keep waiting for the "right" political moment. I need you to be Ramarley's voice, and Sean's voice and Delrawn's voice and Eric's voice.

There's not much more that can happen related to Ramarley right now so I am fighting to prevent future killings by police and I am fighting to support other families.

50-a must be repealed. Thank you for listening and having me testify.

PUBLIC ADVOCATE FOR THE CITY OF NEW YORK
Jumaane D. Williams

TESTIMONY OF PUBLIC ADVOCATE JUMAANE D. WILLIAMS TO THE NEW YORK STATE SENATE STANDING COMMITTEE ON CODES PUBLIC HEARING ON POLICING, REPEALS PROVISIONS RELATING TO PERSONNEL RECORDS OF POLICE OFFICERS, FIREFIGHTERS, AND CORRECTIONAL OFFICERS OCTOBER 17, 2019

Good afternoon,

My name is Jumaane D. Williams, and I am Public Advocate for the City of New York. I would like to thank Chairman Jamaal T. Bailey and the Members of the Standing Committee on Codes for holding this hearing on Senator Bailey's bill, S3695, which repeals section 50-A of the New York State Civil Rights Law. This bill would repeal provisions relating to personnel records of police officers, firefighters, and correction officers, essentially making them available to the public.

The interpretation and application of section 50-A deprives the public of information fundamental to oversight and lends a shield of opacity to the very public state and local police agencies that have perhaps the greatest day-to-day impact over the lives of citizens. Section 50-A increases the harms caused to New Yorkers who experience police abuse by denying them and their loved ones access to information as to whether departments take disciplinary action against officers who mistreat them, which includes withholding information about officers whose actions result in a person's death. It also prevents us all from creating a true system to identify officers who, with early intervention, can be put on a corrective force or guided to another career before the worst occurs. Between 2011 and 2015, at least 319 NYPD staff committed offenses, including lying under oath, driving under the influence, and excessive force with almost no serious consequence.

Given the clear lack of discipline with regard to police misconduct, Chairman Bailey's bill is crucial for enforcing accountability and improving police-community relations. That is why I have introduced Resolution 750-2019 - with 21 council members' support - calling on the New York State Legislature to pass, and the Governor to sign S3695 in the beginning of next year's session.

If we do not repeal section 50-A, public trust in our law enforcement and the NYC administration will continue to be eroded. The two areas where people are yearning to see change are transparency and accountability, and we have not seen much progress in those areas, unfortunately. Section 50-A can no longer be used as an excuse to tie the hands of District Attorneys as a reason for a slap on the wrist treatment of officers who have undermined their duty to serve and protect.

Having been a victim of excessive force myself in the last term, I am sad that not much has changed in the two areas I have mentioned. Repealing 50-A is a necessary step toward justice for Eric Gardner, for Saheed Vassell, for Ramarley Graham, for Delrawn Smalls, for Dwayne Jeune, for their families, and for the countless New Yorkers who are just asking for truth and openness.

For those reasons, I urge the members of the Senate to pass S3695. Again, thank you to Chairman Bailey and the Members of the Standing Committee on Codes for taking up this issue.

BROOKLYN DEFENDER SERVICES

TESTIMONY OF:
Jacqueline Caruana – Senior Trial Attorney, Criminal Defense Practice

Presented before:
The New York State Senate Standing Committee on Codes

Hearing on Potential Legislative Changes to Section 50-a of the Civil Rights Law

October 17, 2019

My name is Jacqueline Caruana and I am a Senior Staff Attorney in the Criminal Defense Practice at Brooklyn Defender Services (BDS). BDS provides multi-disciplinary and client-centered criminal, family, and immigration defense, as well as civil legal services, social work support and advocacy, for over 30,000 clients in Brooklyn every year. I thank Chairperson Jamaal T. Bailey and members of the New York State Senate Committee on Codes for their leadership on improving police oversight and accountability.

Under Civil Rights Law 50-a (CRL 50-a), the secrecy of police disciplinary systems conceals and perpetuates misconduct and precludes public scrutiny of accountability mechanisms for law enforcement officers or, more likely, the lack thereof. This law also undermines public defenders' ability to fairly defend their clients by blocking courts from reviewing prior misconduct and criminal activity by police officers who are actively making arrests. As a result, police misconduct goes unchecked and unchallenged, fueling the scourge of wrongful arrests, wrongful convictions, and the unlawful incarceration of innocent New Yorkers. The crisis of impunity for police must end. Brooklyn Defender Services supports repealing CRL 50-a to establish basic transparency and accountability for police.

BACKGROUND

The national media focus on police killings of unarmed people has sparked outrage across the country, yet the same attention has not been paid to the non-fatal punitive law enforcement interactions many New Yorkers, particularly Black and Latinx people, experience each day. The lack of consequences for these interactions emboldens racially

biased police tactics that target Black, Latinx, and immigrant communities of color. Even now, as the existence of police body worn camera footage confirms multiple incidents of police misconduct, courts, policymakers, and the public can be blocked from accessing to police disciplinary records that could provide necessary context and show a pattern of bad acts.

New York City's reliance on broken windows policing, in which officers proactively arrest people for the most minor offenses without receiving any particular complaint, has a major impact in the courtroom. Many, if not most, cases rely on the testimony of a single police officer alone, rather than a civilian-generated complaint. Excessive prosecutorial power and discretion, coupled with sentencing guidelines that mandate long prison sentences, have made trials nearly extinct. Over 95 percent of convictions are the result of plea bargains. (Many other cases end in an Adjournment in Contemplation of Dismissal or an outright dismissal.) With little to no evidence shared with the public defender, the outcome of a case—and in many cases someone's freedom—is dependent on the credibility and integrity of a single police officer.[1] Police officers have become the most common witnesses in our criminal legal system, and a nearly ubiquitous presence in the everyday lives of low-income people of color. Yet, our communities, public defenders, and journalists have absolutely no access to information about police officer misconduct or mechanisms to hold police accountable.

BDS supports repealing CRL 50-a and appreciates Senator Bailey's efforts to get it enacted. CRL 50-a unjustly prevents defense attorneys from presenting evidence that would prompt judicial review of police misconduct, criminal activity by police officers, or challenge the credibility of an officer. Though the law allows disclosure when "mandated by lawful court order," some judges hold subpoenas of potential police officer misconduct to a heightened standard of scrutiny and precariously rely on prosecutorial discretion to investigate and disclose misconduct, making the provision in the statute weak.[2]

On January 25, 2019, the Report of the Independent Panel on the Disciplinary System of the New York City Police Department strongly recommends that NYPD support legislative efforts to amend Civil Rights Law Section 50-a.[3] This bolsters what advocates have been saying for decades. We believe the only change that should be made to 50-a is to completely repeal it.[4] To be clear, the current exemptions under the Freedom of Information Act sufficiently filter access to police disciplinary records without the need for CRL 50-a.

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[1] Gaby Del Valle, *Most Criminal Cases end in Plea Bargains, not Trials*, August, 7, 2017, The Atlantic, available at: https://theoutline.com/post/2066/most-criminal-cases-end-in-plea-bargains-not-trials?zd=1&zi=tzbk66dp.

[2] Under *Brady*, prosecutors have a constitutional duty to disclose to the defense any favorable, material evidence known to the prosecution team. Jonathan Abel, *Prosecutors' duty to disclose impeachment evidence in police personnel files: the other side of police misconduct*, available at: https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/07/11/prosecutors-duty-to-disclose-impachment-evidence-in-police-personnel-files-the-other-side-of-police-misconduct/?noredirect=on&utm_term=.7d38aafc1fa9

[3] The Report of the Independent Panel on the Disciplinary System of the New York City Police Department, January 25, 2019 available at: https://www.independentpanelreportnypd.net/

[4] New York City Bar, *Report on Legislation*, available at: http://documents.nycbar.org/files/2017285-50aPoliceRecordsTransparency_Advocacy.pdf.

HOW CRL 50-a OPERATES IN LEGAL PRACTICE

When defense counsel's request for police disciplinary records is denied pursuant to CRL 50-a, the client's constitutional right to present a defense and confront his accusers has been greatly infringed upon. In practice, the inability to access these police records severely limits the ability to impeach and cross examine police witnesses. This is particularly concerning because New York courts have found that a defendant's right to impeachment material can outweigh a witness' right to privacy through sealing of records.[5]

Furthermore, the United States Supreme Court recognizes that the prosecution has a continuing duty to disclose any information that could prove favorable to the defendant. This duty extends not only to specifically exculpatory information, but to all favorable information, including information that will be used for impeachment. Evidence of prior misconduct by a specific police officer is relevant for impeachment purposes where proof of guilt turns largely on acceptance of that officer's testimony.[6] While it is clear that prosecutors are aware of prior incidents of police misconduct, disclosure of this information to defense counsel has been inconsistent and sporadic, at best. [7]

When prosecutors fail to disclose evidence of police misconduct, defense counsel is beholden to the unconstitutional requirements of CRL 50-a in order to obtain access to these records. The police department actively opposes access to disciplinary records and the courts routinely deny defense counsels' requests. As a result, police officers in New York are granted a special privacy right that no other professional or civilian witness is granted.

We ask the committee to consider this: If a doctor were to engage in misconduct that would bring harm to a patient, no one would trust that doctor enough to be their patient; if a teacher were to lie to parents about the care of their child, no parent would trust that teacher to care for their child. Their disciplinary records are either available online or through FOIL. Yet police officers are repeatedly engaging in misconduct, including providing false information while under oath, and instead of acknowledging these serious issues, the City of New York and local governments across the state willingly overlook it and instead allow these officers to remain employed, paying out countless millions of dollars in lawsuits to civilians on their behalf. Critically, law enforcement is the only profession authorized to use lethal force, and therefore they should be held to a higher standard of transparency and accountability, not lower.

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[5] *See* People v. Rodriguez, 152 Misc. 2d 328 (N.Y. Sup. Ct. 1991); People v. Rahming, 26 N.Y.2d 411 (N.Y. 1970); People v. Vidal, 26 N.Y.2d 249 (N.Y. 1970).

[6] Brady v. Maryland, 373 U.S. 83 (1963); *See* Puglisi, 44 N.Y.2d at 749; People v. Morales, 97 Misc. 2d at 740.

[7] "Bronx Prosecutors Release Secret Records on Dishonest Cops."https://gothamist.com/news/bronx-prosecutors-release-secret-records-dishonest-cops

CLIENT STORIES

Mr. S – Prosecution is aware of officer misconduct and opposes access to disciplinary records: Mr. S was charged with misdemeanor offenses. The Prosecution filed a memorandum in the case, disclosing that the detective involved on the case had been previously disciplined by the NYPD for faulty investigation procedures and as a result, had undergone "retraining." This same detective had also been sued 7 times as a result of civil rights violations made by the detective. Mr. S's attorney filed a motion with the court to access the detective's disciplinary records with NYPD. Despite the prosecutor's awareness the existence of relevant disciplinary records, they opposed the request for records, calling it "a foray into a witness' confidential records in the hope of finding some unspecified information that can be used to impeach the witness." The judge agreed with the prosecution and denied access to the detective's disciplinary records. Several months later, the prosecution dismissed the case against Mr. S. This detective is still employed by NYPD.

Mr. J – NYPD is aware of officer misconduct and opposes access to disciplinary records: Mr. J was charged with a felony offense as a result of an investigation and identification procedure conducted by a detective with NYPD. That particular detective had been the subject of multiple lawsuits that were settled by the City. Mr. J's defense attorney requested the detective's disciplinary records and NYPD opposed access to the records. In their opposition papers, the attorney for the detective acknowledged that this detective had been subjected to civil litigation and failed to "properly document investigative activity," but argued that did not demonstrate a "history of actual misconduct," because the number of lawsuits attributed to the detective, is "miniscule when compared to the number of police interactions in which [the detective] has been involved." The judge agreed with NYPD and denied access to the records. To us, this was not a defense but a call to action to reinvestigate those other cases. This case is still pending and Mr. J faces up to 25 years in prison and lifelong barriers to success if he is convicted of this felony offense.

Mr. C – No Evidence or Mechanism to Prove Client's Claims: My client Mr. C for assaulting a police officer. Mr. C stated that Officer B falsely stopped, detained, and arrested him for disorderly conduct. Mr. C denied assaulting Officer B and claimed that, in fact, he was harassed and assaulted by Officer B and his partner. The police—whose credibility will be squarely at issue during trial—claimed that Mr. C appeared to have an unknown "heavy object" in his sweater pocket, fled from police, and was disorderly. The police officers later claimed that Mr. C assaulted Officer B by head-butting him. However, there was no evidence that Officer B suffered any injuries and Mr. C's attorney had no means of knowing about the credibility of the officers, any evidence against the client, or exculpatory evidence supporting the client's claim.

The only method by which to obtain police disciplinary records is to file a motion with the court and request that the court order the police records to be turned over to the judge to review. Absurdly, in this motion, the defense is required to make "a clear showing of facts sufficient to warrant the judge to request police records for review."[8] We cannot make that

[8] The Court of Appeals in People v Gissendanner (45 NY2d 543, 547-548 [1979]

claim without access to police records; therefore, these motions are usually unsuccessful. In the case of Mr. C, he was eventually given an ACD.

Mr. H – Evidence of Wrongdoing, but No Accountability: Mr. H was charged with assaulting a corrections officer. Mr. H. denied committing any of the charged offenses and violations and further contended that Corrections Officer R wrongfully assaulted him and arrested him. The police reports, Department of Corrections' reports, and initial discovery disclosure indicated very clearly that Corrections Officer R conducted an unlawful strip search of Mr. H and unlawfully used excessive force on Mr. H while he was detained. Corrections Officer R and other officers alleged that Mr. H was refusing to be strip searched. According to Mr. H, Corrections Officer R provided no basis or reason for why they were conducting this search. Additionally, several correction officers removed Mr. H to a private room, supposedly without video cameras, to conduct this search. Corrections Officer R alleged that Mr. H had a sharpened piece of plastic in his pants pocket and that when Corrections Officer R attempted to retrieve this object, Mr. H allegedly bit his Corrections Officer R's finger. Mr. H was injured and received treatment at the detention facility where he was being held.

Mr. H adamantly contended that he was not preventing Corrections Officer R from performing any lawful duty; in fact Mr. H contended that Corrections Officer R violently attacked him along with other officers and that any injury that CO R may have sustained was the result of Corrections Officer R's own actions. Moreover, Corrections Officer R and the other officers fabricated their versions of what happened inside the detention facility on that day to erase the unlawful force used by Corrections Officer R and the other officers to wrongfully accuse Mr. H of having a weapon in order to justify Corrections Officer R's assault on Mr. H.

Corrections Officer R's credibility as well as his motive to fabricate were central to this case at trial. Such issues, including Corrections Officer R's propensity for violence and use of force, specifically excessive force, as well as his bias against Mr. H and his motive to fabricate his story were both material and relevant to this case.

A motion was filed with the court to obtain Corrections Officer R's disciplinary record but was denied because the judge determined that the defense did not make *a clear showing of facts sufficient to warrant the judge to request police records for review.*

Mr. H's case went to trial where it was revealed during the trial that Corrections Officer R and other Corrections Officers forged paperwork and planted evidence. Mr. H was acquitted by a jury; however, Corrections Officer R still works at the same detention facility.

RECOMMENDATIONS

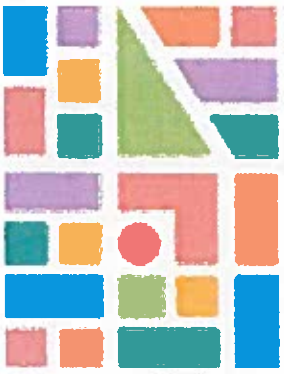
We thank Senator Bailey, along with his co-sponsors, for advancing S.3695/A.2513. This bill would repeal of section 50-a of the Civil Rights law and help address the lack of transparency in police departments across the state, as well as the inconsistent, arguably non-existent, accountability for police misconduct. This, of course, is only the beginning of

the work that needs to be done to mitigate discriminatory policing tactics and finally hold law enforcement agents accountable for their misconduct and criminal activity, but it is a critical step forward.

We respectfully urge the Senate Committee on Codes, as well as the remainder of the Senate and the Assembly to support and vote for the passage of S. 3695/A.2513 and repeal Civil Rights Law 50-a.

We thank the Committee for the opportunity to speak on this issue and hope you will view BDS as a resource as we continue to fight for a more fair and just state.

If you have any question, please feel free to reach out to Jackie Caruana, Senior Staff Attorney, at jcaruana@bds.org.



THE LEGAL AID SOCIETY

TESTIMONY

The Senate of the State of New York

In Support of Senate Bill 3695 to Repeal 50-A

The Legal Aid Society
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October 17, 2019

Good afternoon. I am Molly Griffard, a staff attorney at The Legal Aid Society testifying on behalf of the Special Litigation Unit in the Criminal Practice, a specialized unit dedicated to addressing systemic problems created by the criminal justice system. We thank Senator Bailey for the opportunity to provide testimony on repealing 50-a.

ORGANIZATIONAL INFORMATION

Since 1876, The Legal Aid Society has provided free legal services to New York City residents who are unable to afford private counsel. Annually, through our criminal, civil and juvenile offices in all five boroughs, our staff handles about 300,000 cases for low income families and individuals. By contract with the City, the Society serves as the primary defender of indigent people prosecuted in the State court system. In this capacity, and through our role as counsel in several Freedom of Information Law cases as well, the Society is in a unique position to testify about the importance of repealing 50-a in New York.

