

2023

## The [De]Value of Unsubstantiated Allegations Against the Police

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### Recommended Citation

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## THE [DE]VALUE OF UNSUBSTANTIATED ALLEGATIONS AGAINST THE POLICE

*Francy R. Monestime\**

*In 2020, New York State repealed Civil Rights Law section 50-a, which formerly prohibited disclosure of police and other civil servant disciplinary records. Shortly after this repeal, New York City's Civilian Complaint Review Board (CCRB) released thousands of records of civilian complaints for all current and former New York City police officers that dated back to 2000. The release included substantiated findings of wrongdoing and unsubstantiated records in which no wrongdoing was found. Records continue to be released in this manner following the CCRB's investigations.*

*Under New York City's Administrative Procedure Act, agencies like the CCRB must follow certain procedures before taking actions that implicate citizens' rights. Under New York State's Freedom of Information Law, disciplinary records of municipal and state employees are subject to certain disclosure protections. This Note examines whether releasing unsubstantiated records complies with these two laws.*

*Litigation surrounding the repeal of section 50-a and the release of civilian complaint records has led to differing treatment of police records across New York State. This Note argues that the CCRB's release of records did not comply with the city's Administrative Procedure Act and that unsubstantiated records naming officers should not have been released pursuant to the Freedom of Information Law. This Note posits that the CCRB should correct the procedural deficiencies created by ignoring the former when it released the records and offers concrete solutions to ensure that further releases of records comply with the latter. Finally, this Note addresses some policy concerns regarding civilian complaints against the police.*

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## INTRODUCTION

The New York City Police Department (NYPD) is the largest municipal law enforcement agency in the United States.<sup>1</sup> It has a rich history and is largely recognized as a model of effective crime-fighting across the nation.<sup>2</sup> The NYPD built its reputation in part by engaging with historic levels of crime during the “crack epidemic” of the 1980s<sup>3</sup> and by reducing major crime

1. See *About NYPD*, NYPD, <https://www1.nyc.gov/site/nypd/about/about-nypd/about-nypd-landing.page> [<https://perma.cc/7SUA-UQZ7>] (last visited Nov. 3, 2023).

2. See Rich McHugh, Evan Stulberger & Jonathan Dienst, *An Inside Look at the System That Cut Crime in New York by 75 Percent*, NBC NEWS (Apr. 16, 2016, 12:18 PM), <https://www.nbcnews.com/news/us-news/inside-look-system-cut-crime-new-york-75-percent-n557031> [<https://perma.cc/7LSB-QXZM>]; Heather Mac Donald, *America's Best Urban Police Force*, CITY J., <https://www.city-journal.org/html/americas-best-urban-police-force-11751.html> [<https://perma.cc/9QH5-MCED>] (last visited Nov. 3, 2023).

3. See McHugh et al., *supra* note 2; Michael Marriot, *After 3 Years, Crack Plague in New York Only Gets Worse*, N.Y. TIMES (Feb. 20, 1989), <https://www.nytimes.com/>

rates to near all-time lows.<sup>4</sup> Controversy frequently accompanied the building of this reputation.<sup>5</sup>

Commentators frequently call for accountability and reform in policing, but change has historically been slow,<sup>6</sup> partially due to successful resistance by police agencies and police unions.<sup>7</sup>

Recently, controversial stop and frisk policies<sup>8</sup> as well as notable assaults and deaths involving police<sup>9</sup> have dramatically increased calls for NYPD accountability. The incendiary murder of George Floyd in the summer of 2020 served as a lightning rod, sparking several states to implement meaningful law enforcement accountability measures.<sup>10</sup> City and state legislators made significant and controversial reforms affecting the NYPD,<sup>11</sup> the most significant of which was the legislative repeal of New York Civil Rights Law section 50-a (“Section 50-a”).<sup>12</sup>

Section 50-a formerly permitted law enforcement officers, correctional officers, and firefighters to bar disclosure of certain personnel records, including disciplinary records.<sup>13</sup> With its repeal, the Civilian Complaint Review Board (CCRB)<sup>14</sup> planned to publicly disclose “member of service

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1989/02/20/nyregion/after-3-years-crack-plague-in-new-york-only-gets-worse.html [https://perma.cc/N9Z9-2Q6R].

4. See NYPD, SEVEN MAJOR FELONY OFFENSES (2022), [https://www1.nyc.gov/assets/nypd/downloads/pdf/analysis\\_and\\_planning/historical-crime-data/seven-major-felony-offenses-2000-2021.pdf](https://www1.nyc.gov/assets/nypd/downloads/pdf/analysis_and_planning/historical-crime-data/seven-major-felony-offenses-2000-2021.pdf) [https://perma.cc/6LVW-ZLBF]; POLICE DEP’T, CITY OF N.Y., COMPSTAT: REPORT COVERING THE WEEK 10/2/2023 THROUGH 10/8/2023 (2023), [https://www.nyc.gov/assets/nypd/downloads/pdf/crime\\_statistics/cs-en-us-city.pdf](https://www.nyc.gov/assets/nypd/downloads/pdf/crime_statistics/cs-en-us-city.pdf) [https://perma.cc/QND5-TXH4]. Reviewing the Report’s “Historical Perspective” shows how substantially crime has fallen compared to the early 1990s. See POLICE DEP’T, CITY OF N.Y., *supra*.

5. See MAURICE PUNCH, POLICE CORRUPTION: DEVIANCE, ACCOUNTABILITY AND REFORM IN POLICING 56–73 (2009).

6. See *id.* at 215–16.

7. See *id.* at 216. For example, an NYPD police union successfully campaigned to defeat an early attempt by New York City officials to create a civilian review board in the 1960s. *Id.*

8. See generally Jeffrey Bellin, *The Inverse Relationship Between the Constitutionality and Effectiveness of New York City “Stop and Frisk,”* 94 B.U. L. REV. 1495 (2014).

9. See, e.g., Shamira Ibrahim, *The NYPD’s Long History of Targeting Black Immigrants*, DOCUMENTED (July 1, 2020), <https://documentedny.com/2020/07/01/the-nypds-long-history-of-targeting-black-immigrants/> [https://perma.cc/S68B-5CKU]; Katherine J. Bies, Note, *Let the Sunshine In: Illuminating the Powerful Role Police Unions Play in Shielding Officer Misconduct*, 28 STAN. L. & POL’Y REV. 109, 111 (2017).

10. See *States Diverge on Police Reforms After George Floyd Killing*, PBS (Dec. 30, 2021, 12:41 PM), <https://www.pbs.org/newshour/nation/states-diverge-on-police-reforms-after-george-floyd-killing> [https://perma.cc/RK26-R762].