SUPPORT FOR SENATE BILL S 3695

Civil Rights Law § 50-a prevents the public from receiving critical information about the police officers who serve in their communities, officers entrusted with an immense amount of power. In recent years, 50-a has been invoked to remove NYPD disciplinary summaries, including those stemming from CCRB prosecutions, that had been publicly available in City Hall for decades, to close a public courtroom to mask an officer's disciplinary history, and to refuse to answer community members' and reporters' many calls to identify officers who have committed acts of brutality.[1]

Blocking from public view the disciplinary histories of officers entrusted with the power to use lethal force to protect and serve communities has a multitude of harmful effects. Shielding the identities of officers who have killed civilians amplifies their families' and communities' trauma, and sows distrust

[1] *See, e.g.*, Samar Khushid, *Headley Case Again Raises Questions About NYPD Accountability Under De Blasio*, GOTHAM GAZETTE (Dec. 18, 2018), http://www.gothamgazette.com/city/8150-headley-case-again-raises-questions-about-nypd-accountability-under-de-blasio.

in police.[2] This secrecy especially deprecates trust in the police where, as is often the case, information about the victim's history such as sealed arrest records are leaked.[3] Courts have historically recognized that instead transparency can have a "community therapeutic value"[4] that provides an "outlet[] for 'community concern, hostility, and emotions.'"[5]

50a also undermines the public's ability collectively analyze, understand and participate in reform of CCRB accountability measures. When no outcomes of CCRB investigations or prosecutions are made public, the police department can claim that a fully functional police accountability system exists—whether true or not—without presenting any contradictory evidence to the public.[6] Members of over-policed communities are in turn left without recourse to understand whether police or other oversight accountability systems have made any efforts to eradicate systemic abuses, resulting in the belief that the police cannot police themselves. Reporting on aggregated data about types of complaints and allegations as well as demographics of complainants and officers are available and is a great first step.[7] But we could go much further, like in Chicago with the Citizens Police Data Project[8] or New Jersey with the Force Report[9], to "operationalize transparency" and make misconduct histories available.

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[2] Ciara McCarthy, *Saheed Vassell's Family Demand Answers After Police Shooting*, PROSPECT HEIGHTS PATCH (May 2, 2018, 5:58 PM), https://perma.cc/WZ3R-RJ8N (quoting Lorna and Eric Vassell, Saheed Vassell's parents, as saying "[t]hese are not the actions of a city government committed to the truth – instead it seems like public officials and the NYPD trying to hide something.").

[3] *See, e.g.*, *See* Tina Moore & Bruce Golding, *Man Killed by NYPD Had Bizarre Run-in with Cops in 2008*, N.Y. POST (Apr. 5, 2018 10:40 PM), https://perma.cc/94PV-M973.

[4] David S. Ardia, *Court Transparency and the First Amendment*, 38 CARDOZO L. REV. 835, 895 (2017) (quoting Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 570-71 (1980) (plurality opinion)).

[5] *Id.* at 868 (quoting Detroit Free Press v. Ashcroft, 303 F.3d 681, 704 (6th Cir. 2002)).

[6] *See* Jillian Jorgensen et al., *De Blasio, NYPD Big See No Problem with How Cops Address Police Misconduct*, N.Y. DAILY NEWS (Mar. 15, 2018, 10:06 PM)

[7] Civilian Complaint Review Board, "Data Transparency Initiative," available at https://www1.nyc.gov/site/ccrb/policy/data-transparency-initiative.page.

[8] Citizens Police Data Project, available at https://cpdp.co/ (publicizing, among other things, individual officers' complaint histories).

[9] "The Force Report," N.J.com, available at https://force.nj.com/ (database of five years of documents relating to police uses of force, covering every local police department in New Jersey).

This past December, the Court of Appeals gave 50a its broadest ever interpretation, reframing it from an exemption to FOIL weighed against the public interest in access to information about government, to a blanket protection for police officer's privacy that far exceeds the those of all other state employees.[10] This decision cemented the NYPD's recent strict fidelity to making virtually all information about the prior misconduct of police officers, whether substantiated by a CCRB investigation and prosecuted by an APU prosecutor, caught on video, violent, criminal, or otherwise squarely in the public interest, unattainable for members of the public—even where officers' names have been redacted and the information could only be used to assess disciplinary systems rather than individual officers. It is now clear that the only way for New Yorkers to gain insight into police departments' disciplinary systems is through legislative repeal of 50-a.

Counter to claims that 50a repeal will compromise generalized "privacy rights" and safety of officers, the repeal of 50a will *not* allow the public to access personal information of officers. FOIL exemptions already prevent officers' residential, social security, and medical information from being released.[11] Repealing 50a would only place the police on equal footing with other working professionals, such as doctors and lawyers, who are subject to discipline that is reported online.[12] Repeal would facilitate accountability systems similar to these other professions and allow for public trust in the ability of state police agencies to oversee their officers.

CONCLUSION

We thank you for hearing our testimony today.

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[10] New York Civil Liberties Union v. New York City Police Department, No. 133, 2018 WL 6492733 (N.Y., Dec. 11, 2018).

[11] *See, e.g.*, Matter of Obiajulu v. City of Rochester, 213 A.D.2d 1055, 1056 (4th Dep't 1995) ("personal and intimate details of an employee's personal life are exempt") (internal quotation omitted); Lyon v. Dunne, 180 A.D.2d 922, 924-25 (3d Dep't 1992) (ordering redaction of addresses, phone numbers, and dates of birth from otherwise disclosable investigation records).

[12] *E.g.* James Kelly, *New York Courts Put Attorney Discipline Records Online*, N.Y. L. INSTITUTE, (Feb. 24, 2015), http://www.nyli.org/new-york-courts-put-attorney-discipline-records-online.

The Bronx Defenders | Redefining public defense.

The New York State Senate
Standing Committee on Codes
Hearing on Potential Legislative Changes to Section 50-a of the Civil Rights Law
October 17, 2019

The Bronx Defenders ("BxD") respectfully submits the following testimony regarding proposed legislation to change Section 50-a of the Civil Rights Law. BxD is a community-based and nationally recognized holistic public defender office dedicated to serving the people of the Bronx. BxD provides innovative, holistic, client-centered criminal defense, family defense, immigration representation, civil legal services, social work support, and other advocacy to indigent people of the Bronx. Our staff of over 300 represents approximately 22,000 individuals each year. In the Bronx and beyond, BxD promotes criminal justice reform to dismantle the culture of mass incarceration.

BxD expresses our strong support for S.3695 (Bailey) / A. 2513 (O'Donnell) to fully repeal New York Civil Right Law Section 50-a. Section 50-a maintains a shroud of secrecy over the disciplinary records of police officers, depriving New Yorkers from getting crucial information about law enforcement officials who engage in misconduct and abuse the public trust. Repealing 50-a is a critical step towards police accountability and protecting the civil rights and liberties of New Yorkers, particularly people of color.

Police misconduct is a lived reality for many of our clients. Our clients are pushed and shoved, their faces scraped on walls and on the floors, their arms broken and their heads intentionally banged against cars and walls — even after they are handcuffed. Police misconduct can also be psychologically scarring even when it is not physically. Such was the case for a client of ours, who, strolling down the street towards his bus stop, was stopped by two undercover officers — guns brandished — who proceeded to throw him to the ground and later strip search him at the precinct. By the time our client's case ended — with a dismissal — he had undergone months of therapy to address the trauma he had suffered from that encounter.

Transparency in police accountability and discipline, and the proper documentation and disclosure of police misconduct, are critical to both the effective representation of our clients in criminal court and to our clients' ability to receive some form of closure and justice in their cases. For some of our clients, access to these records could be the difference between a conviction and a dismissal. We recently represented a client who, like many of our clients, was stopped, frisked, and charged with possession of controlled substance, in a blatant application of the racist stop-and-frisk practices that continue to harm our clients and their communities. The arresting officer's misconduct records indicated a clear pattern of similar behavior. These records helped obtain a dismissal in that case, which was the first step in our client's path to find justice and closure.

Use of officer misconduct records in litigation is central to our criminal process and necessary to provide some measure of accountability for officer unlawful behavior. This is especially true when other accountability systems, such as the IAB or the CCRB, fail to do more than give an anemic slap to the wrist of the offending officer. For many of our clients who often face the harsh consequences of a criminal conviction and loss of liberty, access to these records is especially urgent.

The Role of Police Disciplinary Records in Litigation and the Need to Repeal 50-a

Transparent police misconduct records are vital for the fair and just functioning of the criminal justice system. These records often contain information that demonstrate an officer's bias, deceit, escalation of encounters, use of force, or other types of information that undermines the credibility of the officer's conduct. Such information can shed light on whether the officer acted lawfully in the case being litigated. At times, the information in these records is so detrimental to an officer's credibility that it can serve as *de facto* exculpatory evidence by demonstrating that the officer simply cannot be trusted to tell the truth on the stand. Therefore, police misconduct records are of vital importance in conducting a fair trial and in upholding the right to access exculpatory information.

Because of Section 50-a, however, these important records are not accessible to defense attorneys until the eve of trial, if at all. Prosecutors and judges serve as the gatekeepers to these records. Without a judge's order, or a prosecutor's good will, defense counsel may not even know that misconduct records exist in the first place, much less view them or use them at trial. Indeed, at times, prosecutors are not even aware of the existence of misconduct records until alerted by attorneys with prior knowledge about the officer involved.

Faced with this reality, BxD has relied heavily on the misconduct records database created by the Legal Aid Society. This database includes some misconduct records for some officers. However, the database is extremely limited: it includes only those records that prosecutors or the courts choose to hand over to defense attorneys, which defense attorneys remembered to upload to the system. In other words, the database reflects only a fraction of the misconduct records that exist.

Thus Section 50-a serves to minimize police accountability, hurt the most vulnerable communities in our State, and block the administration of justice from those who have been unlawfully injured by the State. We join the call to the State Legislature and the Governor to repeal Section 50-a of the New York Civil Rights Law, the section that protects these records from the public eye. Repeal of this section would make misconduct records more accessible to lawyers and the public, and would result in more accountability and protection against the abuse of power by law enforcement.

The Role of Transparency in Effective Police Discipline

Transparency, in the form of accessible information, is a first and important step towards accountability. The issue of police discipline has come to the forefront of public discourse in recent years, after police violence, use of force and misconduct were exposed to the public's eye. Police discipline is a factor in minimizing these incidents in the future, and restoring some of the public's lost faith in law enforcement. Transparency is therefore an instrumental part of transforming the system and addressing the public outcry.

Transparency works on several separate tracks to improve accountability. First, transparency allows policy makers, such as this Committee, to understand the factors and context that give rise to these incidents. It is difficult to discuss the extent of police misconduct when our information comes from the media, which cannot report on the thousands of other misconduct incidents happening across the City and the State. It is similarly difficult to consider mechanisms for change and accountability without such information. Access to police misconduct records will bring transparency to the discussion, and allow this Committee and other bodies to have more informed, in-depth, and relevant discussions of the problem and the ways by which it can be fixed.

Second, transparency sends a clear signal to law enforcement personnel that they are being monitored and that they could be held accountable if they were to act in an unlawful or unethical way. Open access to misconduct records means that police will be questioned about their actions at hearings, trials, and in the court of public opinion. It means that before pulling out their firearms, beating, shoving and kicking residents of this State, officers will more likely consider how they will face the attention that their actions will garner, and the oversight that will follow. That pause for thought and reflection before action will lead to less misconduct and more community-oriented policing. Transparency will thus incentivize better behavior by forcing reflection and making it clear that police actions will be reviewed by all stakeholders.

Third, transparency improves imperfect forms of accountability by holding those mechanisms (and the people who oversee them) themselves accountable. For example, at times CCRB investigations results in recommendations to take action against the offending officers, but the recommendations are ignored by those higher-ups who need to approve them. These decisions happen in the dark: few people outside of the CCRB and the police knowing anything about what transpired and what led to these decisions. Without transparency, those making these decisions are immune from public opinion and pressure, and can act with complete immunity from the repercussions of their actions. Repealing Section 50-a, and giving multiple stakeholders access to misconduct information, will bring accountability to these decision-makers, and thus improve these processes of accountability.

Finally, transparency is necessary for fair trials to take place in the face of criminal charges. Individuals charged with crimes are legally entitled to access officer misconduct records and to use these throughout the litigation of their case. In cases where the officer's credibility is at issue, misconduct records demonstrating a lack of credibility can amount to exculpatory evidence that is pertinent for the fair litigation of the case. But because of Section 50-a, these records are often not immediately available to defense attorneys and the people they represent.

Instead, these records are kept hidden until the eve of trial, and at times, until after the trial has started. Many times, records disclosed by the prosecutors are only those they thought to obtain and only those they deem relevant. In other words, too often defense attorneys receive late and selective, partial access. Thus defense attorneys may learn about the problematic history of an officer after different investigation opportunities have already passed; after negotiating a plea offer that could have been more favorable had the misconduct record been out in the open; and after months of preparing a defense that does capitalize on the credibility issues illuminated by the misconduct record. The consequences is not only a less efficient justice system, delayed by these late disclosures, but one that is less fair and undermines the constitutional right for a fair trial. Repealing Section 50-a means that transparency will be a part and parcel of the criminal process from the start, making it fairer and more just.

Repeal of Section 50-a Aligns with the Aims of the New Discovery Laws

This spring, New York passed historic comprehensive discovery reform. BxD applauds the New York State Assembly, Senate, and the Governor for their commitment to get this piece of landmark legislation passed. The Discovery for Justice Reform Act ("DFJRA") repealed one of the most regressive discovery laws in the country and replaced it with a system of open, early, and automatic discovery for all New Yorkers.

The DFJRA represents a sea change in the way information is shared in the criminal legal system, requiring prosecutors to engage in early, open, and automatic discovery in every case. The plain language of the statute makes clear that the aim of discovery reform was leveling the playing field and full transparency. Section 245.20(1) of the new law requires prosecutors to disclose "all items and information that relate to the subject matter of the case" in the possession of law enforcement within 15 days of criminal court arraignment. Section 245.20(7) also requires judges to apply a "presumption in favor of disclosure" when interpreting the statute. Together, these provisions create a framework for full transparency in criminal cases. Unfortunately, DFJRA does not mandate release of officer misconduct in general, much less for limited review and use by defense attorneys.

The commitment to full transparency in the criminal justice process that the DFJRA represents should serve to guide the Legislature to repeal Section 50-a. The People of New York State, along with the State Legislature, have codified our commitment to a new era of openness, access and transparency in the criminal justice system. The same principles of fairness, justice and accountability that underlie the DFJRA apply with equal force to misconduct records, which are exempted from this legislation. It is time to take the next, most logical step - bring full transparency and accountability to officer misconduct by repealing Section 50-a and permitting access to misconduct records.

NYCDS

Testimony of

Christopher Boyle

Director of Data Research and Policy

New York County Defender Services

Before the

Senate Standing Committee on Codes

Public Hearing on Potential Legislative Changes to

Section 50-a of the Civil Rights Law

October 17, 2019

My name is Christopher Boyle and I am the Director of Data Research and Policy at New York County Defender Services (NYCDS). We are a public defense office that represents New Yorkers in thousands of cases in Manhattan's Criminal and Supreme Courts every year. I have been a New York City public defender for more than twenty years. Thank you to Senator Bailey and the Senate Standing Committee on Codes for holding this hearing today and inviting us to testify about the urgent need to repeal Civil Rights Law 50-a (hereafter "50-a").

New York is the worst state in the nation in terms of police transparency. No other state deprives its residents of documented evidence of police misconduct to the extent that New York does. We are a national outlier and our current policy costs taxpayers millions and harms relations with policed communities. NYCDS joins with our colleagues from the other defender offices in their comments about the threat of the current state of the law to accused people and their communities. I hope my testimony, which will focus more on the data that exists about police transparency and

accountability in New York and across the country, will be useful to the committee in assessing the proposed reform.

50-a permits law enforcement entities like the NYPD to shroud their disciplinary records in secrecy. As a result, criminal trials in New York are conducted without highly relevant prior wrongdoing by police witnesses ever coming to light. The law, at its core, seeks to conceal the truth and does so at the expense of a criminal defendant's fundamental right to confront the witnesses against them.

50-a was enacted in 1976 to protect police officers from cross-examination during criminal prosecutions based on unproven or irrelevant material in their personnel files.[1] Yet court interpretations of 50-a have expanded over the past fifty years to bar the disclosure of substantiated civilian complaints of misconduct. Last year, the New York State Court of Appeals held that 50-a extends blanket police privacy rights to law enforcement with protections exceeding those of all other state employees.[2] This broad interpretation deprives the public of information that is essential to democratic oversight of the police.

New York may be the least transparent in the nation, but that does not mean that taxpayers are shielded from the costs of accountability. New York City alone pays hundreds of millions of dollars every year in legal settlements to victims of NYPD torts. As these payout amounts continue to rise, civilian deaths at the hands of police gain increasingly more scrutiny and media coverage. Shootings by police are now so common that they are the sixth leading cause of death for black men nationwide. It is no wonder that policed communities express increasing frustration with law enforcement and tensions are at an all-time high.

There is another path. New York can follow the lead of all of the other states in the country and end the shroud of secrecy around substantiated complaints of misconduct by New York police. Their personal records can and should be protected to the same level as any other state employee, but no more. True transparency and resulting accountability cannot begin in our state until the legislature repeals 50-a. We urge you to do so this session.

New York's Police Record Secrecy Law is a National Outlier

New York has the worst record in the nation in terms of public transparency of police misconduct.[3] 50-a has the highest standard of scrutiny for release of police records and the Court of Appeal's recent decision in *NYCLU v. NYPD* (2018) held that law enforcement officers' personnel records confidential. New Yorkers seeking information regarding police misconduct must present a good faith factual predicate to warrant judicial review for information that is "relevant and material" to

[1] New York Department of State Committee on Open Government, *2018 Report to the Governor and State Legislature* (2018), available at https://www.dos.ny.gov/coog/pdfs/2018%20Annual%20Report.pdf.
[2] In the Matter of New York Civil Liberties Union v. New York Police Department, 32 N.Y.3d 556 (2018), available at https://www.nycourts.gov/ctapps/Decisions/2018/Dec18/133opn18-Decision.pdf.
[3] New York Public Radio WNYC News, *Is Police Misconduct a Secret in Your* State, Oct 15, 2015, available at https://www.wnyc.org/story/police-misconduct-records/.

the case.[4] This is a higher standard than even Delaware, the next-worst state in the nation in terms of police transparency.[5]

California was until recently in the same tier as New York, but even in that state many police oversight agencies, including those in large metropolitan areas such as San Francisco, Los Angeles, and Oakland, voluntarily made their police disciplinary records public prior to reform.[6] In 2018, California passed the Right to Know Act (Senate Bill 1421). The new law, which went into effect on January 1, 2019, requires police departments to open internal investigation records related to serious use of force and police wrongdoing.[7]

In repealing 50-a, New York would join Alabama, Arizona, California, Connecticut, Florida, Georgia, Maine, Minnesota, North Dakota, Ohio, Utah, Washington State, and Wisconsin – the other states where police disciplinary records are generally available to the public.[8] We could not find any evidence from these states showing that transparency of police records of misconduct impacted public safety or that it proved more costly for taxpayers.

Unchecked Police Misconduct Levies Significant Costs on Taxpayers

Each year, the City of New York pays out hundreds of millions of dollars to victims of police misconduct. According to the 2018 New York City Comptroller Annual Claims Report, tort claim settlements and judgements from 2018 accounted for 229.8 million dollars in NYPD payouts.[9] NYPD misconduct settlements and judgements account for 38 percent of the total cost of claims made against the city in Fiscal Year 2018.[10] Tort claims against the NYPD include allegations of excessive force, civil rights violations, and personal injury or property damage claims stemming from motor vehicle accidents involving police vehicles.[11]

Yet this multi-million-dollar figure does not cover all of the NYPD's misconduct. As the city comptroller's report points out, "Civil Rights settlements due to excessive force, wrongful conviction claims under 42 U.S.C. § 1983, and false arrest claims that arise from constitutional violations" are not included in the NYPD tort settlement and judgement statistics in the

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[4] *Dunnigan v. Waverly Police Department* 719 N.Y.S.2d 399, 400 (2001).

[5] According to WNYC, police disciplinary records in Delaware are confidential under the state's Law Enforcement Officers' Bill of Rights and the privacy exemption to the Delaware Freedom of Information Act. *See* New York Public Radio WNYC News, *Is Police Misconduct a Secret in Your* State, Oct. 15, 2015, available at https://www.wnyc.org/story/police-misconduct-records/.

[6] Lisa Fernandez, *Interactive map: Who is releasing police personnel files under new law, and who is not*, KTVU Fox 2, Oct. 3, 2019, available at https://www.ktvu.com/news/interactive-map-who-is-releasing-police-personnel-files-under-new-law-and-who-is-not

[7] ACLU of Southern California, *Access to CA Police Records*, available at https://www.aclusocal.org/en/know-your-rights/access-ca-police-records.

[8] According to WNYC, many of these states still make records of unsubstantiated complaints or active investigations confidential. WNYC, *Is Police Misconduct a Secret in Your State* (2015).

[9] New York City Comptroller, *Annual Claims Report* 18, April 15, 2019, available at https://comptroller.nyc.gov/reports/annual-claims-report/.

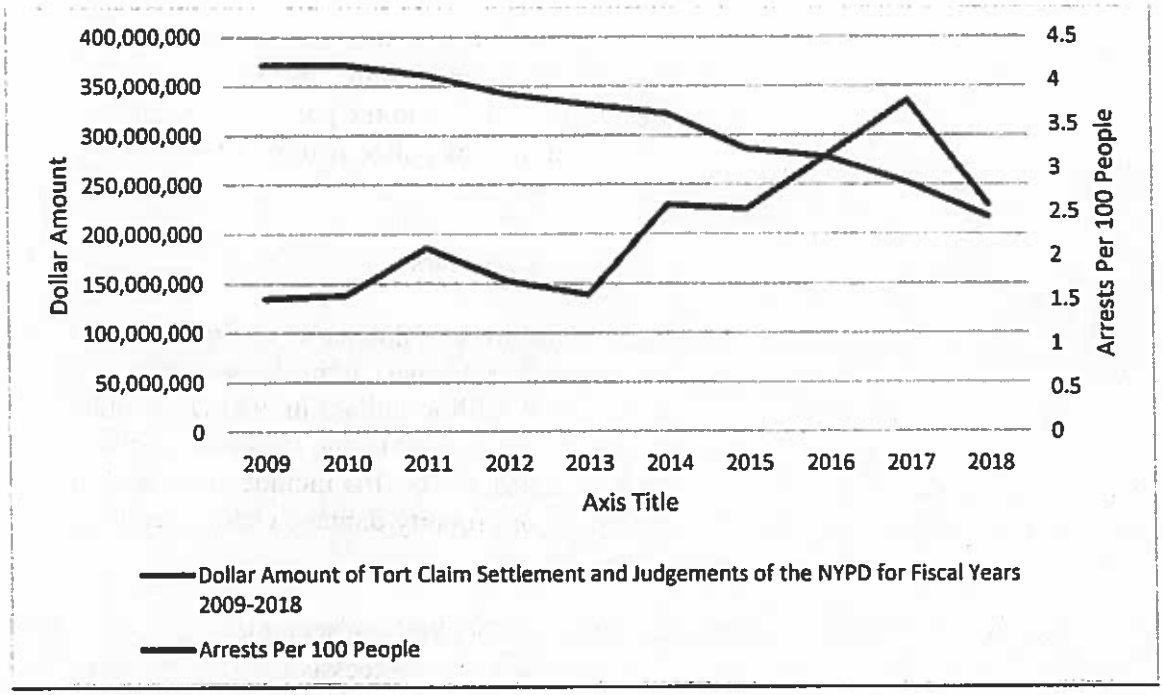
[10] Ibid at 18.

[11] Ibid.

Comptroller Annual Claims Report.[12] Thus the actual costs to taxpayers for police misconduct are even greater than the tort claim settlement and judgment numbers suggest.

We compare the comptroller's data with NYC arrests per 100 people below. Even as police interactions with the public ostensibly are going down, the total costs to taxpayers for NYPD misconduct continues to rise.

Dollar Amount of Tort Claim Settlement and Judgements of the NYPD for Fiscal Years 2009-2018, compared with NYC arrests rates for same years[13]



Communities are Harmed and Misconduct is Allowed to Flourish Under 50-a

As public defenders, we have long witnessed the lack of trust between communities of color and the police. Generations of systemic violence against communities of color at the hands of police officers have rightly made many people of color wary of any interaction with law enforcement. And the harm they may potentially experience is not abstract.

A recent study by Rutgers University identified police use of fatal force as a leading cause of death in young men.[14] The researchers found that black men in the U.S. are twice as likely to be killed

[12] NYCDS verified this with the Office of Comptroller via phone conversation on 10/15/19.
[13] Data sources: New York City Comptroller, *Annual Claims Report* 18 (April 15, 2019), available at https://comptroller.nyc.gov/reports/annual-claims-report/ and Division of Criminal Justice Services, *Adult Arrests: 2009-2018*, available at https://www.criminaljustice.ny.gov/crimnet/ojsa/arrests/nyc.pdf.
[14] Frank Edwards, Hedwig Lee, and Michael Esposito, *Risk of being killed by police use of force in the United States by age, race–ethnicity, and sex*. Proceedings of the National Academy of Sciences, 2019, available at

by police than men overall. Latinx men are 1.4 times as likely to be killed by police as their white counterparts. Frank Edwards, one of the researchers for the study, advised that "if we are going to decrease the number of civilian deaths in this country as a result of these encounters" government must increase transparency of police use-of-force.[15]

Edwards is not the only person to call for increased transparency as an antidote to persistent misconduct and killings by police. Cynthia Conti-Cook, an attorney at The Legal Society who published a law review article earlier this year, argues that:

> Courts have recognized that transparency can have a "community therapeutic value" that provides an "outlet[] for 'community concern, hostility, and emotions.'" Transparency facilitates healing. Without transparency, fear of future harm continues, officers are able to exploit the power of reliable anonymity, and lack of information further deprives family and community members of informed decision-making when considering whether to pursue justice through a civil lawsuit, a civilian complaint, political campaigns, media campaigns, or criminal prosecution.

Families of people killed by police suffer significant harm because of laws like 50-a that limit public accountability. Constance Malcolm, Ramarley Graham's mother, had to bring a lawsuit to gain access to internal NYPD records related to the investigation and prosecution of her son's death at the hands of the NYPD in 2012. Ms. Malcolm alleges that police tampered with the crime scene after her son's death when they moved his body from his grandmother's bathroom.[16] The police officer who shot Ramarley was not successfully indicted in state criminal court, was never charged with federal civil rights crimes, and was allowed to quietly resign in 2017.[17] Ms. Malcolm may never know what happened to her son because 50-a shields the officers in his case from accountability.

Gwen Carr, the mother of Eric Garner, fought for five years for the NYPD to take action against Daniel Pantaleo, the officer who killed her son in 2014.[18] Ms. Carr has been at the front lines of the advocacy efforts to repeal 50-a, along with Ms. Malcolm and other family members of people killed by the police. In 2017, Mr. Pantaleo's Civilian Complaint Review Board (CCRB) history was leaked to the press. His records showed that Mr. Pantaleo had four prior substantiated complaints for abusive stops and searches. In those four cases, the NYPD, which is not required to comply with the CCRB's recommendations, "imposed the weakest disciplinary action for two violations, and modified penalties for the other two violations."[19] Mr. Pantaleo could have been

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https://news.rutgers.edu/news/police-use-fatal-force-identified-leading-cause-death-young-men/20190729#.XaXryndFwiR.

[15] Ibid.

[16] David Colon, *City Councilmember to NYPD: Release Ramarley Graham's Records to His Family*, GOTHAMIST, Aug. 17, 2017, available at https://gothamist.com/news/city-councilmembers-to-nypd-release-ramarley-grahams-records-to-his-family.

[17] Cynthia Conti-Cook, *A New Balance: Weighing Harms of Hiding Police Misconduct Information from the Public.* 22 CUNY Law Review 157, 166, 2019.

[18] Ibid at 157.

[19] New York City Bar, *Committee Report: Allow for Public Disclosure of Police Records Relating to Misconduct: Repeal CRL 50-a* (May 2018), available at https://s3.amazonaws.com/documents.nycbar.org/files/2017285-50aPoliceRecordsTransparency.pdf.

taken off the streets years before he killed Eric Garner, but he was not. Mr. Pantaleo was fired by the NYPD earlier this year after mounting public pressure.

There is no doubt that activism by directly impacted families, along with increased media attention and new social science research, have brought increased scrutiny to actions by police, particularly excessive use of force cases and killings. But in New York, the only way to begin to allow families to heal is to drop the veil of secrecy and repeal 50-a.

Secret Police Records Harm Accused People and the Community's Faith in the Criminal Legal System

The cost of secret police records is born every day by accused people across New York State. The U.S. Constitution requires prosecutors to disclose to defendants any favorable, material evidence know to the prosecution, including evidence related to impeachment of a police officer. But 50-a makes it nearly impossible for accused people to obtain this information, denying them their right to a fair trial.

And the fact of the matter is that some police officers do lie under oath and some engage in misconduct. In 2018, the *New York Times* found that on more than 25 occasions since January 2015, judges or prosecutors determined that a key aspect of a New York City police officer's testimony was probably untrue.[20] A recent *Gothamist/WNYC* investigation in partnership with *The Appeal* found that prosecutors in all five boroughs consistently fail to document similar signs of officer dishonesty.[21] These findings are consistent with what NYCDS attorneys see on a regular basis in criminal court.

When a person's liberty is at stake, they must have access to evidence of prior untruthfulness under oath and relevant disciplinary records, including prior acts of misconduct. This evidence should be provided to accused people early on in the case so that they can better assess the weight of the evidence against them. Because of 50-a, police lie in court and abuse people in the streets with impunity, and then testify again and again against people in court. Police officers who engage in misconduct must be weeded out and jurors and judges must know about their records in order to properly assess the evidence in the case. Anything less is not a fair trial and is a violation of our clients' rights.

Conclusion

There are countless reasons why New York should repeal 50-a. The Department of State's Committee on Open Government made the argument succinctly in a December 2018 report: "It is

[20] Joseph Goldstein, *Testilying by Police: A Stubborn Problem*, N.Y. TIMES, March 18, 2018, available at https://www.nytimes.com/2018/03/18/nyregion/testilying-police-perjury-new-york.html.
[21] George Joseph & Ali Winston, *When Proosecutors Bury NYPD Lies*, GOTHAMIST, Sept. 17, 2019, available at https://gothamist.com/news/when-prosecutors-bury-nypd-officers-lies.

ironic that public employees having the most authority over peoples' lives are the least accountable relative to disclosure of government records. This situation is untenable."[22]

There is another way forward. New York State can join the rest of the country and afford police officers the same standards of privacy as other public employees. Their private records can be protected, but the public can and must have access to evidence of wrongdoing so that we can begin to rebuild communities that have been harmed for too long by NYPD officers who act with impunity.

If you have any questions about my testimony, feel free to contact me at cboyle@nycds.org.

[22] New York Department of State Committee on Open Government, *2018 Report to the Governor and State Legislature* (2018), available at https://www.dos.ny.gov/coog/pdfs/2018%20Annual%20Report.pdf. (pg 4).

Police Benevolent Association
Of The City Of New York, Inc.

NEW YORK STATE SENATE STANDING COMMITTEE ON CODES
Public Hearing: Policing (S3695), repeals provisions relating to personnel records of police officers, firefighters, and correctional officers
October 17, 2019
Senate Hearing Room, 250 Broadway, New York, New York

STATEMENT OF NYC PBA PRESIDENT PATRICK J. LYNCH

The Police Benevolent Association of the City of New York, Inc. ("NYC PBA") and its over 24,000 members, who patrol New York City's streets and do the difficult and dangerous work of protecting every resident, every visitor and every business operating within the five boroughs, submits this statement sharing our strong concerns regarding Senate Bill S.3695 and general efforts to repeal Civil Rights Law § 50-a ("CRL § 50-a")—a statute that for more than four decades has protected not only police officers and their families, but also firefighters, correction officers, paramedics, parole officers, and probation officers throughout New York State.

CRL § 50-a was enacted with overwhelming bipartisan support to protect police officers "from the use of records—including unsubstantiated and irrelevant complaints of misconduct—as a means for harassment and reprisals," a goal that all New Yorkers should share and one that, in the current climate and in light of technological advances over the last 43 years, is even more important in 2019 than it was when first enacted in 1976.

As discussed below, proposed legislation that would have such a drastic impact—stripping the civil rights of hundreds of thousands of New York union members, endangering the physical safety of countless families, destroying the careers of dedicated public servants—must be based on facts, not falsehoods. The facts should not be in dispute. Yet the entire campaign to repeal CRL § 50-a is premised on assertions that are simply and demonstrably incorrect—for example, claims that "no one [is] allowed access to police disciplinary records" under CRL § 50-a and "New York is one of only two states that still blocks access to police disciplinary records."[1] But CRL § 50-a is absolutely no bar to countless individuals and agencies responsible for police oversight accessing disciplinary records. And an independent study found that New York is one of the vast majority of states that limit public access to such documents; indeed, there are at least "23 states plus the District of Columbia where police disciplinary records are

[1] Jillian Jorgensen *et al.*, *Go away 50-a! Pols hope new democrat-led Albany will repeal roadblock to NYPD transparency*, N.Y. Daily News (Nov. 11, 2018).

pretty much always confidential."[2] In light of these and numerous other material misrepresentations, proponents of repeal have little credibility with respect to CRL § 50-a, and every legislator must understand that these activists have peddled inaccuracies in support of their position.

In addition to knowingly misleading both the public and elected officials, supporters of repeal completely ignore the serious risks to police officer safety and the reputational harm of publishing false allegations—which will unfairly impact the careers of good police officers who keep all New Yorkers safe. And just as troubling, the repeal of CRL § 50-a would leave police officers—who have been murdered simply because they are police officers—with fewer privacy rights and far less protection than any number of other professions.

Finally, it is important to note that much of the support for repeal comes from organizations and persons that represent criminals and those accused of crimes. Put simply, these entities cynically seek to repeal CRL § 50-a as a pure litigation tactic, which would enable them to use false and fraudulent misconduct allegations against police officers to derail criminal cases against their clients.

The History of CRL § 50-a

In 1974, New York State enacted the Freedom of Information Law ("FOIL"), with the stated goal of providing the public with "access to the records of government." However, from the very beginning the Legislature recognized that this right to access would not be absolute and crafted various exemptions to the law including, for example, documents that would constitute an "unwarranted invasion of privacy" or "investigatory files compiled for law enforcement purposes."

Two years later, and in light of the fact that the existing protections of FOIL were ***not*** adequately safeguarding police personnel records,[3] the Legislature—including the Democrat-controlled Assembly—overwhelmingly voted to enact CRL § 50-a.[4] The purpose of the legislation was described as follows:

> In today's milieu police officers are bearing the brunt of fishing expeditions by some attorneys who are subpoenaing personnel records in an attempt to attack the

[2] Robert Lewis *et al.*, *Is Police Misconduct a Secret in Your State?*, WNYC News (Oct. 15, 2015).

[3] The Sponsor's Memo suggests that while CRL § 50-a "may have been necessary" in 1976, that is "no longer the case today" in light of subsequent changes to FOIL protecting against "unwarranted invasions of privacy." But, this timeline—which has also been advanced by repeal activists—is incorrect. The Court of Appeals has explained that "Section 50-a was first enacted into law some two years ***after the passage*** of FOIL . . . The Legislature was well aware of the use of FOIL to obtain [police personnel] records."

[4] The bill passed in the Assembly by a vote of 122 to 24. In the Senate, it easily passed with broad bipartisan support by a vote of 48 to 4.

> officer's credibility, a tactic that has led to abuse and in some cases to the disclosure of unverified and unsubstantiated information that the records contain. It also has resulted in the disclosure of confidential information and privileged medical records.

Thus, the Legislature noted that while the ***impetus*** for CRL § 50-a was inappropriate conduct by attorneys, the ***harm*** being addressed was the release of confidential police officer information to the public.[5] As explained by the New York Court of Appeals, "the legislative purpose behind 50-a . . . was to protect the officers from the use of records—including unsubstantiated and irrelevant complaints of misconduct—as a means for harassment and reprisals." And it similarly explained in a subsequent decision that "the original legislation was sponsored and passed as a safeguard against potential harassment of officers through unlimited access to information contained in personnel files. 'It has become a matter of harassment of police officers that personnel records be constantly requested, scrutinized, reviewed and commented upon, sometimes publicly.'"

Importantly, given the incredible technological advances of the last 43 years, the protections of CRL § 50-a are needed now more than ever. In 1976, allegations of misconduct may have been printed in a local paper. In 2019, allegations of misconduct are sensationalized by media outlets hungry for clicks, are amplified by countless advocacy groups, politicians, and pundits, are the subject of a never-ending 24-hour news cycle, and are posted on the internet for the entire world to see. And with the wealth of personal information now available on the internet—including not only telephone numbers and home addresses, but also the names and addresses of close relatives—any unstable individual who takes published allegations of misconduct as inspiration or justification to harm a police officer or police family member needs only a few minutes searching in order to locate his or her target. The potential for harassment and reprisals—the harm the Legislature sought to protect against—has increased exponentially over the last four decades.[6]

CRL §50-a Provides Countless Individuals and Agencies with Access to Police Personnel Files

CRL §50-a provides a thorough statutory framework that has been enforced for more than 40 years to balance the safety and privacy interests of police officers with the public's interest in transparency. The statute contemplates that "personnel records used to evaluate

[5] It also noted the importance of protecting civil liberties, stating that "as with all citizens, the civil rights of police officers must be protected" because "these rights are sacred."