11. For example, New York City legislators eliminated a qualified immunity defense with respect to local civil rights violations. See N.Y.C., N.Y., ADMIN. CODE §§ 8-801 to 8-807 (2023).

12. See S.B. 8496, 203d Leg., Reg. Sess. (N.Y. 2020).

13. See N.Y. CIV. RIGHTS LAW § 50-a (McKinney 1976) (repealed 2020).

14. The New York City Civilian Complaint Review Board is an independent city agency which is empowered to receive, investigate, mediate, hear, make findings in, and recommend actions against New York City police officers regarding complaints of excessive or unnecessary force, abuse of authority, discourtesy, or use of offensive language, collectively “FADO”. See *About CCRB*, N.Y.C. CIVILIAN COMPLAINT REV. BD., <https://www1.nyc.gov/site/ccrb/about/about.page> [https://perma.cc/9SDT-4Q3F] (last visited Nov. 3, 2023).

histories” (complaint histories) of NYPD police officers.<sup>15</sup> Several civil service unions fought the disclosure<sup>16</sup> but lost, and the CCRB successfully published the complaint histories of thousands of NYPD police officers.<sup>17</sup>

The CCRB’s release of complaint records raises material issues concerning administrative law and freedom of information law. This Note explores whether the CCRB, a New York City (“City”) administrative agency, had the authority to unilaterally release the complaint histories, particularly when they contained unsubstantiated allegations against NYPD officers.

Though the civil service unions lost their legal battle to protect the complaint histories, the decision did not sufficiently consider certain fundamentals required in exercising administrative agency authority, guidance under New York’s Freedom of Information Law<sup>18</sup> (FOIL), and other factors which should have protected police officers against publication of unsubstantiated allegations.

Section 50-a constituted only one of three substantial protections for police records. After its repeal, two remained: the City Administrative Procedures Act<sup>19</sup> (CAPA) and FOIL. Part I of this Note discusses the CCRB’s founding, its authority under the New York City Charter (“Charter”), and the legal background surrounding Section 50-a and its repeal.

Part II reviews the CCRB’s actions after Section 50-a’s repeal, considers CAPA and FOIL protections, and compares *Uniformed Fire Officers Ass’n v. De Blasio*<sup>20</sup> to *Gannett Co. v. Herkimer Police Department*.<sup>21</sup>

Part III brings the earlier conversation together to discuss current problems with publishing complaint histories under both CAPA and FOIL. It then offers solutions to bring the CCRB within CAPA compliance and to produce FOIL disclosures that protect the privacy interests of police officers.

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15. See Ashley Southall, *323,911 Accusations of N.Y.P.D. Misconduct Are Released Online*, N.Y. TIMES (Aug. 20, 2020), <https://www.nytimes.com/2020/08/20/nyregion/nypd-ccrb-records-published.html> [<https://perma.cc/XE8C-9DQB>]. CCRB’s complaint histories website contains every FADO civilian allegation lodged against current and former police officers dating back to 2000, including unsubstantiated allegations. See *NYPD Member of Service Histories*, N.Y.C. CIVILIAN COMPLAINT REV. BD., <https://www.nyc.gov/site/ccrb/policy/MOS-records.page> [<https://perma.cc/VH32-GC3W>] (last visited Nov. 3, 2023).

16. See *Uniformed Fire Officers Ass’n v. De Blasio*, No. 20-CV-5441, 2020 WL 5640063 (S.D.N.Y. Aug. 21, 2020), *aff’d*, 846 F. App’x 25 (2d Cir. 2021).

17. See *Uniformed Fire Officers Ass’n v. De Blasio*, 846 F. App’x 25, 33 (2d Cir. 2021); Southall, *supra* note 15.

18. N.Y. PUB. OFF. LAW §§ 84–90 (McKinney 2023).

19. N.Y. CITY CHARTER §§ 1041–1047 (2023).

20. 846 F. App’x 25 (2d Cir. 2021). The *De Blasio* court affirmed denial of injunctive relief for several unions that sought to block release of the complaint histories. See *id.* at 33.

21. 169 N.Y.S.3d 503 (Sup. Ct. 2022). The *Gannett* court barred disclosure of unsubstantiated allegations against police officers, citing FOIL and other factors. See *id.* at 510.

## I. HISTORIES OF THE CCRB AND SECTION 50-A

Part I.A discusses the CCRB's establishment and its complex history with the NYPD. Part I.B discusses the CCRB's and the NYPD's differing priorities. Part I.C discusses Section 50-a's history and the environment leading to its repeal.

A. *The CCRB's Establishment*

As a result of mounting tensions in African-American and Hispanic neighborhoods, a coalition of organizations formed the Permanent Coordination Committee on Police and Minority Groups<sup>22</sup> in 1950.<sup>23</sup> Through the committee's sustained pressure, the first New York CCRB was created in 1953.<sup>24</sup>

The City's first CCRB fell under the NYPD's control.<sup>25</sup> The Police Benevolent Association (PBA)<sup>26</sup> was against establishing a police complaint board and had early success in ensuring that investigations were conducted solely by police officers.<sup>27</sup> The PBA's influence also effectively prevented civilians<sup>28</sup> from becoming CCRB board members.<sup>29</sup> They successfully defeated Mayor John Lindsay's attempt to create a "mixed" CCRB with both NYPD and civilian board members in 1966.<sup>30</sup>

Civilian board members were barred from the CCRB for the first thirty-five years of its existence.<sup>31</sup> In 1987, Mayor Ed Koch made a push, backed by the New York City Council, to finally add civilians to the CCRB's ranks.<sup>32</sup> Nonetheless, the CCRB remained under the NYPD's authority.<sup>33</sup>

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22. The Committee consisted of eighteen civil rights groups concerned with rising police hostility against Black and Puerto Rican New Yorkers. See Amir Khafagy, *Amid Calls to Reform Police, New York Activists and Lawmakers Demand an Elected Civilian Complaint Review Board*, APPEAL (June 29, 2020), <https://theappeal.org/amid-calls-to-reform-police-new-york-activists-and-lawmakers-demand-an-elected-civilian-complaint-review-board/> [https://perma.cc/7RAW-25Z8].

23. Lawrence Wittner, *Subversion of NYC's Police Brutality Policies: A Short History*, N.Y. ALMANACK (June 10, 2020), <https://www.newyorkalmanack.com/2020/06/subversion-of-nycs-police-brutality-policies-a-short-history/> [https://perma.cc/CH5S-3MWY].

24. See *id.*; see also Raymond W. Patterson, *Resolving Civilian-Police Complaints in New York City: Reflections on Mediation in the Real World*, 22 OHIO ST. J. ON DISP. RESOL. 189, 189 (2006).

25. Patterson, *supra* note 24, at 189.

26. The PBA is the largest municipal police union in the world and currently represents over 20,000 sworn NYPD police officers. See *Who We Are*, NYCPBA, <https://www.nycpba.org/about-the-pba/who-we-are/> [https://perma.cc/Z6GN-XBFM] (last visited Nov. 3, 2022).

27. See Patterson, *supra* note 24, at 189–90; Bies, *supra* note 9, at 123–24.

28. For purposes of this Note, civilian means a person who is not affiliated with the NYPD.

29. See Patterson, *supra* note 24, at 189–90.

30. See *id.* Both NYPD and non-NYPD board members would constitute a mixed CCRB. See *id.*

31. See *id.*

32. See *id.* at 190.

33. See *id.*

A major riot occurred in 1988 at Tompkins Square Park in lower Manhattan.<sup>34</sup> NYPD officers had to enforce a newly implemented curfew at the park.<sup>35</sup> 200 demonstrators showed up to protest the enforcement.<sup>36</sup> Violence erupted as protestors threw bottles at the police, and the NYPD rushed the crowds, indiscriminately striking protestors with their nightsticks.<sup>37</sup> Approximately fifty injuries were sustained from both sides of the melee.<sup>38</sup> Video footage of the riot was widespread, and the police received sharp criticism for their actions.<sup>39</sup> The then-Chief of Department had trouble defending the NYPD.<sup>40</sup> He noted that the “appalling behavior” of several of the officers during the incident overshadowed the work of the majority of the on-scene officers, who exercised restraint and professionalism in the face of extreme provocation.<sup>41</sup>

The Tompkins Square Park incident served as the springboard for a finally independent CCRB.<sup>42</sup> In the aftermath of the incident, organizations such as the New York Civil Liberties Union (NYCLU) called for a “powerful, civilian-controlled review process.”<sup>43</sup> The NYCLU graphically highlighted the significant injuries resulting from the NYPD’s actions at the park and what it viewed as the lack of accountability for involved officers.<sup>44</sup> It found that of the 121 civilian complaints filed in the NYPD-controlled CCRB nearly two years after the riot, less than twelve officers were found guilty in a department trial and that all six officers who had been criminally indicted had their charges dismissed or were acquitted.<sup>45</sup> It also found that the CCRB had insufficient power because it could not compel discussions with the PBA nor use subpoena power to encourage cooperation from police officers.<sup>46</sup>

In 1992, Mayor David Dinkins created a special commission to investigate alleged corruption in the NYPD over objections by the Police Commissioner.<sup>47</sup> Additionally, he suggested creating an independent

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34. *See id.* at 190 n.8.

35. *See* Howard W. French, Michael Wines & Todd S. Purdum, *Melee in Tompkins Sq. Park: Violence and Its Provocation*, N.Y. TIMES (Aug. 14, 1988), <https://www.nytimes.com/1988/08/14/nyregion/melee-in-tompkins-sq-park-violence-and-its-provocation.html> [<https://perma.cc/3JUN-FP9C>].

36. *See id.*

37. *See id.*

38. *See id.*; Patterson, *supra* note 24, at 190 n.8.

39. *See* Patterson, *supra* note 24, at 190 n.8.

40. *See* Letter from Robert J. Johnston, Jr., Chief of Dep’t, City of N.Y. Police Dep’t, to Benjamin Ward, Police Comm’r, City of N.Y. Police Dep’t (Aug. 23, 1988) (on file with the Lloyd Sealy Library, John Jay College of Criminal Justice).

41. *See id.*

42. *See* Patterson, *supra* note 24, at 190.

43. *See* NYCLU, POLICE ABUSE: THE NEED FOR CIVILIAN INVESTIGATION AND OVERSIGHT 1–2 (1990), <https://www.nyclu.org/sites/default/files/publications/Police%20Abuse%20The%20Need%20for%20Civilian%20Investigation%20and%20Oversight.pdf> [<https://perma.cc/NRW3-JYS9>].

44. *See id.* at 2–3.

45. *Id.* at 3.

46. *See* NYCLU, *supra* note 43, at 7–9.

47. *See* WILBUR C. RICH, DAVID DINKINS AND NEW YORK CITY POLITICS 159–60 (2007).

civilian police review board focused on corruption.<sup>48</sup> This corruption board never materialized,<sup>49</sup> but Mayor Dinkins sought to correct the CCRB's lack of power by creating an independent civilian review.<sup>50</sup> With his backing, the New York City Council established an independent CCRB in 1993.<sup>51</sup>

### *B. The CCRB and NYPD Under the Charter*

A city charter defines the organization, powers, functions, and essential procedures of a particular city's government.<sup>52</sup> Comparable to a constitution, a city's charter is its single most important "law."<sup>53</sup> New York State delegates to cities the authority to create a charter and grants cities fairly broad authority in engineering such charters, so long as they do not offend state law and certain judicial holdings.<sup>54</sup>

The modern New York City Charter traces its roots back to 1897.<sup>55</sup> The 1897 Charter provided for the NYPD, but the document contained no provisions for a CCRB nor any particular agency missioned to monitor the police.<sup>56</sup> Today, the Charter enumerates the NYPD and CCRB in consecutive chapters.<sup>57</sup>

Chapter 18 of the Charter grants the NYPD's authority.<sup>58</sup> It charges the NYPD with several duties, including preserving the peace, preventing crime, detecting and arresting offenders, suppressing riots, and dispersing unlawful assemblies.<sup>59</sup> The chapter also provides that the NYPD Police Commissioner is the agency's "chief executive officer"<sup>60</sup> who maintains "control . . . , administration, disposition and discipline of the [NYPD and its personnel]."<sup>61</sup> The NYPD's powers are broad and significant.

Chapter 18-A of the Charter grants the CCRB's authority.<sup>62</sup> The first clause of the CCRB's chapter provides that "[i]t is in the interest" of the citizenry that investigations of police complaints by citizens "be complete,

48. *See id.* at 160.

49. *See id.*

50. *See id.*

51. *See* N.Y.C., N.Y., Local Law 1, Int. No. 649-A (Jan. 5, 1993) (codified at N.Y. CITY CHARTER § 440(a)(2023)).