[6] The argument raised in the Sponsor's Memo that existing FOIL exemptions are "sufficient for protecting police" is seriously misguided and dangerous. First, the application of FOIL exemptions like the "unwarranted invasion of privacy" is entirely discretionary, which means that they in fact provide ***zero protection*** for police officers. Second, time-and-time again government agencies have shown that they cannot be relied upon to safeguard sensitive information in the FOIL context. For example, in response to a recent FOIL request, New York City inadvertently produced confidential names and numbers on two separate occasions, with its lawyer stating "the words that were to be redacted were not actually blacked out. I have no explanation for it. It is an embarrassing situation. I really don't know why it happened." *See* Stephen Brown, *FOIL-ed again! City attorneys mistakenly release confidential information on NYPD's facial recognition program for second time*, N.Y. Daily News (July 14, 2019).

performance toward continued employment or promotion . . . shall be confidential," but provides numerous carve-outs and exceptions to that general rule. First, the statute expressly states that it is no bar to various officials and agencies with responsibility for police oversight accessing police personnel records. Second, it provides a clear mechanism for any "person" to access such files, either through a court order or the consent of the relevant officer. Accordingly, the repeal activists' claim that "no one [is] allowed access to police disciplinary records" under CRL § 50-a is plainly false.

The plain language of CRL § 50-a(4) states that the law simply "***shall not apply***" to numerous individuals and entities that the public has entrusted to oversee police officers. CRL §50-a does not apply to "a grand jury." It does not apply to "any district attorney." It does not apply to "the attorney general." It does not apply to any "county attorney." It does not apply to "a corporation counsel." It does not apply to a "town attorney" or a "village attorney." And it includes a catchall phrase, which makes clear that the law does not apply to "any agency of government which requires the records . . . in the furtherance of their official functions." Thus, even outside entities such as the New York City Civilian Complaint Review Board ("CCRB") — which is widely viewed as having an institutional bias against police officers—also have access to police personnel files.[7] As explained by Margaret Garnett—former Executive Deputy Attorney General for Criminal Justice in the Attorney General's Office and head of the division that has oversight over police shootings of unarmed individuals—in her experience "50-a hasn't impeded any criminal investigations" because "it's not a shield for exposure to prosecutors."[8]

The statute further includes a procedure whereby members of the public can access police personnel files either through a court order or via the consent of the police officer at issue. Importantly, the law contemplates a legal process that includes all interested parties—such as the person making the request and the police officer—having an opportunity to be heard. Indeed, cases where courts have conducted *in camera* reviews and then ordered the production of police personnel records are numerous.

Like New York, the Vast Majority of States Limit Access to Police Disciplinary Records

New York is one of the vast majority of states that have made the reasoned decision to limit access to police personnel records. In fact, an independent study conducted by WNYC—which is certainly not a pro-police entity—found that there are "***23 states plus the District of Columbia where police disciplinary records are pretty much always confidential.***" Moreover, it found that in a further 15 states police personnel records have "limited availability."[9] And

[7] To the extent that activists do not believe that these oversight agencies are achieving "accountability," they should direct their advocacy at reforming the policies and processes of these agencies, as opposed to stripping the civil rights of hundreds of thousands of New Yorkers. As repeal activists have not articulated any realistic mechanism by which so-called "transparency" will engender "accountability," accessing individual officer files will serve no purpose other than to villainize and harass.

[8] Jeff Coltin, *Records standoff between NYPD and Vance continues*, City & State (July 17, 2018).

[9] Robert Lewis *et al.*, *Is Police Misconduct a Secret in Your State?*, WNYC News (Oct. 15, 2015).

even in the very small minority of states—such as Utah—where police records are sometimes public, "many of these states still make records of unsubstantiated complaints or active investigations confidential,"[10] unlike the situation that would exist if a repeal is successful. Thus, the repeal of CRL § 50-a could see New York earn the very dubious distinction of being dead last—50th out of 50 states—in protecting the safety and privacy of police officers and their families.

Recent Court Decisions Have Taken an Exceedingly Narrow Approach to CRL § 50-a

The Sponsor's Memo cites a 2014 report for the assertion that courts have "expanded" CRL § 50-a to "allow police departments to withhold from the public virtually any record that contains any information that could conceivably be used to evaluate the performance of a police officer." However, court decisions from 2019—not 2014—make clear that the exact opposite is true. In fact, New York's appellate courts have been interpreting the statute so narrowly that documents indisputably "used in employee performance evaluations" are being found to fall outside the scope of CRL § 50-a.

The Third Department's recent decision in *Prisoners' Legal Services of New York v. New York State Department of Corrections & Community Supervision* is instructive. 173 A.D.3d 8 (2019). There, the Court was faced with the question of whether CRL § 50-a applied to use of force reports, which are used to detail any incident that a corrections officer "uses physical action to resolve." There was no dispute that these reports are used to "evaluate performance," indeed the Court noted that they could "prompt an investigation that may lead to disciplinary action or even criminal prosecution."

If the sponsors' assertion that courts are construing CRL § 50-a broadly were correct, there is no doubt that these use of force documents would be covered by the statute. But a unanimous panel of five appellate judges emphatically rejected that conclusion. Instead, they attempted to severely limit the application of CRL § 50-a through a new and additional requirement—according to the Third Department, it is not enough that a document is used to evaluate the performance of first responders, it now has to be "solely used for that purpose" to be protected. Moreover, the Third Department is not alone in devising novel approaches to narrow the scope of CRL § 50-a. Earlier this year, the First Department announced its own new CRL § 50-a standard—that in addition to being used to evaluate the performance of a police officer, the record must also be "primarily generated for, [or] used in connection with any pending disciplinary charges or promotional processes." *PBA v. de Blasio*, 171 A.D.3d 636 (1st Dep't 2019).

Despite CRL § 50-a being construed very narrowly, supporters of repeal nevertheless continue to make the same old "broad interpretation" argument, which again highlights that there is simply no legitimate basis or need to address CRL § 50-a.

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[10] *Id.*

Absent CRL § 50-a, Police Officers Would Have Far Less Protection than other Professions

The Sponsor's Memo erroneously claims that repeal will simply provide police officers with the same privacy protections as "all other public employees." However, New York State has confirmed that if CRL § 50-a were repealed, police officers would in fact receive ***far less*** protection than state-licensed professionals.[11]

The New York State Education Department—tasked with investigating misconduct related to virtually all licensed professions—states that unsubstantiated claims it receives are ***not*** public and many substantiated claims are in fact kept confidential. Specifically, "complaints are accusations of professional misconduct; ***those that do not result in disciplinary action are confidential.***"[12] Moreover, "minor forms of misconduct may be handled through advisory letters or administrative warnings . . . ***these administrative actions are confidential.***" In light of the fact that—unlike massage therapists, speech pathologists, interior designers, and geologists—police officers have been targeted for assassination on numerous occasions simply because of their uniform, the safeguards in place to protect them must be ***more robust*** than those of licensed professionals, ***not less.***[13]

The same is true with respect to teachers, who have protections that are in many ways similar to CRL § 50-a. For example, Education Law § 6510(8) specifically states:

> The files of the Department relating to the investigation of possible instances of professional misconduct, or the unlawful practice of any profession licensed by the board of regents, or the unlawful use of a professional title or the moral fitness of an applicant for a professional license or permit, ***shall be confidential and not subject to disclosure at the request of any person, except upon the order of a court in a pending action or proceeding.***

Moreover, the New York State Committee on Open Government recently issued an Advisory Opinion noting that pursuant to Education Law § 3020-a, whenever a teacher is acquitted of misconduct claims the "charges must be expunged from the employment record" in order "to preclude unsubstantiated charges from being used unfairly against or in relation to a tenured

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[11] http://www.op.nysed.gov/opd/opdfaq.htm (FAQ, "How can I find out if there have been any disciplinary actions against a licensee?").

[12] *Id.*

[13] The list of state-licensed professionals that would have far stronger privacy protections in the event of a CRL § 50-a repeal includes: Acupuncturists, Architects, Athletic Trainers, Behavior Analysts, Certified Public Accountants, Chiropractors, Dentists, Dental Hygienists, Dietitian-Nutritionists, Engineers, Geologists, Interior Designers, Laboratory Technicians, Land Surveyors, Landscape Architects, Massage Therapists, Medical Physicists, Mental Health Practitioners, Midwives, Nurses, Occupational Therapists, Opticians, Optometrists, Perfusionists, Pharmacists, Physical Therapists, Podiatrists, Polysomnographic Technologists, Psychologists, Respiratory Therapists, Social Workers, Shorthand Reporters, Speech Pathologists, and Veterinarians. *See* http://www.op.nysed.gov/prof/.

teacher." Again, there is no valid justification for police officers to receive less privacy protection than teachers, yet that would be the reality of a CRL § 50-a repeal.

Finally, it is critical for the Codes Committee to understand why privacy rights are so important to police officers and why they absolutely need the protections of CRL § 50-a. The job of a New York City Police Officer is truly unique. They are charged with at all times abiding by every single rule and regulation in a Manhattan telephone-book-sized patrol guide, which is constantly being amended via mass emails from the Department. They are subject to tremendous scrutiny from their superior officers (sergeants, lieutenants, captains etc.), the Police Commissioner, the CCRB, the Internal Affairs Bureau, the NYPD Inspector General, the Mayor's Office, the City Council, City and State prosecutors, State and Federal Courts, the Federal Monitor, the media, advocacy groups, and the public. They are responsible for making split-second decisions under exceedingly stressful circumstances, which will be endlessly second-guessed by these entities and individuals (from the safety of their offices and with the benefit of unlimited time). They are sent out to implement the policies of high-ranking police officials and politicians—policies they have no role in creating, and yet they bear 100% of the blame when those policies fail. Moreover, the relatively small cadre of police officers who are tasked with the most critical and sensitive duties—namely, hands-on proactive enforcement to remove guns, narcotics and violent offenders from the streets—experience the greatest exposure to retaliatory complaints and heightened bureaucratic scrutiny. In short, there are innumerable ways that the best and brightest police officers can find themselves in disciplinary proceedings, through absolutely no fault of their own. Against this backdrop, it would be patently unfair to risk the lives and destroy the careers of well-performing, hard-working police officers by repealing CRL § 50-a.

CRL § 50-a is Crucial if New York State Believes it is Important to Protect Police Officers and Their Families From Physical Harm

The confidentiality protections afforded by CRL § 50-a are absolutely vital to protect the safety of the tens of thousands of New York police officers and their families. To be clear, police officers are human beings; they are mothers and fathers and sisters and brothers; they are constituents and residents of New York's communities. It is well-documented that when criminals and others have been able to access police officer information, they have used it to harm, harass, and threaten. This is not limited to access to addresses and phone numbers. In this technological age, it should go without saying that access to details of an incident can be relied upon to identify and locate an officer or officer's family. For example:

- According to the U.S. Department of Justice, an alleged murderer recently attempted to send a mail bomb to the New York City police officers who arrested him. He had methodically "conducted internet searches and made telephone calls to determine the locations of the officers' residences." The bomb, however, was sent to the wrong address and the civilian who received the package was murdered when the bomb detonated.[14]

[14] Press Release, *Brooklyn Man Arrested for Using a Weapon of Mass Destruction*, United States Department of Justice (Feb. 28, 2018).

- According to NYPD Police Commissioner James O'Neill's testimony to the New York City Council, an arrested individual was recently able to locate the home address and telephone number of a New York City police officer and left the following threatening voicemail:

  *Hey, [officer's name], highway cop motherf**ker. Hope all is well. I'll be seeing you very shortly. I hope you and your family on [address of officer's family] are doing very well. I'll see you soon.*

- According to the NYPD's Deputy Commissioner for Intelligence and Counterterrorism, threats against New York City police officers are so prevalent that the Department has had to create a special unit—the Threat Assessment and Protection Unit ("TAPU")—to handle them. Since 2016, TAPU has received over 1,000 threats, including a person who recently filed a CCRB complaint and then stated that a detective who died in the line of duty "got what he deserved" and that another police officer "was next."[15]

- In California, the identity of an officer involved in a shooting incident was recently leaked. Activists were able to track him down using a wedding website, and stormed his wedding celebration yelling "murderer." In the wake of the incident, the organizer said that "I think [police officers] need to be approached in spaces where they're a little more vulnerable."

- According to NYC Inspector General Margaret Garnett, CRL § 50-a is meant to protect officers from retaliation, as "some officers have required around-the-clock protection at their homes after being accused of misconduct."[16]

If Civil Rights Law 50-a is repealed, the safety of New York police officers and their families will be placed in jeopardy and a valuable weapon will be provided to those who would seek to do harm to members of law enforcement. Those who doubt that the repeal of CRL § 50-a would increase the risks to police officers need only look at the actions of the unhinged killer with a grudge who travelled from Maryland to New York City and murdered NYPD Police Officers Wenjian Liu and Rafael Ramos simply because of the uniform they wore. Revealing the names, circumstances of incidents, and allegations involving police officers would serve to increase the risks to police officers, and simply dismissing these risks will not make them go away. Nevertheless, there is nothing to suggest that the agitators for repeal have seriously considered the impact it would have on the safety of police officers, their families, and other

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[15] Affidavit of John J. Miller, dated September 14, 2018. The Miller affidavit details numerous other threats and assaults that occurred following the release of police officer information, including (1) a retired police captain who was "violently assaulted" by an individual claiming to know "where the retired captain lived" and "that the captain had a new baby at home"; (2) a precinct commander whose "family received death threats by telephone" after his personal information was revealed; and (3) a police captain who received threats that she would be assaulted when she arrived at her home after protesters chanted her home address.

[16] Jeff Coltin, *Records standoff between NYPD and Vance continues*, City & State (July 17, 2018).

public servants, and in the event that a police officer or other public sector employee or his or her family is harmed as a result of ill-considered changes to the law, New Yorkers will look critically at those who disturbed a policy that has served to protect public safety workers for decades.

Finally, there is ample evidence that in the current climate, police officers are increasingly targeted by the public simply for being police officers—even without the reliance on confidential information. For example, in 2017, NYPD Police Officer Miosotis Familia was murdered by a man who had previously "ranted against police in a disjointed, 11-minute Facebook Live video" about unspecified allegations of misconduct. Recently, numerous videos have surfaced showing emboldened incendiaries threatening and physically assaulting New York City police officers. Indeed, in the last few months alone, NYC Police Officers have been shot, hit by cars, punched in the face, had concrete thrown at them from rooftops, been hit with plastic buckets, and pelted with Chinese food, milk, and water. This strongly reaffirms the purpose of CRL § 50-a. Increasing public access to confidential personnel files will only exacerbate this already volatile situation, and will directly undermine any effort to improve police-community relations.[17]

Repeal Would Result in Significant Reputational And Other Harms

In addition to ignoring the dire safety risks, many proponents ignore the reputational harm that will be inflicted on police officers in the event that CRL § 50-a is repealed. As briefly discussed above, it has long been the public policy of New York State to keep unfounded and unsubstantiated allegations of misconduct confidential. This public policy reflects an awareness of the unavoidable and irreparable harm to one's reputation and livelihood resulting from the publication of unfounded accusations. In short, no matter the job, nobody—not state legislators, not police officers—should have unsubstantiated allegations ruin their lives and derail their careers. Nevertheless, the repeal of CRL § 50-a would inexplicably allow for the publication of false allegations against police officers, which will not only unfairly tarnish their careers and reputations, but also see them being treated worse than a host of other professionals (none of whom deals with the same dangers as police officers).[18]

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[17] Advocates make a patently absurd and incredibly naïve argument regarding police officer safety: that some disciplinary records were released in Chicago and they are not aware of any "reports" of police officers being attacked as a direct result. This argument completely misses the point (as the activists know full well). If CRL § 50-a is repealed, the media will publish sensationalized stories based on unsubstantiated allegations of police misconduct. These accounts—specifically designed to be controversial to generate clicks and internet traffic—undoubtedly would contribute to a climate where certain individuals feel that it is acceptable to attack police officers.

[18] As an illustration of how far activists are willing to go to tarnish NYC Police Officers, Joo-Hyun Kang—the Director of Communities United for Police Reform—tweeted the following just ***two days*** after hero NYC Police Officer Brian Mulkeen was tragically killed in the line of duty:

"[PO Mulkeen] was the named cop in a case settled with accusations of false arrest and retribution."

This was a classic "nuisance" settlement, where New York City unfortunately makes a business decision that it is cheaper to pay a nominal settlement—here, $15,000—than to litigate the case in court, even

As City Councilmember Donovan Richards recently admitted:

> Many of our NYPD officers have believed that they would not get a fair shake, only to find that they were exonerated by a thorough [CCRB] investigation. . . . [T]hat happens in a lot of cases. In fact, the large majority of CCRB complaints are not substantiated. . . . I have to acknowledge that many times being a police officer involves making difficult decisions and walking a fine line. And while an individual might not like the way they were treated, there are times when something upsetting doesn't rise to the level of misconduct.[19]

Indeed, CCRB's own statistics completely undermine the case for the repeal of CRL § 50-a and in fact illustrate the remarkable work being done by NYC Police Officers. Out of approximately ***20 million*** annual police/citizen interactions, in 2018 only 10,660 even resulted in a complaint to the CCRB (0.05%), despite CCRB making more than 1,000 public presentations in an effort to solicit more claims. And of those 10,660 complaints, CCRB—which has a well-earned reputation for its anti-police bias—was only able to substantiate 2.1% (226 complaints). The fact of the matter is that virtually all police interactions result in no complaints, and virtually all complaints result in no finding of misconduct.

It would be patently unfair for a police officer to have allegations that are ultimately found to be unsubstantiated nevertheless published on the internet for the world to see. And that unfairness is further compounded by the fact that individuals regularly lodge false misconduct claims against police officers in the hope of financial gain, or to simply retaliate against police officers doing their jobs. For example, a recent video captured a man bragging about assaulting police officers and then filing lawsuits against the City, stating that the cops "get hurt and I get paid. I got three lawsuits, working on number four."[20]

Supporters of Repeal Would Have Police Officers Treated Less Favorably than those Convicted of Crimes

To further illustrate the inequity of this proposed legislation, the repeal of CRL § 50-a would have police officers treated worse than those accused and even convicted of crimes. Specifically, under New York law those who receive favorable results in criminal cases automatically have their records sealed, and many records of criminal convictions may now also be kept confidential. By contrast, absent CRL § 50-a, police officers acquitted of misconduct will still have all allegations—including false claims—made public.

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where the allegations are completely meritless. Nevertheless, Ms. Kang tweeted a link to the complaint which contained nothing more than unsubstantiated allegations of misconduct. That repeal activists are willing to sink this low and smear a police officer who had just died keeping our City safe is both troubling and telling.

[19] January 22, 2019 City Council Committee on Public Safety Hearing.

[20] *See* Rocco Parascandola *et al.*, *SEE IT: Man beaten by cops with batons in Washington Heights bragged about suing the NYPD BEFORE controversial clash*, N.Y. Daily News (Jan. 9, 2019).

In light of this incongruity, progressive commentators have now recognized that taking wholly inconsistent positions on CRL § 50-a and other issues—*i.e.*, being for privacy for criminal records, but against privacy for police records—in fact does far more harm than good. Indeed, one prominent public defender recently argued that reform values "require consistency" and noted that "calling for harshness for one leads to harshness for all." Moreover, the New York State Senate has plainly recognized the many harms associated with the publication of records of misconduct (much less the publication of mere allegations of misconduct)—indeed, in the Sponsor's Memo for Senate Bill S.6579-A (vacating marijuana records), Senator Bailey specifically cited the fact that public "records can follow a person for the rest of one's life and impact the ability to access jobs" and various other necessities. It is patently intellectually inconsistent to value the privacy concerns of those accused or convicted of crimes, while ignoring the privacy concerns of police officers and other first responders.

Moreover, according to progressive voices, there would be many unintended and undesirable consequences of a CRL § 50-a repeal. For example, during an October 4, 2019 New York Law School presentation entitled "Policing the Police—Enforcing Transparency and Accountability," panelists highlighted two likely outcomes of repeal:

- **The publication of police disciplinary records will adversely impact the most vulnerable police officers.** As noted above, given the innumerable rules and regulations that govern police officers and the incredible amount of oversight they face, there are countless ways that even the most competent police officer can find herself facing discipline. Accordingly, police discipline is inherently arbitrary—those who get brought up on charges are generally ***not*** so-called "bad apples," but rather are those police officers who fall victim to the biases of their supervisors (based on race, gender, appearance, popularity etc.). Thus, commentators have suggested that repeal—and the reputational and other harms it brings—will have a hugely negative impact on our minority and women police officers. It is the NYC PBA's membership—which, at 55% persons of color and 20% female, is significantly more diverse than the superior ranks of the NYPD—that will unfairly bear the brunt of a CRL § 50-a repeal.[21]

- **The publication of police disciplinary records may cause police departments to "circle the wagons" and impose less discipline.** Commentators have argued that if increased accountability is the goal, the repeal of CRL § 50-a will have the exact opposite effect. If supervisors know that alleging misconduct could lead to a front page story in the tabloids, or might destroy a police officer's reputation, or will place her at risk of physical harm, common sense dictates that they will think twice about pursuing discipline. As it stands now, police officers are in fact governed by robust systems of discipline that are already viewed by many to be overly punitive.

[21] For the avoidance of any doubt, the NYC PBA only represents NYC Police Officers, not superior officers like Captains and Lieutenants. Our members are on the receiving end of discipline, and do not discipline others.

Calls for the Repeal of CRL § 50-a are Based on Numerous Falsehoods

The liberties that the repeal activists have taken with the record should speak volumes to any legislator willing to consider this issue with an open mind. Faced with a set of facts that plainly does not support repeal, activists have instead resorted to half-truths, misleading sound bites, and hashtags in a desperate attempt to gain access to sensitive police personnel files. By way of example only, they publicly claim that:

- "New York is now one of only two states that still blocks access to police disciplinary records," even though it is undisputed—as confirmed by an independent study—that in fact the vast majority of states protect such records.[22] This assertion was made by Cynthia Conti-Cook, who is perhaps the most vocal proponent of repeal.

- California no longer "blocks access to disciplinary records." In fact, California recently ***amended*** its law to provide public access to a narrow subset of records such as those relating to incidents involving an officer's discharge of a firearm at a person or where officer use of force results in "death or great bodily injury." It did not "repeal" the entire law or provide access to the entirety of an officers' personnel records, as the activists now call on the New York State Legislature to do.

- "No one [is] allowed access to police disciplinary records" under CRL § 50-a, even though the statute expressly provides that numerous individuals and agencies with police oversight are allowed access to police disciplinary records.

- They merely want police officers to "have the same level of privacy protection that other public employees, like teachers, and other state-licensed professionals expect regarding their disciplinary records," even though they know—and as the website they have specifically cited in support confirms—that repeal would in fact give first responders far less protection.[23]

- Repeal is necessary because courts are construing CRL § 50-a broadly, even though New York appellate courts have in fact recently bent over backwards to construe the statute as narrowly as possible.

All New Yorkers—and particularly our elected officials—should be troubled by the activists' attempts to repeal civil rights by false pretenses.[24]

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[22] Jillian Jorgensen *et al.*, *Go away 50-a! Pols hope new democrat-led Albany will repeal roadblock to NYPD transparency*, N.Y. Daily News (Nov. 11, 2018).

[23] Cynthia Conti-Cook & Dan Quart, *Holding law enforcement accountable begins with full repeal of 50-a*, City & State (Feb. 6, 2019).

[24] Similarly, the activists may have the audacity to cite a NYC Bar Association report calling for repeal of CRL § 50-a. This report was authored by Cynthia Conti-Cook, who has been heavily involved in litigation challenging the law. Nevertheless, Ms. Conti-Cook did not disclose this clear conflict of interest in her original report. After this conflict was brought to the attention of the City Bar, it was

There is No Credible Evidence that New Yorkers Support the Repeal of CRL § 50-a

Finally, it is extremely important to put the repeal movement in the proper context. It has been pressed mainly, if not exclusively, by advocate groups, many of which play an active role in support of criminals and the criminal accused in our justice system. These activists seek to repeal CRL § 50-a as a vehicle to call into question every police action, arrest, and conviction (not to mention tarnish the reputations of all police officers). Institutional providers of indigent defense services, for example, have made a concerted effort to weaponize police personnel records obtained in the course of their criminal defense activities, by funneling them to a sympathetic and sensationalistic press in order to poison jury pools and obtain acquittals for their criminally accused clients. However, there is no evidence that the public at large seriously questions police discipline throughout New York State or demands the disclosure of first responder personnel files.

Moreover, if the activists were truly interested in "accountability," rather than looking to repeal CRL § 50-a they would join the NYC PBA in seeking an improved disciplinary system—one that includes a fair process, and progressive and commensurate forms of preventive, supportive, and corrective discipline. As many have observed, there is simply no nexus between the "transparency" sought here—the wholesale publication of all police disciplinary records, including false and fraudulent claims—and the activists' alleged goal of "accountability."[25] Accordingly, instead of repealing a law that keeps New Yorkers safe in the name of so-called "accountability," elected officials and interested parties should focus on ensuring that a fair disciplinary system is in place—for example, through the use of truly neutral arbitrators, which the NYC PBA has advocated in favor of for years.

* * *

In light of all of the foregoing, the NYC PBA strongly opposes any efforts to repeal Civil Rights Law § 50-a.

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forced to issue a revised report stating that Ms. Conti-Cook "participated significantly in drafting the report" and is employed by the Legal Aid Society, which has "been engaged in litigation over the appropriate interpretation of the scope of section 50-a."

[25] Moreover, the hypocrisy of the repeal activists with respect to "transparency" should not go unnoticed by this Committee. Earlier this month, NYCLU—one of the most vocal advocates of repeal—successfully challenged a State law that would have required it to be transparent about its donors. As a state official noted, "everyone preaches transparency until transparency shows up on their own front door."

COBA PRESIDENT ELIAS HUSAMUDEEN'S TESTIMONY ON POTENTIAL LEGISLATIVE CHANGES TO SECTION 50-A OF THE CIVIL RIGHTS LAW

October 17, 2019

Sen. Jamaal T. Bailey
Chairman
Senate Standing Committee on Codes
250 Broadway
New York, NY 10007

Good afternoon Chairman Bailey and members of this committee. My name is Elias Husamudeen and I am President of the Correction Officers' Benevolent Association (COBA), the second-largest law enforcement union in the City of New York. My members, also known as New York City's Boldest, oversee the second-largest municipal jail system in the United States.

I thank you for inviting me to come before you and to share with you the grave concerns we have concerning the potential changes or proposed repeal of Section 50-A.

In 1981, an amendment was made to Section 50-adding local Correction Officers to the protected class of law enforcement officers, which highlighted the fact that statutory protection should be expanded because of the increasing number of legal actions brought by inmates and ex inmates of correctional facilities which had been accompanied by an increase in the number of requests from attorneys representing them for unlimited access to personnel records of Corrections Officers. Corrections Officers are concerned that such unrestricted examinations of their personnel records increase their vulnerability to harassment or reprisals. To help alleviate this concern and to promote better relations between Corrections Officers and their governmental employers, this legislation imposed reasonable limitations on access to personnel records in the custody of a sheriff's office or county department of corrections.

Additionally, this amendment, declared that the described abuses of personnel information, which the amendment was designed to prevent included 'harassment or reprisals' against an officer or his/her family.

Currently, Correction Officers facing disciplinary hearings have their cases adjudicated by the Office of Administrative Trials and Hearings (OATH). And the rulings and recommendations of OATH judges concerning Correction Officers disciplinary matters are made public.

A couple years ago, COBA's attorneys filed a lawsuit in State Supreme Court arguing that Section 50-A of New York State's civil rights law, which makes law enforcement records confidential should be extended to records about corrections officers that are now published by the city's administrative court, OATH.

Today's increased social media climate, coupled with the rise in gang activity in our jails, necessitates taking this action to protect our officers, their families and their loved ones from potential retaliatory action.

Our position in this debate over the potential repeal of 50-A is somewhat unique. Not only are we calling for the personnel records of law enforcement officers to remain private, we're also calling for added protections for our members to prohibit OATH from publishing the disciplinary reports and recommendations made by Administrative Law Judges concerning our members. In short, Correction Officers should have the same protections as Police Officers concerning the privacy of their personnel records.

Our members are exposed to dangerous gangs every day-gangs that communicate from jail to other gang members on the street. Increasing the accessibility of our members personnel records not only jeopardizes the safety of our members, it also jeopardizes the safety of their families, which was raised as legitimate concern dating back to 1981.

Sadly, our culture today is consumed with punishing and demonizing law enforcement officers, including Correction Officers. Criminal Justice Activists have made us all the enemy. The reality is we are the last line of defense between public safety and lawlessness. The very fact that the legislature is even considering this misguided measure that serves only to appeal to the criminal justice activists at the expense of our lives and the lives of our families as well is indeed disheartening.

Perhaps whenever an inmate who served time or was accused of a violent crime re-enters our community, the State of New York should post an online database detailing the extensive rap sheet of that individual so neighborhoods, schools, and after school programs could be made aware of the potential threat. We do that now for sexual predators, but we don't do it for all criminals.

In closing, on behalf of my 10,000 members who put their lives on the line every day on behalf of this city and on behalf of their families, I strongly urge you not to repeal 50-A and in fact, expand its protections to better protect my members from the clear and present dangers they face on and off the job. It's about safety and security. That's the bottom line. With that, I'm happy to answer any questions you may have.

Testimony of Alvin Bragg
Co-Director of the New York Law School Racial Justice Project

New York Senate Standing Committee on Codes
October 17, 2019
250 Broadway
New York, NY 10007

Regarding the Repeal of New York Civil Rights Law Section 50-a

Alvin Bragg, on behalf of the New York Law School Racial Justice Project, respectfully submits the following testimony today regarding the repeal of N.Y. CIV. RIGHTS LAW § 50-a.

The Racial Justice Project is a legal advocacy organization dedicated to protecting the constitutional and civil rights of people who have been denied such rights on the basis of race, and to increasing public awareness of racism and racial injustice in, among other areas, the areas of education, employment, political participation, economic inequality, and criminal justice. The Racial Justice Project's work includes impact litigation, appellate advocacy, legislative advocacy, training, and public education.

For the reasons outlined below, the Racial Justice Project expresses full support for the repeal of N.Y. CIV. RIGHTS LAW § 50-a.

Overview of N.Y. CIV. RIGHTS LAW § 50-a

N.Y. CIV. RIGHTS LAW § 50-a provides that police officers' "personnel records used to evaluate performance toward continued employment or promotion" "shall be considered confidential" and not subject to public disclosure absent the officer's consent or a court order.[1] The New York Court of Appeals has held that N.Y. CIV. RIGHTS LAW § 50-a was enacted to protect police officers from the use of personnel records for "harassment and reprisals and for purposes of cross-examination by plaintiff's counsel during litigation."[2] Straying far from this legislative purpose, police departments and municipalities: (a) employ an overly broad conception of what constitutes a personnel record;[3] (b) use the law as a shield against disclosure of even the most basic information (*e.g.*, the identity of police officers at the scene of a civilian death caused by police use of force);[4] and (c) inconsistently invoke the law to release materials selectively.[5]

Overview of *NYCLU v. NYPD*

In late 2018, in *New York Civil Liberties Union v. New York City Police Dep't*, 32 N.Y.3d 556, 564 (2018), the New York Court of Appeals broadly interpreted N.Y. CIV. RIGHTS LAW § 50-a. This ruling makes it even more important to repeal N.Y. CIV. RIGHTS LAW § 50-a.

The NYCLU submitted a Freedom of Information Law ("FOIL") request to the New York City Police Department ("NYPD") seeking copies of all internal disciplinary proceedings and adjudications arising from cases in which the Civilian Complaint Review Board ("CCRB") had substantiated charges against a member of the NYPD from January 1, 2001 to August 17, 2011, the time at which the FOIL request was made. The NYPD denied the request, invoking N.Y. CIV. RIGHTS LAW § 50-a. The NYCLU administratively appealed; the NYPD granted the appeal in part. The NYCLU then commenced a CPLR Article 78 proceeding, seeking disclosure of the withheld NYPD disciplinary records. The Supreme Court ordered the NYPD to select five random adjudication decisions, redact them to remove information identifying officers who were the subjects of the complaints, and submit the decisions for *in camera* review. The Supreme Court deemed the redactions adequate and ordered that the remainder of the requests were to be done in the same manner as the five *in camera* submissions. The NYPD appealed, and the First Department unanimously reversed and dismissed the proceeding.

Upon the NYCLU's appeal, a divided Court of Appeals held that police personnel records are exempt from disclosure pursuant to the Freedom of Information Law ("FOIL"), Public Officers Law Section 87(2)(a), and N.Y. CIV. RIGHTS LAW § 50-a. Effectively, the decision eliminates access to such records through FOIL and thereby bars access to police personnel records, even if the records are redacted and the police department itself is willing to release them.[6]

N.Y. CIV. RIGHTS LAW § 50-a Urgently Requires Repeal

Public access to police disciplinary decisions is critical to maintaining public confidence in law enforcement and ensuring that NYPD disciplinary actions are properly pursued and adjudicated. As the law is an obstacle to promoting these important policies, N.Y. CIV. RIGHTS LAW § 50-a should be repealed in its entirety.

N.Y. CIV. RIGHTS LAW § 50-a is Not Necessary for Law Enforcement Purposes

N.Y. CIV. RIGHTS LAW § 50-a is wholly unnecessary for law enforcement purposes. FOIL provides that a police department or prosecutorial office may withhold records from public disclosure on the basis that the records "are compiled for law enforcement purposes and which, if disclosed, would . . . interfere with law enforcement investigations" or reveal non-routine criminal investigative techniques.[7] FOIL also expressly allows records not to be released publicly if disclosure "would constitute an unwarranted invasion of personal privacy" or "could endanger the life or safety of any person[,]" thereby making N.Y. CIV. RIGHTS LAW § 50-a unnecessary to protect police officers' safety or privacy.[8]

N.Y. CIV. RIGHTS LAW § 50-a Undermines Effective Law Enforcement

The anti-transparency application of N.Y. CIV. RIGHTS LAW § 50-a erodes community trust in policing and prosecutions and, thereby, undermines effective law enforcement. Disclosure of police-civilian interactions is essential to effective policing and prosecutions. Such disclosure provides critical information to the public and fosters dialogue about needed systemic reforms that can improve police-community relations and avoid future tragic police-community interactions.

By way of example, I oversaw a unit at the New York State Attorney General's Office that investigated police use of lethal force.[9] Based upon input we received from families whose loved ones were killed by police, we decided, for each investigation that did not result in a criminal charge, to issue public reports of our investigative findings. These public reports: (1) named the involved officers; (2) provided accounts of interviews of police officers; (3) released video of police officer actions; and (5) attached forensic reports concerning, for example, ballistics and DNA evidence.[10] The disclosure of this information fostered productive police-community dialogue.

The Lack of Transparency Concerning Eric Garner's Death is a Prime Example of Why N.Y. CIV. RIGHTS LAW § 50-a Requires Repeal

The lack of transparency concerning Eric Garner's death underscores the need to repeal N.Y. CIV. RIGHTS LAW § 50-a.

The Racial Justice Project is co-counsel in a lawsuit that was filed in August 2019 against the Mayor and the Police Commissioner of the City of New York (among others) by Gwen Carr and Ellisha Flagg Garner (Eric Garner's mother and sister), Constance Malcolm (whose son Ramarley Graham was killed by the NYPD in February 2012) and several organizers and advocates for police accountability. The lawsuit was filed, because ***more than five years*** after Mr. Garner's death, the public and his family are still being denied access to fundamental information concerning his death, including even the identity of all of the police officers at the scene of his arrest. The City uses N.Y. CIV. RIGHTS LAW § 50-a to facilitate this lack of transparency.