52. DIV. OF LOC. GOV'T SERVS., N.Y. DEP'T OF STATE, REVISING CITY CHARTERS IN NEW YORK STATE 1 (1998), [https://dos.ny.gov/system/files/documents/2023/01/revising-city-charters\\_0.pdf](https://dos.ny.gov/system/files/documents/2023/01/revising-city-charters_0.pdf) [<https://perma.cc/G8JB-JCVF>].

53. *Id.*

54. *Id.* at 5.

55. *See generally* MARK ASH, THE GREATER NEW YORK CHARTER AS ENACTED IN 1897 (1897); *About Charter Revision Commissions*, N.Y.C. CHARTER REV. COMM'N, <https://www.nyc.gov/site/charter/about/about-the-commission.page> [<https://perma.cc/D73X-5THK>] (last visited Nov. 3, 2023).

56. *See* ASH, *supra* note 55.

57. *See* N.Y. CITY CHARTER §§ 431–441 (2023).

58. *See generally id.* §§ 431–438.

59. *See id.* § 435(a).

60. *Id.* § 434(b).

61. *Id.* § 434(a).

62. *See id.* §§ 440–441.



thorough and impartial.”<sup>63</sup> The chapter also provides the CCRB with powers “to receive, investigate, hear, make findings and recommend action” regarding police complaints lodged by the public.<sup>64</sup> Additionally, the CCRB must promulgate rules of procedure in accordance with CAPA under its Charter chapter.<sup>65</sup>

The CCRB chapter provides that findings and recommendations by the board will be submitted to the police commissioner and that “prior unsubstantiated, unfounded or withdrawn complaints” may not provide the basis for any finding or recommendation regarding a civilian complaint.<sup>66</sup> Under the CCRB chapter, the only duty of public disclosure granted by the Charter appears to be to inform the public about the board and its duties.<sup>67</sup>

### C. The Repeal of Section 50-a

As the City considered creating a CCRB,<sup>68</sup> the state legislature adopted New York Civil Rights Law Section 50-a.<sup>69</sup> The 1976 law formerly permitted law enforcement officers, correction officers, and firefighters to bar disclosure of certain personnel records, including disciplinary records.<sup>70</sup> The original version of Section 50-a made these records confidential and subject to review only by court order unless the requestor was a government official, a district attorney, a special prosecutor, or a grand jury.<sup>71</sup>

The legislative history shows that several justifications supported Section 50-a. One concern was protecting police officers who were required to testify in criminal proceedings.<sup>72</sup> The New York State Assembly (“Assembly”) endorsed a state police spokesman’s statement alleging that defense attorneys sought to discredit police officer witnesses by subpoenaing personnel files and using them to “confront [police witnesses] with allegations, complaints, disciplinary proceedings, [and] reprimands filed against them.”<sup>73</sup> According to the spokesman, this was particularly problematic at the time, as every communication concerning a state officer’s behavior, whether substantiated or not, was entered into their personnel folder and could be used to unjustly discredit the officer.<sup>74</sup> State legislators Frank Padavan and Louis Desalvio

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63. *Id.* § 440(a).

64. *Id.* § 440(c)(1).

65. *Id.* § 440(c)(2).

66. *Id.*

67. *See id.* § 440 (c)(7). The CCRB must also promulgate rules that prescribe how an individual complainant is to be informed of the status of their CCRB complaint. *Id.* § 440(c)(2). This Note considers this duty to be distinct from the CCRB’s broad disclosure of complaint histories.

68. *See supra* Part I.A.

69. 1976 N.Y. LAWS ch. 413 (codified at N.Y. CIV. RIGHTS LAW § 50-a (McKinney 1976) (repealed 2020)).

70. *Id.*

71. *See id.*

72. DIV. OF BUDGET, BUDGET REPORT ON BILLS, S. 199-7635-B, 2d Sess., at 1 (N.Y. 1976).

73. *Id.*

74. *See id.*

noted that “police officers [were] bearing the brunt of fishing expeditions by attorneys, leading to abuse and disclosure of unverified and unsubstantiated information contained in personnel records.”<sup>75</sup> Justice Roger S. Hayes of the New York County Supreme Court highlighted that police personnel records often contained “raw, unverified information” that was derogatory of the subject police officer, including complaint letters from the public.<sup>76</sup> Justice Hayes noted that this information could be misused and recommended that Section 50-a be approved.<sup>77</sup>

Another justification for the law was safety concerns for officers and their families. One of the budget reports on the bill highlighted that family members of police officers were identified and subject to harassment when the officers’ personnel files, containing home addresses and identities of the officers’ personal connections, were disclosed.<sup>78</sup>

Another substantive concern raised for Section 50-a was the civil rights of police officers. Senator Padavan and Assemblyman Desalvio stated that the civil rights of police officers required protection just like the rights of any other citizen.<sup>79</sup> They added that these rights were “sacred” and should only be given away if they were of “paramount interest [to] the public good.”<sup>80</sup> PBA president John T. Maye also cited the importance of protecting the civil rights of police officers.<sup>81</sup>

Many government officials either supported or did not object to Section 50-a. New York Attorney General Louis Lefkowitz did not object to the bill.<sup>82</sup> Two New York City district attorneys also supported Section 50-a’s enactment.<sup>83</sup> Bronx County District Attorney Mario Merola noted that the law would discourage “bad faith probing into police personnel records.”<sup>84</sup> Supporters also agreed that necessary police records would still be available under Section 50-a. Justice Hayes noted that, regardless of whether criticism of Section 50-a was merited, the law did not impose “onerous burden[s]” on

75. Memorandum from Frank Padavan, New York State Senate, and Assemblyman Louis Desalvio, New York State Assembly, to Judah Gribetz, Counsel to Governor Hugh L. Carey, in Support of Senate No. 7635-B, Assembly No. 9640-A (June 7, 1976) (on file with University at Buffalo Libraries).

76. Memorandum from Roger Hayes, New York State Div. of Crim. Just. Servs., to Judah Gribetz, Counsel to Governor Hugh L. Carey (June 16, 1976) (on file with University at Buffalo Libraries).

77. *Id.*

78. *See* DIV. OF BUDGET, BUDGET REPORT ON BILLS, S. 199-7635-B, 2d Sess., at 2 (N.Y. 1976).

79. Memorandum from Padavan & Desalvio, *supra* note 75.

80. *Id.*

81. Letter from John Maye, President of Patrolman’s Benevolent Ass’n, to Hugh L. Carey, Governor of New York (June 18, 1976) (on file with University at Buffalo Libraries).