The lawsuit seeks a judicial inquiry, during which City officials would be required to testify under oath to provide details about issues such as:

- The filing of a false arrest report claiming that no force was used in effecting the arrest of Mr. Garner;
- Statements by two Sergeants to NYPD internal investigators that, during his arrest, Mr. Garner did not appear to be in distress and that his condition did not seem to be serious;
- The inadequacy of the medical treatment provided to Mr. Garner; and
- The leaking of Mr. Garner's alleged arrest and medical history.[11]

It is unjust to require Mr. Garner's family to file a lawsuit, five years after his death, to get these basic facts.

Conclusion

We thank the Committee for the opportunity to provide testimony today. The Racial Justice Project looks forward to working with the Committee on this and other measures to enhance law enforcement transparency and accountability.

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[1] N.Y. CIV. RIGHTS LAW § 50-a (also applying to records of firefighters and correction officers, among others).

[2] *New York Civil Liberties Union v. New York City Police Dep't*, 32 N.Y.3d 556, 564 (2018) (quoting *Prisoners' Legal Servs. of New York v. New York State Dep't of Corr. Servs.*, 73 N.Y.2d 26, 31-32 (1988)).

[3] N.Y.C. BAR ASS'N, REPORT ON LEGISLATION BY THE CIVIL RIGHTS COMMITTEE AND THE CRIMINAL COURTS COMMITTEE (2018) ("In 2014, however, the death of Eric Garner led to renewed focus on CRL 50-a and how its broadened interpretation has shielded officers from public accountability and impedes racial justice. As the Garner case exemplifies, policies and practices that appear to prioritize protecting officer misdeeds over strengthening community trust divide communities of color from the police departments that are meant to protect them.").

[4] Petition at 2, *Gwen Carr v. Bill De Blasio*, Docket No. 101332/2019 (N.Y. Sup. Ct. Aug 27, 2019) ("[T]he City has not even identified all of the NYPD officers present at the scene.").

[5] Rocco Parascandola & Graham Rayman, *Exclusive: NYPD Suddenly Stops Sharing Records on Cop Discipline in Move Watchdogs Slam as Anti-Transparency*, N.Y. DAILY NEWS (Aug. 24, 2016), https://www.nydailynews.com/new-york/exclusive-nypd-stops-releasing-cops-disciplinary-records-article-1.2764145.

[6] *New York Civil Liberties Union v. New York City Police Dep't*, 32 N.Y.3d 556 (2018).

[7] Public Officers Law Section 87(2)(e).

[8] *Id.* 87(2)(b) and (f).

[9] N.Y. Exec. Order No. 147, 9 CRR-NY 8.147 (July 8, 2015).

[10] *See e.g.*, N.Y. STATE OFFICE OF THE ATT'Y GEN. SPECIAL INVESTIGATIONS AND PROSECUTIONS UNIT, REPORT ON THE INVESTIGATION INTO THE DEATH OF EDSON THEVENIN (2017), https://ag.ny.gov/sites/default/files/oag_report_-_edson_thevenin.pdf; N.Y. STATE OFFICE OF THE ATT'Y GEN. SPECIAL INVESTIGATIONS AND PROSECUTIONS UNIT, REPORT ON THE INVESTIGATION INTO THE DEATH OF MIGUEL ESPINAL (2016), https://ag.ny.gov/sites/default/files/oag_report_-_bronx-westchester.pdf; N.Y. STATE OFFICE OF THE ATT'Y GEN. SPECIAL INVESTIGATIONS AND PROSECUTIONS UNIT, REPORT ON THE INVESTIGATION INTO THE DEATH OF RAYNETTE TURNER (2015), https://ag.ny.gov/pdfs/SIPReport.pdf.

[11] Petition at 13-15, *Gwen Carr v. Bill De Blasio*, Docket No. 101332/2019 (N.Y. Sup. Ct. Aug 27, 2019).

Testimony of Gabby Seay, Political Director, 1199SEIU United Healthcare Workers East

Senate Standing Committee on Codes

Hearing on Senate Bill 3695

Delrawn Small. Sean Bell. Akai Gurley. Patrick Dorismond. These names have something in common. Not only were these unarmed men killed by members of the New York Police Department, but they are also a part of the 1199SEIU family. And on behalf of that family of 450,000 healthcare workers, I am here to testify in support of Senate bill S3695, which would repeal Civil Rights Law 50-a, which has been interpreted to broadly shield police disciplinary records from public scrutiny.

In 1976, the New York State Legislature passed Civil Rights Law 50-a, out of concern that defense attorneys were gaining access to files unsubstantiated allegations against police officers in order to impeach the officers' testimony on the witness stand. Subsequently, court decisions and local governments have repeatedly broadened the interpretation of the law, holding that it prevents any public disclosure of substantiated allegations, including even disciplinary actions taken by public bodies like the Civilian Complaint Review Board. As the *New York Times* wrote in 2015, the law now "gives the public far less access to information about police officers than workers in virtually any other public agency,"[1] despite the power they hold over the lives of New Yorkers. Only ~~two~~ one other states have laws as restrictive, and as the New York City Bar Association states, "there is no evidence that officers in [the other 47] states are any less safe or any less capable of testifying in court to defend their conduct than officers in New York."[2]

Our union approaches this issue in two ways. First, we approach it as an organization largely comprised of people of color who have been historically and systemically over policed and routinely experience discriminatory policing, including police violence. Our members and their families have experienced police harassment, assault, and as you've heard from testimony this

[1] https://www.nytimes.com/2015/07/29/opinion/stop-hiding-police-misconduct-in-new-york.html?_r=0
[2] https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/allow-for-public-disclosure-of-police-records-relating-to-misconduct-repeal-crl-50-a

morning, even killed by the police. The struggle our members have faced to just to find out what, if any, disciplinary charges were pursued against officers involved in their loved one's death is one that no family should have to endure.

We also approach it as a labor union which fully supports every worker's right to due process in employer discipline, and one which represents many workers whose disciplinary records are subject to far greater public transparency than 50-a applies to police records.

For example, the State Education Department publishes a monthly summary online of actions on professional misconduct and discipline for professions including registered and licensed practical nurses, which includes the nurse's name, license number, a summary of the charges and the Regents' action.[3] Individual certified nurse, home health and personal care aides can be searched by name in the state's registries, which include administrative findings of misconduct.[4] Enforcement actions taken against individual workers by the New York State Attorney General's Medicaid Fraud Control Unit, which is charged by the Federal government to enforce quality standards in nursing homes, are also publicly available.[5]

This information is available to the public because of the position of trust health care providers hold as we care for the sick and vulnerable. Police officers, armed and given the power to arrest, certainly hold no less a position of trust.

For these reasons, we urge the Legislature to improve police accountability and public transparency by repealing Civil Rights Law 50-a.

[3] http://www.op.nysed.gov/opd/rasearch.htm
[4] https://registry.prometric.com/public, https://apps.health.ny.gov/professionals/home_care/registry/home.action
[5] https://nursinghome411.org/selected-enforcement-actions-taken-by-the-nys-attorney-general-medicaid-fraud-control-unit-2018-excel/

Peace and good afternoon,

My name is Darian X and I am the Youth Organizer for Justice and Community Safety at MRNY. Today myself and many other community groups gather before the Senate to continue to call for a full repeal of Civil Rights Law 50-A. Young, Black, Latinx, Queer and Trans people in our communities regularly experience police violence and abuse, yet we lack the basic ability to identify officers who commit these egregious acts of harm. Police secrecy laws like 50-A make it nearly impossible for the families who have lost loved ones to the police and individuals who have been brutalized, sexually assaulted, and abused by law enforcement to hold police departments and officers accountable.

The need to act and fully repeal 50-A has never been more clear in the state of NY ! Eric Garner, 43 years old, lynched by the hands of NYPD officers and left to die on the sidewalk in Staten Island. However, in the wake of our communities mourning of Eric Garner, 50-a was used as an excuse not to disclose disciplinary records and information about substantiated CCRB complaints against Daniel Pantaleo,the NYPD officer who put Eric in a NYPD-banned chokehold, while multiple other officers tackled him and forced him to the ground. Many of the other officers who participated in killing him remain anonymous and shielded by CRL 50-A. Saheed Vassel, 34 Years old executed in front of his friends and community, his assailants also remain anonymous, yet present in our communities. How long will our policy makers continue to allow

members of our communities to be killed and their killers walk away with anonymity and impunity?

However, we have not always applied blue walls of silence to this kind of information. For 40 years, the NYPD used to publish outcomes of disciplinary proceedings including officer names, until they decided to reinterpret 50-a and claim that it lets them withhold even this basic summary information. So while the police unions may joust rhetoric suggesting that officers will be injured or harmed, we know that this is simply a gross act of political theatre and is in no way accurate. **CRL 50-A serves no function to protect an officer's safety or personal privacy.** However, it has served to permit police departments to withhold virtually any information related to outcomes of police department disciplinary trials, and even misconduct documents which have now been redacted to remove any identifying officer information.

Our communities have a right to know officers who abuse their powers and commit harm and violence to our friends and families ! It is time for the NY Senate to join our communities and commit to repealing one of the most secretive laws in the country when it comes to hiding police misconduct from public view by repealing 50-a in the 2020 session. As brother Desmond Tutu said " If you are neutral in situations of injustice, you have chosen the side of the oppressor." We ask you today to choose transparency, to choose accountability, to choose justice for our communities. Repeal 50-A ! Thank You.

Transgender Law Center

Making Authentic Lives Possible

To: New York State Senate Standing Committee on Codes
From: Transgender Law Center
Re: Legislative Changes to Section 50-a of the Civil Rights Law
Date: 10/17/2019

Testimony in Support of Repeal of CRL 50-a

Transgender Law Center (TLC) is the largest national trans-led organization advocating self-determination for all people. In furtherance of our mission to keep transgender and gender nonconforming people alive, thriving, and fighting for liberation, TLC supports the repeal of New York Civil Rights Law 50-a.

Transgender people across the nation and in New York state experience disproportionate mistreatment by law enforcement and correctional officers. To address these harms, we need to be able to fully understand the patterns of abuse and how internal disciplinary systems are currently addressing them. Repealing 50-a would shed light on such patterns, leaving us better prepared to strategically work to ensure the safety of all New Yorkers.

Transgender people in New York, particularly transgender people of color, face alarming rates of police harassment. The 2015 U.S. Transgender Survey results for New York found that, "[i]n the past year, of respondents who interacted with... law enforcement officers who thought or knew they were transgender, 61% experienced some form of mistreatment," ranging from verbal harassment to forced sexual activity. TLC attorneys have worked with several trans women who were profiled as sex workers by police and threatened with arrest unless they performed sexual acts on the officers. Once they performed the acts, however, the officers would arrest the women anyway.

The current lawsuit brought by the ACLU and NYCLU against the New York Police Department on behalf of Latina trans woman Linda Dominguez is one example of the kind of behavior that is often only addressed behind closed doors, if at all. Dominguez was charged with "false personation" in 2018, when she told police officers both her birth name and legal name upon her arrest. NYPD officers left her chained to jail cell bars in pink

handcuffs all night to humiliate Dominguez, and verbally harassed her while she was locked there.

This kind of harassment is also why most transgender people feel unsafe going to the police. 58% of New York State respondents to the USTS said they would feel uncomfortable asking the police for help if they needed it. This is a particular problem for transgender people who experience intimate partner violence or transphobic attacks. TLC attorneys have worked with several trans New Yorkers who have called the police for help and have been ignored, or, worse, arrested themselves. While our attorneys have made complaints about these patterns, there is no way to know if officers are being held accountable, because 50-a shields such records from the public.

Correctional officers, another group whose disciplinary records are protected by 50-a, also disproportionately abuse trans people, particularly trans people of color. The USTS found that one in five incarcerated respondents had been physically or sexually assaulted by prison staff in the last year. Among those who were physically assaulted by staff, about half reported that this had happened multiple times in the past year. The USTS also found deprivation of medical care for more than a third of transgender respondents in prison.

The tragic death of Layleen Polanco, an Afro-Latina transgender woman who died while held in Riker's Island this past summer, is one example of the dire consequences of this kind of neglect. Polanco was held in solitary confinement, as many transgender people in prisons and jails are, despite prison staff knowing that she had an epileptic condition. Polanco had a seizure while in isolation and died alone in her cell without treatment. Advocates have spoken out about conditions for transgender people on Riker's Island for decades, but the protections of 50-a make it difficult to know how seriously correctional officers' violations of trans people's rights are being taken.

In order to understand how such tragedies can occur, we need to be able to see how internal systems are responding when harm occurs. We need to be able to understand patterns of behavior and discipline in order to hold violent individuals and systems accountable. Therefore, TLC supports the full repeal of CRL Section 50-a.

Testimony for the New York State Senate Standing Committee on Codes
Public Hearing: Policing (S3695)

Delivered by Quadira Coles
Policy Manager

October 17, 2019

Good morning Chair Bailey and members of the Senate Standing Committee on Codes. My name is Quadira Coles and I am the Policy Manager at Girls for Gender Equity (GGE). Thank you for holding this important hearing on policing transparency and for the opportunity to speak today.

GGE is an intergenerational, advocacy and youth development organization that is committed to the physical, psychological, social, and economic development of girls and women. GGE is committed to challenging structural forces, including racism, sexism, transphobia, homophobia, and economic inequality, which constrict the freedom, full expression, and rights of trans and cis girls and young women of color, and gender non-conforming youth.

We are also proud members and leaders of a number of coalitions and joint campaigns that advance our work – pertinent to today's hearing, the Dignity in Schools Campaign, the Sexuality Education Alliance of New York, and Communities United for Police Reform.

We work daily with young women and TGNC youth of color who are policed at every juncture of their lives: on the way to and from school by NYPD officers, in school by NYPD School Safety Agents and police, while accessing city services, or simply being in public space. Young women and TGNC young people are criminalized for everyday behavior, often times hyper-sexualized due to historically located racialized and gender-based stereotypes, and they are regularly policed because of their race, ethnicity, sexual orientation, gender identity and/or gender expression.

As an organization that has worked to address gender-based violence for over 16 years, we understand that acts of gender-based violence are often patterned and repetitive. Frequently, sexual harassment and sexual assault are not a one time or isolated incident. Further, survivors who report sexual misconduct by police officers are met by a disciplinary system that benefits from hiding misconduct – especially repeated misconduct – from the public eye. This secrecy unnecessarily causes undue onus on survivors of all police misconduct, including families who have lost loved ones to police violence.

While there is little transparency on the full scope or prevalence of police sexual misconduct, research indicates that police officers sexually harass and assault women and girls with alarming frequency.[1] As one example, analysis of a New York City youth survey conducted by the CUNY Graduate Center found that 40% of the young women surveyed had experienced sexual harassment by police officers, and LGB youth were twice as likely to have experienced negative sexual contact with police.[2] This latter point is supported by the CCRB's own evaluation of LGBTQ-related complaints that found members of the LGBTQ community experience misconduct due to their sexual orientation or gender expression and officers may make enforcement decisions based on homophobic and transphobic biases and intolerance.[3] These findings mirror the concerns and lived experiences of the young people with which GGE works.

In 2018, Buzzfeed exposed the fact that hundreds of officers were allowed to keep their jobs after committing egregious offenses. These offenses included lying under oath to grand juries and District Attorneys, and lying in official reports, physically attacking people and other excessive force and sexual misconduct, including in schools.

The database shows 206 cases involving a School Safety Agent (SSA) or representative of the School Safety Division of the NYPD. Substantiated charges included 52 instances of physical contact with students, including "acted inappropriately with a student," "unnecessary and excessive force against a student," "wrongly searched a student and made them disrobe," and "dragged a student by the arm" – all responded to with the forfeiture of vacation days. Further, of those 206 cases, an average of 391 days passed between the date of the charges and the date of the disposition.

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[1] Andrea J. Ritchie & Delores Jones-Brown (2017) Policing Race, Gender, and Sex: A Review of Law Enforcement Policies, Women & Criminal Justice, 27:1, 21-50, DOI: 10.1080/08974454.2016.1259599

[2] Brett G. Stoudt, Michelle Fine, & Madeline Fox (2011) Growing Up Policed in the Age of Aggressive Policing Policies, 56 N.Y.L. Sch. L. Rev. 1331; Michelle Fine, Nicholas Freudenberg, Yasser Payne, Tiffany Perkins, Kersha Smith, & Katya Wanzer (2003) "Anything can happen with police around": Urban youth evaluate strategies of surveillance in public places. Journal of Social Issues 59:141-58.

[3] Civilian Complaint Review Board (2016) Pride, Prejudice and Policing: An Evaluation of LGBTQ-Related Complaints from January 2010 through December 2015. New York, NY: Author.

Greater transparency around the history of police disciplinary records through the repeal of 50-a and passage of S3695 would be a significant step in ensuring that officers who harm community members are held accountable, and simultaneously advancing safe and supportive schools.

The full repeal of the law is necessary to advance true community safety for girls and TGNC youth of color in New York. We again thank the New York State Senate Committee on Codes for holding this hearing. If you have any questions, please contact us.

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Testimony of Michael Sisitzky
On Behalf of the New York Civil Liberties Union
Before the New York State Senate Committee on Codes
In Support of S.3695, Repealing Civil Rights Law Section 50-a

October 17, 2019

The New York Civil Liberties Union ("NYCLU") respectfully submits the following testimony today in support of S.3695, which would repeal Section 50-a of the New York Civil Rights Law. The NYCLU, the New York affiliate of the American Civil Liberties Union, is a not-for-profit, non-partisan organization with eight offices throughout the state and more than 180,000 members and supporters. The NYCLU's mission is to promote and protect the fundamental rights, principles, and values embodied in the Bill of Rights of the U.S. Constitution and the New York Constitution.

Defending New Yorkers' right to be free from discriminatory and abusive policing is a core component of the NYCLU's mission. Protecting this right requires robust systems for investigating abusive officers and holding them accountable. Fundamental to this effort is the ability to access basic information about how these systems operate and whether the outcomes they produce are just.

There is no greater legal barrier to this work than New York Civil Rights Law Section 50-a. Section 50-a cloaks the disciplinary records of police officers, correction officers, and firefighters in secrecy and has been used to shield evidence of law enforcement abuse from the public. The NYCLU expresses our full support for S.3695 and its companion bill in the Assembly, A.2513, which would repeal this antidemocratic provision and allow public access to the types of records most needed to guard against official misconduct by law enforcement.

I. Background and History of Section 50-a

New York's Freedom of Information Law ("FOIL") begins by declaring that "a free society is maintained when government is responsive and responsible to the public, and when the public is aware of governmental actions."[1] It goes on to say that "[t]he 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."[2] Section 50-a flies in the face of these principles.