82. *See* Memorandum from Louis J. Lefkowitz, New York State Dep’t of L., to Hugh L. Carey, Governor of New York (June 11, 1976) (on file with University at Buffalo Libraries).

83. *See* Letter from Mario Merola, Dist. Att’y of Bronx Cnty., to Judah Gribetz, Counsel to Governor Hugh L. Carey (June 7, 1976) (on file with University at Buffalo Libraries); Letter from Thomas R. Sullivan, Dist. Att’y of Richmond Cnty., to Judah Gribetz, Counsel to Governor Hugh L. Carey (June 9, 1976) (on file with University at Buffalo Libraries).

84. Letter from Merola, *supra* note 83.

the courts or defense attorneys legitimately seeking police personnel records.<sup>85</sup>

Opponents of Section 50-a made several arguments against its adoption. They reasoned that requiring a judicial subpoena to release police records was overly protective.<sup>86</sup> They also worried that the police would enjoy procedural safeguards not given to other citizens or civil servants.<sup>87</sup> Additionally, they lamented that Section 50-a would undermine judicial economy by adding an additional mechanism governing the introduction of evidence.<sup>88</sup> Special Deputy Attorney Joseph P. Hoey argued against the law for “general policy reasons,” partly because of “the [increasing] need for public accountability of public servants.”<sup>89</sup> Other entities countered that the pool of prospective police officers would shrink without Section 50-a’s protections; however, Mr. Hoey dismissed the argument, reasoning that prospective officers would not “be dissuaded from public service merely because their employment records [were] available to the public at large.”<sup>90</sup> He felt that the benefit of assuring public availability of police records outweighed fears of safety or misuse of police records by defense attorneys, both of which he argued could be mitigated by means other than Section 50-a.<sup>91</sup>

After considering all relevant views, the 1976 New York legislature overwhelmingly voted to adopt Section 50-a, with a vote of 170 to 28.<sup>92</sup>

Section 50-a was criticized throughout its roughly forty-five-year history, but efforts to repeal it proved unsuccessful<sup>93</sup> until recently. Calls for police reform are not novel,<sup>94</sup> but they sharply rose in intensity in the mid-2010s following several widely covered deaths involving police.<sup>95</sup> Increased calls

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85. See Memorandum from Hayes, *supra* note 76.

86. See DIV. OF BUDGET, BUDGET REPORT ON BILLS, S. 199-7635-B, 2d Sess., at 2 (N.Y. 1976).

87. *Id.*

88. *Id.*

89. Letter from Joseph P. Hoey, Special Deputy Att’y Gen. of Suffolk Cnty., to Judah Gribetz, Counsel to Governor Hugh L. Carey (June 18, 1976) (on file with University at Buffalo Libraries).

90. *See id.*

91. *See id.*

92. S. JOURNAL, 119th Leg., 2d Sess., 36–37 (N.Y. 1976).

93. For example, the Assembly did not reach a vote on a 2016 attempt to repeal Section 50-a. See Assemb. B. 9332, 201 Leg., 2d Sess. (N.Y. 2016) (“AN ACT to repeal section 50-a of the civil rights law . . .”).

94. See, e.g., John Rather, *Suffolk Police: Reform Pressure Grows*, N.Y. TIMES (July 12, 1987), <https://www.nytimes.com/1987/07/12/nyregion/suffolk-police-reform-pressure-grows.html> [<https://perma.cc/FYC7-388B>]; *Fighting Police Abuse: A Community Action Manual*, ACLU (Dec. 1, 1997), <https://www.aclu.org/other/fighting-police-abuse-community-action-manual> [<https://perma.cc/QD8E-VNSF>]; HUM. RTS. WATCH, SHIELDED FROM JUSTICE: POLICE BRUTALITY AND ACCOUNTABILITY IN THE UNITED STATES (1998), <https://www.hrw.org/legacy/reports98/police/usp014.htm> [<https://perma.cc/2VBL-2HGH>].

95. See, e.g., NAZGOL GHANDNOOSH, SENT’G PROJECT, BLACK LIVES MATTER: ELIMINATING RACIAL INEQUALITY IN THE CRIMINAL JUSTICE SYSTEM 3, 8 (2015), <https://www.sentencingproject.org/wp-content/uploads/2015/11/Black-Lives-Matter.pdf> [<https://perma.cc/YU8D-R88X>]; Oliver Laughland, *Akai Gurley Death: Congressman Calls for NYPD Reform After ‘Terrible Tragedy,’* GUARDIAN (Nov. 25, 2014, 2:04 PM), <https://>

for reform likely coincided with the proliferation of cell phone cameras.<sup>96</sup> Amid a growing anti-police sentiment,<sup>97</sup> the graphic, caught-on-camera death of George Floyd<sup>98</sup> ultimately proved to be the final blow to Section 50-a.<sup>99</sup> Several states, including New York, enacted over 100 police oversight bills.<sup>100</sup> The New York legislature, capitalizing on the momentum generated by Mr. Floyd's death, proposed eliminating Section 50-a.<sup>101</sup> Governor Andrew Cuomo, who had previously been noncommittal toward repealing Section 50-a,<sup>102</sup> signed its repeal into law within one week of its proposal on the senate floor.<sup>103</sup> The speed of Section 50-a's repeal reflected the diminished influence of police unions within a new, pro-reform milieu.<sup>104</sup>

Some considered Section 50-a to be unclear regarding what records were protected.<sup>105</sup> It formerly protected “[a]ll personnel records used to evaluate performance toward continued employment or promotion.”<sup>106</sup> In addition to repealing Section 50-a, legislators utilized Senate Bill 8496 to redefine what types of records were subject to FOIL.<sup>107</sup> The legislature supplemented

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[www.theguardian.com/us-news/2014/nov/25/akai-gurley-death-nypd-reform-tragedy](https://www.theguardian.com/us-news/2014/nov/25/akai-gurley-death-nypd-reform-tragedy) [https://perma.cc/7KJ3-8N9H].

96. See Joel Rose, *This Is the Police: Put Down Your Camera*, NPR (May 13, 2011, 12:01 AM), <https://www.npr.org/2011/05/13/136171366/this-is-the-police-put-down-your-camera> [https://perma.cc/JT6W-GKRH].

97. New York City Police Commissioner William Bratton noted “[t]here is no denying that in this country over the last several years there has been an anti-police attitude that has grown, and that’s unfortunate.” See *Transcript: Mayor De Blasio Holds Media Availability with Commissioner Bratton*, NYC (Oct. 21, 2015), <https://www1.nyc.gov/office-of-the-mayor/news/743-15/transcript-mayor-de-blasio-holds-media-availability-commissioner-bratton> [https://perma.cc/M55E-5A9C].

98. On May 25, 2020, Minneapolis police officers detained George Floyd for allegedly passing a counterfeit bill at a convenience store. See *Three Former Minneapolis Police Officers Convicted of Federal Civil Rights Violations for Death of George Floyd*, U.S. DEP’T JUST. (Feb. 24, 2022), <https://www.justice.gov/opa/pr/three-former-minneapolis-police-officers-convicted-federal-civil-rights-violations-death> [https://perma.cc/B3Y4-FUX6]; *How George Floyd Died, and What Happened Next*, N.Y. TIMES (July 29, 2022), <https://www.nytimes.com/article/george-floyd.html> [https://perma.cc/2LZX-DQ3X]. As the officers awaited paramedics for Mr. Floyd, then–Minneapolis Police Officer Derek Chauvin cavalierly knelt on Mr. Floyd’s neck for approximately nine minutes, as shocked onlookers attempted to tell the officers that Mr. Floyd could not breathe. *Id.* Chauvin did not let up even after another on-scene officer expressed concern that Mr. Floyd was “passing out.” *Id.* Mr. Floyd ultimately died following the interaction. *Id.* Video of the incident enraged the nation and world. *Id.*

99. See Steve Eder, Michael H. Keller & Blacki Migliozi, *As New Police Reform Laws Sweep Across the U.S., Some Ask: Are They Enough?* N.Y. TIMES (Apr. 18, 2021), <https://www.nytimes.com/2021/04/18/us/police-reform-bills.html> [https://perma.cc/PZ7J-A6Q5].

100. *Id.*

101. See Luis Ferré-Sadurni & Jesse McKinley, *N.Y. Bans Chokeholds and Approves Other Measures to Restrict Police*, N.Y. TIMES (June 12, 2020), <https://www.nytimes.com/2020/06/12/nyregion/50a-repeal-police-floyd.html> [https://perma.cc/BD7Q-XWZD].

102. *Id.*

103. See *Senate Bill S8496*, N.Y. ST. SENATE, <https://www.nysenate.gov/legislation/bills/2019/S8496> [https://perma.cc/X47C-P9HT] (last visited Nov. 3, 2023).

104. See *supra* Part I.B.

105. See Ferré-Sadurni & McKinley, *supra* note 101.

106. N.Y. CIV. RIGHTS LAW § 50-a (McKinney 1976) (repealed 2020).

107. See S.B. 8496, 203d Leg., Reg. Sess. (N.Y. 2020).

section 86 of New York's Public Officers Law<sup>108</sup> to provide that the applicable records "includ[ed], but [were] not limited to . . . complaints, allegations, . . . charges[,] . . . transcript[s] of any disciplinary [proceedings,] . . . [and] disposition[s] of any disciplinary proceeding[s]." <sup>109</sup> Arguably, the language "including, but not limited to" still creates some obscurity regarding which records may be released pursuant to Section 50-a's repeal.<sup>110</sup> Despite the new definition of "[l]aw enforcement disciplinary records,"<sup>111</sup> courts have expressed different views regarding which records are subject to disclosure following Section 50-a's repeal.<sup>112</sup>

## II. UNILATERAL RELEASE OF COMPLAINT HISTORIES

Section 50-a's repeal represented a major victory for repeal proponents in the decades-long battle to release police records.<sup>113</sup> CCRB Chair Fredrick Davie opined that "[t]he repeal of . . . Section 50-a—one of the most restrictive police secrecy laws in the country—was a landmark moment for New Yorkers."<sup>114</sup> He added that the decision to repeal it was "the right one" and he was "proud the CCRB ha[d] acted quickly to . . . provide New Yorkers with greater transparency" in releasing the complaint histories.<sup>115</sup> However, the CCRB's quick actions were inconsistent with CAPA's administrative scheme and FOIL's protections. Part II.A discusses the immediate aftermath of Section 50-a's repeal. Part II.B discusses CAPA's rulemaking requirements. Part II.C reviews FOIL's impact on police records. Part II.D discusses litigation surrounding the release of disciplinary records.

### A. Aftermath of Section 50-a's Repeal

There should be multiple processes available for seeking redress when a citizen is harmed by the police, and civilian oversight is recognized as a valuable mechanism for holding officers accountable.<sup>116</sup> The release of police personnel records could be considered an evolution of the work that groups like the CCRB have been doing for decades, creating transparency

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108. N.Y. PUB. OFF. LAW § 86 (6) (McKinney 2023).

109. See S.B. 8496, 203d Leg., Reg. Sess. (N.Y. 2020).

110. See *id.*

111. *Id.*

112. See *infra* Part II.D.

113. See Ashley Southall, *N.Y.P.D. Releases Secret Misconduct Records After Repeal of Shield Law*, N.Y. TIMES (Mar. 8, 2021), <https://www.nytimes.com/2021/03/08/nyregion/nypd-discipline-records.html> [<https://perma.cc/J4Y7-6VZ6>].

114. Craig McCarthy & Aaron Feis, *NYC Publishes Trove of NYPD Disciplinary Data Involving Cops*, N.Y. POST (Mar. 4, 2021), <https://nypost.com/2021/03/04/nyc-publishes-disciplinary-data-involving-all-active-nypd-cops/> [<https://perma.cc/3B79-96TP>].

115. *Id.*

116. See Sharon R. Fairley, *Survey Says: The Development of Civilian Oversight of Law Enforcement Skyrockets in the Wake of George Floyd's Killing*, 31 S. CAL. REV. L. & SOC. JUST. 283, 319 (2022).

with a “tool that can be used to hold officers accountable.”<sup>117</sup> The way that the CCRB implemented this tool raises concerns.