Originally passed in 1976 as an attempt to limit defense attorneys' ability to impeach the credibility of police officers by bringing up unproven

[1] N.Y. Pub. Off. Law § 84
[2] *Id.*

allegations of misconduct, Section 50-a is now infamous for the harm it causes victims of police abuse and the damage it inflicts to the ideals of transparent governance.[3]

Section 50-a states that "[a]ll personnel records used to evaluate performance toward continued employment or promotion" of police officers, correction officers, and firefighters "shall be considered confidential and not subject to inspection or review without the express written consent of such [police officer, correction officer, or firefighter] ... except as may be mandated by lawful court order."[4]

The law's application by police departments and its interpretation in the judiciary has enabled departments to cover up their inaction on allegations of officer misconduct when confronted with demands for accountability – including from police abuse victims and grieving family members who have lost loved ones to police killings. It has been twisted to justify the secrecy of everything from body camera footage[5] to completely anonymized data about departments' use of force.[6]

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On the national level, this provision makes New York State an outlier in elevating police personnel records to the level of state secrets. We are one of just two states to maintain a law specifically making these records secret. California, long part of an ignoble trio alongside New York and Delaware, recently took steps to open the books of certain records of police misconduct,[7] joining a group of 28 states that make police disciplinary records available to the public in at least some cases and leaving New York and Delaware to compete for last place in terms of transparency. Of the 28 states where at least some records are accessible, 13 states—a geographically and politically diverse group including, among others, Alabama, Arizona, Connecticut,

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[3] While 50-a applies to records of correction officers and firefighters as well, the bulk of the public controversy and litigation surrounding the law's application have been in the context of police records, and police records are the main focus of testimony and broader advocacy around the repeal of 50-a.
[4] N.Y. Civil Rights Law § 50-a(1).
[5] Ashley Southall, "New York Police Union Sues to Stop Release of Body Camera Videos," N.Y. Times, Jan. 9, 2018, https://www.nytimes.com/2018/01/09/nyregion/new-york-police-union-body-camera-lawsuit.html.
[6] Graham Rayman, "NYPD Refuses to Reveal Precinct Use-of-Force Data, Citing State Law," N.Y. Daily News, May 10, 2018, https://www.nydailynews.com/new-york/nypd-refuses-reveal-use-of-force-data-citing-state-law-article-1.3981630.
[7] Liam Dillon and Maya Lau, "Gov. Jerry Brown Signs Landmark Laws that Unwind Decades of Secrecy Surrounding Police Misconduct, Use of Force," L.A. Times, Sep. 30, 2018, https://www.latimes.com/politics/la-pol-ca-police-misconduct-rules-changed-20180930-story.html.

Florida, Ohio, and Washington—start from the position that disciplinary records specifically are and should be open to the public.[8]

II. Expansion of 50-a in the Courts

The current application of Section 50-a has moved far beyond the limited purpose the Legislature intended when the law was enacted. According to former State Senator Frank Padavan, who was the lead sponsor of the legislation that created 50-a, "the sole intention of the statute ... was to stop private attorneys from using subpoenas to gain unfettered access to the personnel records of police officers," and that the law "was never intended to block the public disclosure of records on police misconduct, including documented criminal behavior."[9] Over time, however, court decisions transformed and repurposed 50-a such that the withholding of these records is now the law's primary function.

The expansion of 50-a in the courts proceeded gradually at first, before rapidly accelerating in recent years. For years, 50-a's application appeared limited to requests for records in the context of active litigation as opposed to more general public records requests through FOIL. In 1986 the Court of Appeals affirmed a lower court decision holding that 50-a was "only intended to prevent a litigant in a civil or criminal action from obtaining documents in a police officer's file that are not directly related to that action,"[10] but just two years later, the Court allowed 50-a to block the release of records even in the absence of any ongoing litigation if there was a chance that those records could *potentially* be used in litigation.[11]

Though 50-a was well known to public defenders and to organizations like the NYCLU that frequently submit public records requests concerning police policies and practices, 50-a forcefully entered the broader public consciousness following the July 2014 killing of Eric Garner. Eric Garner was killed by a New York Police Department ("NYPD") officer, Daniel Pantaleo, who subjected him to a banned chokehold, and in the wake of his death, New Yorkers began demanding more information on how the NYPD holds its officers accountable for misconduct.

The NYPD responded with even more secrecy. In 2016, while New Yorkers were demanding greater transparency, the de Blasio administration

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[8] Robert Lewis, Noah Veltman, and Xander Landen, "Is Police Misconduct a Secret in Your State?" WNYC, Oct. 15, 2015, https://www.wnyc.org/story/police-misconduct-records/.

[9] Brendan J. Lyons, "Court Rulings Shroud Records," Times Union, Dec. 15, 2016, https://www.timesunion.com/tuplus-local/article/Court-rulings-shroud-records-10788517.php.

[10] *Capital Newspapers Div. of Hearst Corp. v. Burns*, 67 N.Y.2d 562, 565, 496 N.E.2d 665, 667 (1986)

[11] *Prisoners' Legal Servs. of New York v. New York State Dep't of Corr. Servs.*, 73 N.Y.2d 26, 32–33, 535 N.E.2d 243, 246 (1988).

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and the NYPD reversed a 40 year-old practice of releasing "personnel orders" that contained basic summaries of disciplinary charges and outcomes, claiming for the first time that this practice violated Section 50-a.[12] This robbed the public and the media of one of the only sources of information on whether officers who engage in serious misconduct face any measure of accountability. In a case involving a request for Civilian Complaint Review Board ("CCRB") records related to the officer who killed Eric Garner (a request that was opposed by the de Blasio administration), the Appellate Division expanded the types of records subject to 50-a's secrecy regime, holding that even basic summaries of prior substantiated instances of misconduct that are produced and held by an independent oversight agency constitute personnel records within the meaning of the statute.[13] In a later and astounding attempt to expand the law's scope, the Deputy Commissioner for Legal Matters argued in a 2018 letter to the Inspector General for the NYPD that Section 50-a even bars the release of aggregate, anonymized data on how many use of force incidents were reported in a given precinct.[14]

By far the most serious blow to police transparency and accountability came in a December 2018 ruling from the Court of Appeals deciding the extent of 50-a's reach. The case arose from an NYCLU FOIL request, in which we sought to better understand how disciplinary decisions were made within the NYPD by requesting copies of the recommended decisions issued by NYPD administrative judges. Our request explicitly did not seek any information that would have identified an individual officer. The Court rejected our request, and in so doing, expanded Section 50-a's reach so dramatically that now, unlike any other exemption in the state Freedom of Information Law (under which disclosure of covered records is still permissive and redactions are favored to withholding), Section 50-a now stands as a categorical ban on the disclosure of police personnel records.[15] The Court held that 50-a "mandate[s] confidentiality and suppl[ies] no authority to compel redacted disclosure," with the result being that not only are police departments permitted to withhold covered records, they are actually compelled to treat them as confidential and actively prevented from releasing them absent the specific procedures outlined in 50-a itself.[16]

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[12] Rocco Parascandola and Graham Rayman, "Exclusive: NYPD Suddenly Stops Sharing Records on Cop Discipline in Move Watchdogs Slam as Anti-Transparency," N.Y. Daily News, Aug. 24, 2016, https://www.nydailynews.com/new-york/exclusive-nypd-stops-releasing-cops-disciplinary-records-article-1.2764145.

[13] *Luongo v. Records Access Officer, Civilian Complaint Review Bd.*, 150 A.D.3d 13, 22–23, 51 N.Y.S.3d 46, 55–56 (N.Y. App. Div.), *leave to appeal denied*, 30 N.Y.3d 908, 93 N.E.3d 1213 (2017)

[14] *NYPD Response to the Report of the Office of the Inspector General for the NYPP entitled "An Investigation of NYPD's New Force Reporting System* (May 4, 2018), https://www1.nyc.gov/assets/doi/oignypd/response/NYPD_Reponse_DOIForceReportingSystemReport_50118.pdf .

[15] *New York Civil Liberties Union v. New York City Police Dep't*, 32 N.Y.3d 556, 118 N.E.3d 847 (2018)

[16] *Id.* at 570.

In the months since this ruling, courts have allowed 50-a to obscure even more records. In March 2019, a trial court blocked the NYPD from releasing completely anonymous summary reports on the outcomes of departmental disciplinary trials, even though the underlying records themselves would have remained confidential.[17] The following month, the Appellate Division held that personnel records remain subject to 50-a's blanket confidentiality even after an officer retires.[18] Litigation will likely continue around the margins of what constitutes a personnel record—running the risk that even more records may disappear from the public discourse—until the Legislature takes action to correct and reject this growing move toward secrecy through passage of S.3695.

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III. Records Hidden by 50-a are Matters of Vital Public Importance

The types of records that Section 50-a shrouds in secrecy are vitally important for public conversations about the impact that policing has on communities throughout New York. By forcing the public to rely on only the information that trickles out of police departments in leaks, Section 50-a frustrates the ability of advocates and policymakers alike to engage in meaningful and informed discussions about accountability. The public's trust in police is diminished every time a department resists sharing even the most basic information about what rules and procedures they have in place to respond to complaints of misconduct and what happens once those complaints start winding their way through opaque disciplinary systems. S.3695 will enable the public to understand more about how these systems operate by giving the public access to the information necessary to interpret them. We know this because of how much the public learns about police policies and practices whenever these types of records are leaked to journalists.

Shortly after Daniel Pantaleo killed Eric Garner, advocates sought access to information about his disciplinary record. Although New York City succeeded in court to block the release of Pantaleo's history of substantiated CCRB complaints, those records ultimately became public after they were leaked to reporters in 2017.[19] These records revealed that Pantaleo had seven disciplinary complaints and 14 individual allegations made against him before he ever put Eric Garner in a fatal chokehold. The CCRB had substantiated four of those allegations and recommended that the Department pursue the most serious charges available in all of them, but the NYPD disregarded these recommendations; in two of these instances,

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[17] *Patrolmen's Benev Ass'n of the City of New York, Inc. v Blasio*, No. 153231/2018, 2019 WL 1224787 (N.Y. Sup. Ct. Mar. 11, 2019).

[18] *Hughes Hubbard & Reed, LLP v. Civilian Complaint Review Bd.*, 171 A.D.3d 1064, 1066, 97 N.Y.S.3d 671, 674 (N.Y. App. Div. 2019)

[19] Carimah Townes & Jack Jenkins, "The Disturbing Secret History of the NYPD Officer who Killed Eric Garner," ThinkProgress, Mar. 21, 2017, https://thinkprogress.org/daniel-pantaleo-records-75833e6168f3/.

Pantaleo received the weakest possible disciplinary penalty that could be imposed.[20] Once made public, Pantaleo's disciplinary history was described as "among the worst on the force."[21] The fact that an officer, who would later go on to kill someone using a banned procedure, already had a noteworthy history of engaging in misconduct and violating department rules is clearly something that the public has an interest in knowing. The repeal of Section 50-a will prevent future departments from evading this much needed scrutiny.

Again, journalists helped shine a light on NYPD discipline practices in April 2018, when Buzzfeed released a trove of leaked records for 1,800 NYPD employees who had been charged with misconduct between 2011 and 2015, including records covering at least 319 officers who were allowed to keep their jobs, even after they had committed offenses that were considered fireable under NYPD policy.[22] The public learned of three school safety officers who received a slap on the wrist in the form of five lost vacation days after being found guilty of using excessive force against students.[23] New Yorkers also learned that, despite the NYPD's assurance that they take false statements by officers seriously and despite official policy that generally *requires* the firing of officers who lie about a material matter, most of the more than 100 officers in the leaked database who were accused of "lying on official reports, under oath, or during an internal affairs investigation," were punished with as little as a few days of lost vacation.[24] Without this leak, 50-a would have kept the NYPD's failure to adhere to its own disciplinary rules secret; should S.3695 become law, the public will be able to undertake its own analysis of how these rules are applied without having to wait on department sources to blow the whistle.

Without repealing 50-a, it will be impossible to fully understand the factors that ultimately guide the application of department rules concerning discipline. In many police departments throughout the state, the ultimate power and discretion to decide and impose discipline rests with the head of a given department. Section 50-a amplifies the risks inherent in this centralizing of disciplinary decision-making authority in a single office capable of exercising discretionary authority in secret. Using New York City as an example, despite the existence of an independent CCRB with the power to investigate and prosecute a defined subset of misconduct complaints, New

[20] *Id.*
[21] *Id.*
[22] Kendall Taggart & Mike Hayes, "Secret NYPD Files: Officers Who Lie and Brutally Beat People Can Keep Their Jobs," BuzzFeed News, Mar. 5, 2018, https://www.buzzfeednews.com/article/kendalltaggart/secret-nypd-files-hundreds-of-officers-committed-serious#.ckLYB7aBJq.
[23] Kendall Taggart & Mike Hayes, "Here's Why BuzzFeed News Is Publishing Thousands of Secret NYPD Documents," BuzzFeed News, Apr. 16, 2018, https://www.buzzfeednews.com/article/kendalltaggart/nypd-police-misconduct-database-explainer#.jawrOMqON1
[24] *Id.*

Yorkers are ultimately asked to trust the NYPD to police itself. Decisions about how—and indeed, whether—to discipline officers who violate the public trust are left entirely to the discretion of the NYPD Commissioner. The CCRB and even the NYPD's own Deputy Commissioner for Trials only have the power to make recommendations to the Commissioner about discipline. State and local laws combine to vest the Commissioner with absolute discretion over the final outcome and to allow the NYPD full control over where disciplinary proceedings take place and who has access to information on how these proceedings are resolved.

To its credit, the CCRB produces detailed reports on the outcomes of cases it investigates and prosecutes. The story told by this data, however, is serious cause for alarm. In 2018, the Police Commissioner imposed penalties weaker than those recommended by the CCRB in almost half of all cases that didn't proceed to departmental trials.[25] In the most serious cases that went to full administrative trials, the Commissioner imposed discipline consistent with CCRB recommendations in just 38 percent of cases.[26]

Missing entirely from these numbers, however, is any examination of the qualitative and substantive factors underlying the final decisions: namely, what specific rationale justifies the Police Commissioner in departing from recommended discipline in 62% of CCRB-prosecuted cases? Because of 50-a, the public has no insight into these determinations, and is instead asked to simply trust in the opaque process. S.3695 will ensure that New Yorkers are able to review not just statistical information on police discipline investigations and outcomes, but also the actual reasoning, policies, and analysis that produce that data.

Here again, leaks to the media have proven instructive and offer a glimpse of the information that S.3695 will make available. In August 2019, the recommended decision in the disciplinary trial of Daniel Pantaleo was leaked to the media, adding to the information that had already been leaked regarding his record in 2017.[27] In determining the appropriate penalty recommendation, the judge's opinion considered facts and holdings from a number of NYPD trials that exist as internal precedents within the NYPD's trial room.[28] In essence, there is an entire universe of NYPD case-law to which adjudicators turn for guidance but that the public is denied any opportunity with which to engage. Whether the Police Commissioner relies on similar factors in accepting or rejecting these recommendations is

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[25] Civilian Complaint Review Board, *2018 Annual Report*, 40, https://www1.nyc.gov/assets/ccrb/downloads/pdf/policy_pdf/annual_bi-annual/2018CCRB_AnnualReport.pdf.
[26] *Id.* at 35.
[27] Ashley Southall, "Officer in 'I Can't Breathe' Chokehold Was 'Untruthful,' Judge Says," N.Y. Times, Aug. 18, 2019, https://www.nytimes.com/2019/08/18/nyregion/daniel-pantaleo-eric-garner-chokehold.html.
[28] *Id.*

something that the public must be able to know if the public is to be expected to trust in the fairness of the final decisions.

It should not be this difficult to have informed conversations about police misconduct in New York State. Whistleblowers should not have to risk their jobs to leak information about police misconduct to the press, and New Yorkers should not be forced to rely on journalists reporting on these leaks to get answers to basic questions about accountability. All the while, victims of police misconduct are left guessing as to whether their abuser will face any consequence, and families whose loved ones are killed by police are left without closure, facing the prospect of never knowing whether the officer or officers responsible will be fired or simply forced to give up a few vacation days because 50-a mandates that the outcome remain secret.

Police officers are public officials entrusted with a great deal of power, including the ability to use force and deprive people of their liberty. New Yorkers deserve to know whether they are wielding that power responsibly. As NYPD Commissioner James O'Neill, himself, has stated in calling for changes to 50-a, "nothing builds trust like transparency and accountability."[29]

IV. Existing Protections for Officer Privacy and Safety

Briefly, it is worth addressing the main arguments raised against repealing Section 50-a. Defenders of 50-a claim that the law is necessary to protect the privacy and safety of officers. These are obviously legitimate interests, but 50-a is wholly unnecessary to their vindication. S.3695 will repeal the special layer of secrecy applied to the personnel records of police officers, correction officers, and firefighters, but it will not remove the many adequate protections that exist elsewhere in New York law.

FOIL already allows agencies to withhold records or portions of records where disclosure would constitute "unwarranted invasion of personal privacy"[30] or where disclosure "could endanger the life or safety of any person."[31] These are the same standards that apply to the disclosure of every other public employee's records, allowing public access to disciplinary records while shielding more sensitive information from public view.

Indeed, the categories of information about which 50-a's supporters repeatedly express the greatest concern are already encompassed within

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[29] James O'Neill, "Let NYC See Police Records, Now: We Must Reform State Law Keeping Disciplinary Actions Secret," N.Y. Daily News, Feb. 7, 2019, https://www.nydailynews.com/opinion/ny-oped-let-nyc-see-police-records-now-20190207-story.html.
[30] N.Y. Pub. Off. Law § 87(b).
[31] N.Y. Pub. Off. Law § 87(f).

FOIL's privacy and safety provisions: home addresses,[32] medical records,[33] and social security numbers.[34] An independent panel which reviewed the NYPD's disciplinary system reached the same conclusion that "other provisions of existing New York law would provide sufficient protection to officers' privacy and security interests," and reasoning that "a regime without § 50-a's blanket exemption for police personnel records would still afford officers meaningful protection."[35]

Without the wide sweep of 50-a, the difference will be that agencies will be required to justify withholding or redacting records based on these specific exemptions rather than continue to withhold all records as a matter of course. Departments can continue to respond to legitimate threats to privacy and safety, but not at the cost of denying the public the ability to engage in informed discussion and debate on accountability. Again, as the independent panel pointed out, "It bears emphasis that in the 40 years that the Department regularly posted Personnel Orders for inspection, there was no evidence that any officer was harassed as a result of posting ... If New York is to strike the proper balance between privacy and transparency, concern for officer safety must be respected, but not exaggerated."[36]

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V. Conclusion

We thank the Committee for the opportunity to provide testimony today and for its consideration of this critically important piece of legislation. The NYCLU looks forward to working with the Legislature to fully repeal Section 50-a and to end police secrecy in New York State.