### 1. CCRB’s Conduct After Section 50-a

Immediately after Section 50-a’s repeal, the CCRB started preparing a public portal containing NYPD complaint histories.<sup>118</sup> Mayor Bill de Blasio announced the database to the media,<sup>119</sup> but the decision to release the complaint histories appears to have been the CCRB’s.<sup>120</sup> The CCRB stated that it wanted to make it “easier . . . to find out what is going on in the police disciplinary process” without having to go through FOIL and that creating their database was part of making access easier.<sup>121</sup> Further, Mayor De Blasio only expressed an interest in releasing records for active, and not retired, NYPD officers.<sup>122</sup> The CCRB intended to release records of both active and retired police officers, implying significant or fully independent decision-making power in how police records would be publicly released.<sup>123</sup> Additionally, the CCRB publicly credited itself with releasing the database.<sup>124</sup> The CCRB’s quick work after Section 50-a’s repeal also suggests that they engaged in limited stakeholder conversation and limited discussion regarding CAPA.<sup>125</sup>

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117. See Samantha Max, *New Yorkers Can Now Look Up the Records of Police They Encounter*, GOTHAMIST (Oct. 17, 2023), <https://gothamist.com/news/new-yorkers-can-now-look-up-the-records-of-police-they-encounter> [<https://perma.cc/Y348-L6B2>]. The CCRB complaint history database is one of several databases of police records created after Section 50-a’s repeal. For example, the Legal Aid Society established its own database called “Law Enforcement Look Up,” a resource which allows users to search through thousands of records obtained by the Legal Aid Society over the years. Law Enforcement Look Up also includes civil lawsuits filed against police officers, documents from NYPD internal investigations, CCRB allegations, and adverse officer credibility records. One Legal Aid Society staff attorney notes that the transparency provided by the database helps to “promote[] public trust.” See *id.*; see also *Law Enforcement Lookup*, LEGAL AID SOC’Y, <https://legalaidsoc.org/law-enforcement-look-up/> [<https://perma.cc/Z9B3-JQNP>] (last visited Nov. 3, 2023).

118. See Jonathan Darche, Exec. Dir., Civilian Complaint Rev. Bd., Remarks at Civilian Complaint Review Board Public Meeting, at 22 (July 8, 2020), [https://www.nyc.gov/assets/ccrb/downloads/pdf/about\\_pdf/board/2020-meeting-minutes/20200708\\_boardmtg\\_minutes.pdf](https://www.nyc.gov/assets/ccrb/downloads/pdf/about_pdf/board/2020-meeting-minutes/20200708_boardmtg_minutes.pdf) [<https://perma.cc/WM6D-5RBM>]; *Uniformed Fire Officers Ass’n v. De Blasio*, 973 F.3d 41, 45 (2d Cir. 2020).

119. See *Transcript: Mayor De Blasio Holds Media Availability*, NYC (June 17, 2020), <https://www.nyc.gov/office-of-the-mayor/news/446-20/transcript-mayor-de-blasio-holds-media-availability> [<https://perma.cc/6ZM9-KXLX>].

120. See *generally* Remarks at Civilian Complaint Review Board Public Meeting, *supra* note 118.

121. See *id.* at 21–22.

122. See *Transcript: Mayor De Blasio Holds Media Availability*, *supra* note 119.

123. See Remarks at Civilian Complaint Review Board Public Meeting, *supra* note 118, at 22. The NYPD complaint history website contains records of not only active, but also retired or otherwise inactive NYPD officers. See *NYPD Member of Service Histories*, *supra* note 15.

124. CCRB Chair Davie remarked that he was “proud [that] the CCRB ha[d] acted quickly to once again provide New Yorkers with greater transparency” in releasing the database. See McCarthy & Feis, *supra* note 114.

125. The New York City Office of Technology and Innovation is the only City partner referenced in the board meeting announcing the database. CAPA is not mentioned during the

The NYCLU attended the CCRB's board meeting announcing the database.<sup>126</sup> The next day, the NYCLU filed a FOIL request for the database.<sup>127</sup> Considering that the CCRB was already preparing to release the database to the public, it is unclear what the NYCLU sought to accomplish. The CCRB honored the NYCLU's request within one week, and the NYCLU planned to immediately publish the records.<sup>128</sup> In response to these actions, several civil service unions representing employees from the NYPD, New York City Fire Department (FDNY), and New York City Corrections Department (DOC), among others, filed a lawsuit seeking a preliminary injunction to block the release of certain records in the CCRB database.<sup>129</sup> These unions specifically sought to block the release of "[u]nsubstantiated and [n]on-[f]inal [a]llegations," pending further litigation.<sup>130</sup> The unions were initially granted an injunction<sup>131</sup> but later ruled against on the merits as the district court lifted the injunction.<sup>132</sup> The U.S. Court of Appeals for the Second Circuit affirmed the denial of the injunction, allowing the CCRB to publish the complaint history database and provide the records to groups such as the NYCLU.<sup>133</sup>

## 2. Chief Arguments by the Unions

The police unions argued that releasing their records put them at risk of significant harassment and threatened their safety.<sup>134</sup> Regarding active NYPD officers, the unions presented evidence showing increased threats based partly on perceptions of officer misconduct.<sup>135</sup> They noted that threats and harassment towards police officers increased substantially in 2020.<sup>136</sup> Additionally, they claimed that some records released to the NYCLU and other groups were used to harass on-duty NYPD officers.<sup>137</sup> They cited one example in which a demonstrator approached an on-duty NYPD officer at a protest after looking up the officer's last name on her cell phone.<sup>138</sup> She and

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meeting. See Remarks at Civilian Complaint Review Board Public Meeting, *supra* note 118, at 22.

126. See *Uniformed Fire Officers Ass'n v. De Blasio*, 973 F.3d 41, 45 (2d Cir. 2020).

127. See *id.*

128. See *id.*

129. See *Uniformed Fire Officers Ass'n v. De Blasio*, No. 20-CV-5441, 2020 WL 5640063, at \*1 (S.D.N.Y. Aug. 21, 2020) (denying preliminary injunction sought by the unions), *aff'd*, 846 F. App'x 25 (2d Cir. 2021).

130. See *De Blasio*, 973 F.3d at 45.

131. *De Blasio*, 2020 WL 5640063, at \*1.

132. *De Blasio*, 973 F.3d at 49.

133. See *Uniformed Fire Officers Ass'n v. De Blasio*, 846 F. App'x 25, 32 (2d Cir. 2021).

134. See First Amended Complaint ¶ 93, *De Blasio*, No. 20-CV-5441, ECF No. 226.

135. See *id.* ¶ 94.

136. See *id.*

137. See *id.* ¶ 95.

138. *Id.* While the *De Blasio* court was considering the preliminary injunction, the CCRB released portions of the complaint history database to the NYCLU. See *De Blasio*, 2020 WL 5640063, at \*1; *Uniformed Fire Officers Ass'n v. De Blasio*, 973 F.3d 41, 45–46 (2d Cir. 2020). The court initially suspected collusion, but evidence did not support that finding. See *De Blasio*, 2020 WL 5640063, at \*1; *Uniformed Fire Officers Ass'n v. De Blasio*, 973 F.3d at 45–46.

other demonstrators then came near the officer and loudly berated him, calling him an abuser while spouting off the details of the CCRB history found online.<sup>139</sup>