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[32] *See, e.g., Pasik v. State Bd. of Law Examiners*, 114 Misc. 2d 397, 407, 451 N.Y.S.2d 570, 577 (Sup. Ct. 1982), *modified*, 102 A.D.2d 395, 478 N.Y.S.2d 270 (1984).
[33] *See, e.g., Hanig v. State Dep't of Motor Vehicles*, 79 N.Y.2d 106, 588 N.E.2d 750 (1992).
[34] *See, e.g., Seelig v. Sielaff*, 201 A.D.2d 298, 299, 607 N.Y.S.2d 300 (1994).
[35] *The Report of the Independent Panel on the Disciplinary System of the New York City Police Department* at 45 (Jan. 2019), https://www.independentpanelreportnypd.net/assets/report.pdf.
[36] *Id.* at 45-46.

CITIZENS UNION
OF THE CITY OF NEW YORK

CITIZENS UNION OF THE CITY OF NEW YORK
Testimony to the New York Senate Committee on Codes

250 Broadway
October 17, 2019

Good afternoon Senator Bailey and members of the New York State Senate Committee on Codes. My name is Rachel Bloom and I am the Director of Public Policy and Programs at Citizens Union. We thank you for inviting us here today and giving Citizens Union the opportunity to testify.

Citizens Union is an independent and nonpartisan democratic reform organization that brings New Yorkers together to strengthen our democracy and improve our city and state. Nonpartisan and independent, we seek to build a political system that is fair and open to all – one that values each voice and engages every voter. We thank you for the opportunity to speak today.

As a watchdog group for the public interest and a historic advocate of open and honest government in New York City and State, for the past decade Citizens Union has been exploring the issue of police accountability. Today we urge you to repeal Section 50-a of the Civil Rights Law ("Section 50-a"). Repealing Section 50-a will not only bring much needed transparency and accountability to the New York City Police Department (NYPD), but to the public as well, and consequently, improve the relationship between the NYPD and the public.

The effect of Section 50-a is to significantly deprive the public of information necessary to ensure the accountability of police officers for misconduct. It also limits the Police Department's ability to ensure accountability through its systems of civilian complaints and disciplinary proceedings. Without information as to the outcome of such proceedings in substantiated cases, it is impossible to know if those systems are functioning properly.[1]

[1] The extent to which the confidentiality of police disciplinary records may have kept the public in the dark about significant wrongdoing and the absence of an adequate response is presented in the recent article "Secret NYPD Files: Officers Can Lie And Brutally Beat People – And Still Keep Their Jobs", https://www.buzzfeed.com/kendalltaggart/secret-nypd-files-hundreds-of-officers-committed-serious?utm_term=.qpjdPGnPnE#.upJABvEBEO.

Section 50-a nullifies New York City's own effort to provide a measure of disclosure and accountability. We, at Citizens Union, have firsthand experience of the problem. At our urging, the Police Department and the Civilian Complaint Review Board entered into a Memorandum of Understanding (MOU) in 2012 in which the Police Department authorized the CCRB to undertake all administrative prosecutions of civilian complaints against police officers which have been substantiated by the CCRB and in which the CCRB has recommended that charges and specifications be preferred. The MOU further provides that in any case substantiated by the CCRB in which the Police Commissioner intends to impose discipline that is of a lower level than that recommended by the CCRB or by an NYPD Trial Commissioner, the Police Commissioner shall send the CCRB a detailed, written explanation of the reasons for deviating from that recommendation including each factor the Police Commissioner considered in making his decision. In light of the position of the Police Department that all disciplinary records are confidential under Section 50-a, Citizens Union and the public are unable to monitor compliance with this provision.

One potential argument against repeal (as opposed to modification) of Section 50-a is that police officers should be protected against the disclosure of records pertaining to *unsubstantiated* complaints or charges against them. We are sympathetic to that concern but believe that police officers, like other public officials and employees, already enjoy significant (if not absolute) protection against such disclosure.

FOIL exempts from its requirements records the disclosure of which would constitute an unwarranted invasion of personal privacy [Public Officers Law §§ 87(2)(b) and 89(2)(b)]. The Committee on Open Government has issued two advisory opinions stating that the personal privacy exemption is applicable when allegations or charges of misconduct have not yet been determined or did not result in disciplinary action [FOIL AO-10399 (Oct. 31, 1997) (police officers)], or when allegations of misconduct were not substantiated [FOIL AO-12005 (Mar. 21, 2000) (prison inmates)]. Although the Advisory Opinions of the Committee on Open Government "are not binding authority, they may be considered on the strength of their reasoning and analysis" [*Matter of TJS of N.Y., Inc. v. New York State Dep't of Taxation & Fin.*, 89 A.D.3d 239, 242 n.1 (3d Dep't 2011)]. The reasoning here appears correct at least with respect to documents that reveal the identity of the individuals against whom the unsubstantiated complaints were made.

That is not to say that FOIL would *never* require disclosure of documents relating to unsubstantiated reports of misconduct or that such disclosure would *always* be inappropriate. For example, in a high-profile case in which the nature of the complaint and the name of the police officer were already a matter of public knowledge, and where there was controversy surrounding the adequacy of the investigation, the appropriate balance between the public interest in the matter and the privacy interest of the police officer might tip in favor of disclosure. It is precisely that kind of careful weighing of factors that FOIL mandates, and Section 50-a precludes.

If there is complete secrecy surrounding officer misconduct and discipline – as 50-a currently imposes – then New Yorkers will have no confidence in the City's own police oversight apparatus. Every police officer is impugned when we cannot tell whether officers are held accountable and face consequences for misconduct. This poses a serious risk to both civilians and police officers. That is why it is so urgent to repeal Section 50-a of the Civil Rights Law. Having access to police disciplinary records, knowing when allegations of misconduct have been substantiated, and knowing the outcomes of disciplinary proceedings will allow us to identify individual and systemic problems in the police force and bolster the dignity and professionalism of the department.

MomsRising.org | MamásConPoder.org

CRL-50a Hearing Testimony
October 17, 2019
Monifa Bandele
Senior Vice President, MomsRising

MomsRising is an organization of more than a million people who are working to achieve safe communities, health equity, and economic security for all moms, women, and families in every state in the country. MomsRising is working to dismantle the school-to-prison pipeline, end mass incarceration, for paid family leave, earned sick days, affordable childcare, and for an end to the wage and hiring discrimination which penalizes so many mothers. MomsRising also advocates for better childhood nutrition, health care for all, toxic-free environments, breastfeeding rights so that all children can have a healthy start, and national and state budgets that reflects the contributions of women and moms.

In New York, our thousands of members are working to to bring greater independent oversight, transparency, accountability, and justice for victims of police brutality and misconduct. Everyday, we are working on the ground towards a day where mothers no longer fear that our children could come to harm at the hands of those charged with protecting them.

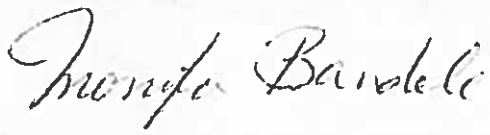
MomsRising supports the repeal of NYS Civil Rights Law 50-a (CRL 50-a). Essentially, CRL 50-a (A.3333 sponsored by Assembly Member Daniel O'Donnell) constitutes for the public disclosure, upheld by the Freedom of Information Law (FOIL), of police records and/or documents. Access to these records and documents will be used to assess any NYPD police officer, in relations to police misconduct, in the same way that we use access to public disciplinary and misconduct records of doctors, lawyers, and other professions that provide services in our communities. The repeal of CRL 50-a is a step forward in disassembling the divide and increasing trust between police officers and the people in the neighborhoods that they are assigned to patrol.

In communities across NYC, women and men of color, trans, gender non-conforming, and non-binary civilians are specifically targeted, face humiliation and abuse during their interactions with the police everyday. Every year, some 1,000 people are shot and killed by police. Yet, in a

twelve-year period, 2005 to 2017, only 80 officers were arrested on murder or manslaughter charges for on-duty shootings, out of which only 35% were convicted. Additionally, studies show that Black Americans are more than twice as likely as their white counterparts to be killed by police. We've seen this narrative play out through the killings of Eric Garner, Sean Bell, James Powell, Ramarley Graham, Kimani Gray, Nicholas Heyward Jr., Mohammed Bah, Amadou Diallo, Shantelle Davis, Saheed Vassell, and the teeming number of innocent black people who were killed at the hands of the NYPD, the very systems that are supposed to protect all of us.

Repealing CRL 50-a is a step forward to guarantee that mothers like, Gwen Carr, mother of Eric Garner, Valerie Bell, mother of Sean Bell, Carol Gray, mother of Kimani Gray, families and loved ones can properly seek the justice that they deserve and, to dismantle a policy that was put in place to protect officers from public accountability and legitimate penalization for unlawful, harmful, and often deadly actions.

Sincerely,



Monifa Bandele
Vice President, Healthy Kids Campaign
Chief Partnership and Diversity Officer
MomsRising.org

Testimony on Civil Rights Law Section 50-a
New York Senate Standing Committee on Codes
David E. McCraw
Senior Vice President & Deputy General Counsel
October 17, 2019

I am the senior newsroom lawyer for The New York Times. In that role, I work closely with reporters across the country as they cover the difficult issues communities face as those communities try to appropriately balance the civil liberties of citizens and the needs for effective law enforcement. Few issues are more important to New Yorkers than their safety and the police practices employed within their towns and cities. The press plays a vital role in raising public awareness, and assuring public accountability, by reporting fully on incidents when the conduct of police officers is called into question. Whether police officers have done wrong or been unfairly accused, we all lose when the public is kept in the dark about internal police investigations. Citizens need to know the facts so they can make informed decisions about law enforcement priorities and resources, community policing, training of officers, and the adequacy and fairness of disciplinary processes.

The reality is that Civil Rights Law 50-a prevents that from happening. By barring the press from getting and reporting official information about incidents of alleged misconduct, the blackout imposed by Section 50-a serves to engender suspicion about whether justice is being done, and it leaves the public with little

choice but to act upon rumors and emotional appeals and partial or wrong information. Our reporters do their best to get at the truth in these cases – cases that often involve conflicting and complicated narratives – but that important work is undermined when the official records are kept under lock and key.

Section 50-a broadly makes secret the personnel records of law enforcement officers, fire fighters, and correction officers. As a result, it hampers routine reporting on public safety when the employment background of a uniformed officer is central to a story. It also undermines journalists' ability to report on trends in law enforcement like the story done earlier this year by USA Today that showed, among other things, that a large number of police misconduct complaints across the country involve just a small number of officers who are repeatedly under investigation. ("Tarnished Brass" Series, April 24, 2019, USA Today.)

But Section 50-a's impact on journalism is most pronounced at times when there are allegations of serious police misconduct – in other words, at times when the public has a powerful and legitimate interest in knowing whether their police force has betrayed the public trust and how senior law enforcement officials are responding. Courts in other states, grappling with these same issues of confidentiality and transparency, have recognized the special importance of assuring public oversight of police disciplinary matters.

I would call the Committee's attention to a case decided several years ago in Massachusetts: Worcester Telegram & Gazette Corp. v. Chief of Police of Worcester, 436 Mass. 378, 386, 764 N.E.2d 847, 854 (2002). Massachusetts' highest court was asked to determine whether documents from an internal affairs investigation of an alleged false arrest were exempt from disclosure under the state's Public Records Law. See Mass. Gen. Laws ch. 4, § 7(26). The Supreme Judicial Court warned of the danger of giving police agencies broad discretion to declare materials from investigations secret. And on remand, the Court of Appeals recognized that records about internal investigations and personnel proceedings involving the police should be *more open, not less open*, than the records from other agencies. As the court wrote:

> It would be odd, indeed, to shield from the light of public scrutiny as "personnel [file] or information" the workings and determinations of a process whose quintessential purpose is to inspire public confidence.

Worcester Telegram & Gazette Corp. v. Chief of Police, 58 Mass. App. Ct. 1, 8-9; 787 N.E.2d 602, 608 (2003).

That point is worth stressing: openness about police disciplinary actions is an essential factor in inspiring public confidence in our police departments. Ultimately, law enforcement agencies depend on the trust and support of New Yorkers to be partners with the police in fighting crime and assuring community

safety. That bond is frayed when secrecy shrouds investigations into alleged police misconduct. While a news story about police misconduct may strike some as detrimental to law enforcement efforts, precisely the opposite is true. Twelve states – ranging from Florida and California to Delaware and Georgia – generally make these kinds of disciplinary records public, and New York should join them. (See https://project.wnyc.org/disciplinary-records/.)

The repeal of Section 50-a would not mean that we would have criminal trials where defense lawyers could freely use personnel records to embarrass cops and shift attention away from the accused. The repeal would not mean that intimate personal facts about officers would now be public. If an officer's disciplinary record is irrelevant in a court proceeding, judges have the power and duty now to prohibit such testimony. If a FOIL requester asks for records containing legitimately private information about a police officer, FOIL's privacy exemption provides protection.

Simply put, the repeal of 50-a will not subject police officers to having their entire professional lives open to public inspection. It will, though, allow journalists to do their jobs more effectively as they work to provide the public with accurate, comprehensive reporting on law enforcement matters.

I urge the Committee to support the repeal of Section 50-a. I am reminded of what the U.S. Supreme Court has said about the need for openness in our court

system: "People in an open society do not demand infallibility from their institutions but it is difficult for them to accept what they are prohibited from observing." Richmond Newspapers v. Virginia, 448 U.S. 555, 572 (1980).

Thank you.

Testimony of Franklin H. Stone

Board Chair, New York State Committee on Open Government

Presented before:

The New York State Senate Standing Committee on Codes

Hearing on Section 50-a of the NY Civil Rights Law

Thursday, October 17, 2019

My name is Franklin Stone and I am the Board Chair of the NYS Committee on Open Government. I am also a former federal prosecutor in the SDNY and am a former Board Chair of the NYC Civilian Complaint Review Board.

The Committee on Open Government is a unit housed in the Department of State that oversees and advises the government, public, and news media on Freedom of Information, Open Meetings, and Personal Privacy Protection Laws. The Committee offers guidance in response to phone inquiries, prepares written legal advisory opinions, and provides training to government and other interested groups. Recommendations to improve open government laws are offered in an annual report to Governor and the State Legislature.

The Committee's last six Annual Reports have highlighted the damage caused by Section 50-a and have called for its revision or repeal. We thank Chairperson Jamaal T. Bailey, along with his co-sponsors, for advancing S.3695/A.2513. This bill would repeal of section 50-a of the Civil Rights law and help to address the lack of transparency in law enforcement departments across the state and to promote accountability for police misconduct.

Background: Section 50-a was never intended to shield all records relating to police conduct

Section 50-a of the Civil Rights Law permits police departments to refuse to disclose any police personnel records that are "used to evaluate performance toward continued employment or promotion." A review of its legislative history indicates that § 50-a was enacted in 1976 with a narrow purpose—to prevent criminal defense lawyers from rifling through police personnel folders in search of unproven or irrelevant information to use in cross examination of police witnesses.

The problem is that over time this narrow exception was expanded by the courts to allow police departments to withhold from the public virtually any record that contains any information that could conceivably be used to evaluate the performance of a police officer. This has turned a narrow FOIL exception into a virtually impenetrable statutory bar to the disclosure of information about the conduct of law enforcement officers. Section 50-a is now being used to prevent meaningful public oversight of law enforcement agencies. Its repeal or revision is long overdue.

Repeal of §50-a would not be injurious to the safety of law enforcement personnel.

The Committee and I personally have only the utmost respect for those who function daily to serve and protect every New Yorker. We recognize the need to ensure their safety and security.

But courts have long recognized that public employees should enjoy little privacy protection for things they do on the job. The effect of §50-a is to make the public employees who have often the greatest power over the lives of New York's residents the least accountable to the public.

FOIL provides all public employees, including law enforcement officers, with the protections necessary to guard against unwarranted invasions of privacy and from disclosures that could jeopardize their security or safety. One of FOIL's express exceptions, §87(2)(b), authorizes an agency to withhold records where disclosure would constitute an unwarranted invasion of personal privacy. This provision has long been held to allow "unsubstantiated allegations" against an employee to be withheld. Section 87(2)(f), permits an agency to deny access when disclosure "could endanger the life or safety of any person" and Section 89(7) permits the home address of a present or former public employee to be withheld. A performance evaluation may also be withheld pursuant to §87(2)(g), concerning "intra-agency materials," insofar as it includes the opinions of agency officials concerning a public employee's performance.

In addition, the courts are adequately equipped to protect against improper cross-examination and to determine when records regarding a police officer's behavior are admissible in a trial. Between FOIL's exceptions and the inherent power of the courts, there are ample protections for the rights of all public employees to feel safe.

New York is virtually unique among the states in its refusal to apply the same transparency to police and other uniformed services as applies to all other public employees. The Committee's~~A~~ review of the 48 states without provisions like Section 50-a does not reveal any greater challenges to the privacy and safety of law enforcement personnel. Indeed, following the creation ~~and release~~ of a police misconduct database in Chicago that makes all police discipline records available online, the Chicago police union confirmed that there was "no increase in threats against officers or their families" as a result of the public police misconduct database. The concerns being voiced ~~claims~~ by law enforcement representatives in New York are ~~quite~~ simply ~~is~~ irrational fearmongering that is not supported by facts.

The NYS Committee on Open Government is a resource available to you.

The annual reports of the Committee on Open Government address Section 50-a and many other compelling issues relating to open government. These reports contain citations to numerous scholarly articles, news reports and editorials decrying the unjust impact of Section 50-a.

We thank the Committee for the opportunity to speak on this issue and hope you will view the Committee on Open Government as a resource as we continue to promote more open government in New York State.

Withholding information about conduct - and especially misconduct – by law enforcement officers defeats accountability, increases public skepticism and foments distrust. We strongly recommend legislative action.