The unions noted similar concerns for retired police officers. They highlighted former police officer Richard Taylor, who had been retired for well over a decade and became a university professor.<sup>140</sup> Some students found Mr. Taylor's CCRB history and posted it on a social media website.<sup>141</sup> The students also sought the professor's firing despite his decade-plus old CCRB allegations being classified as unsubstantiated.<sup>142</sup>

The unions also raised concerns about reputational damage. They believed that releasing unsubstantiated CCRB allegations would impute a defamatory connotation toward active officers by ascribing an aura of misconduct and unfitness for their profession.<sup>143</sup> In their view, the records were harmful and embarrassing and could affect future promotional opportunities and transfers.<sup>144</sup>

Related to reputational damage, the unions raised liberty and due process concerns. They argued that the complaint histories would be publicly available in perpetuity with no possibility for officers to clear their record of unsubstantiated allegations.<sup>145</sup> They added that the unsubstantiated records would follow officers for years, affecting their employment prospects after they leave the NYPD.<sup>146</sup> Mr. Taylor's experience serves as an example.<sup>147</sup>

Another due process concern raised by the unions was the lack of a mechanism to challenge the publication of allegations against individual officers.<sup>148</sup> In their view, satisfying federal and state constitutional due process rights required procedural protections before the CCRB could publish any officer's complaint history.<sup>149</sup> The unions added that safeguards were particularly necessary because "it takes no evidence to make a [civilian] complaint" against a police officer<sup>150</sup> and 92 percent of CCRB allegations were closed without a finding of wrongdoing.<sup>151</sup> The unions also likened the lack of procedural protections to disciplinary Charges and Specifications ("Charges"),<sup>152</sup> reasoning that individual officers should receive a hearing

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139. First Amended Complaint, *supra* note 134, ¶ 95.

140. *Id.* ¶ 63.

141. *Id.*

142. *Id.*

143. *Id.* ¶ 59.

144. *See id.* ¶ 54.

145. *Id.* ¶ 53.

146. *See id.* ¶ 61.

147. *Id.* ¶ 63.

148. *See id.* ¶ 62.

149. *Id.*

150. *Id.* ¶ 2.

151. *See id.* ¶ 41.

152. Charges and Specifications are generally preferred against NYPD police officers for the most serious allegations, in which the NYPD has determined that lesser disciplinary actions, such as a command discipline (i.e., formal write-up, pursuant to which a police officer may be penalized up to ten vacation days) or retraining, would be inappropriate. *See NYPD Discipline*, N.Y.C. CIVILIAN COMPLAINT REV. BD., <https://www.nyc.gov/site/ccrb/complaints/>



before publishing of their complaint histories because a similar protection was provided in the context of Charges.<sup>153</sup>

The police unions also complained of disparate treatment as compared to non-police agencies. The plaintiffs included police, fire, and correction department unions, all affected by Section 50-a's repeal.<sup>154</sup> Nonetheless, the police unions noted that NYPD officers receive fewer protections against records disclosure than other City employees.<sup>155</sup> For example, the FDNY and DOC have similar procedures as the NYPD for investigating complaints against firefighters and correction officers.<sup>156</sup> However, after Section 50-a's repeal, an additional review by New York City's Office of Administrative Trials and Hearings (OATH)<sup>157</sup> provides an extra layer of protection before FDNY or DOC records are released.<sup>158</sup> The police unions also note that even when FDNY or DOC records are released, the OATH web database is significantly more challenging to navigate compared to the CCRB's web interface, essentially adding an extra layer of protection for FDNY and DOC complaint records.<sup>159</sup>

Another material concern raised by the unions was their historical reliance on the City to protect officers' reputations.<sup>160</sup> Separate from Section 50-a,

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complaint-process/police-discipline.page [https://perma.cc/ZX8F-WDJC] (last visited Nov. 3, 2023); *see also* POLICE DEP'T CITY OF N.Y., NYPD ADMINISTRATIVE GUIDE, Procedure No. 318-03 (2023), [https://www.nyc.gov/assets/nypd/downloads/pdf/public\\_information/public-adminguide1.pdf](https://www.nyc.gov/assets/nypd/downloads/pdf/public_information/public-adminguide1.pdf) [https://perma.cc/WZ4W-ZW9L]. Police officers who are not offered or who do not accept a plea deal are subjected to an administrative prosecution in a trial room. *See* N.Y.C. CIVILIAN COMPLAINT REV. BD., *supra*. The process of adjudicating charges shares some similarities with criminal prosecutions.

153. *See* First Amended Complaint, *supra* note 134, ¶ 3.

154. *See id.* ¶ 7–14.

155. *See id.* ¶ 68.

156. *See id.* ¶ 42.

157. The Office of Administrative Trials and Hearings acts as the city's judiciary with primary respect to the city's administrative law, including under the Charter and the RCNY. It authorizes OATH-employed administrative law judges to independently adjudicate matters, such as employee discipline, brought by City agencies, including the NYPD, the FDNY, and the DOC. If an NYPD officer is served with Charges (including those originating from a CCRB complaint) and the officer declines or is not offered a plea deal, the case would be heard by an OATH administrative law judge. *See About OATH*, N.Y.C. OFF. ADMIN. TRIALS & HEARINGS, <https://www.nyc.gov/site/oath/about/about-oath.page> [https://perma.cc/34G4-KT23] (last visited Nov. 3, 2023).

158. *See* First Amended Complaint, *supra* note 134, ¶ 42. Another key difference in treatment noted by the police unions is that OATH does not publish records of unsubstantiated or otherwise unfounded records of complaints against FDNY or DOC employees. This appears to still be the case on inspection of OATH's web database. *See* Response & Reply Brief for Plaintiffs-Appellants at 29, *Uniformed Fire Officers Ass'n v. De Blasio*, 846 F. App'x 25 (2d Cir. 2021) (No. 20-2789); *Basic Search*, N.Y.C. OFF. ADMIN. TRIALS & HEARINGS, <http://a820-isys.nyc.gov/ISYS/ISYS.aspx> [https://perma.cc/4WH2-3NLW] (last visited Nov. 3, 2023).

159. *Compare Basic Search*, *supra* note 158, with *NYPD Member of Service Histories*, *supra* note 15. The police unions note that “there is a ‘vast difference’ between th[e] difficult-to-access [OATH] records and the global publication of [NYPD complaint] allegations ‘in a single clearinghouse of information.’” *See* Response & Reply Brief for Plaintiffs-Appellants, *supra* note 158, at 28 (quoting *U.S. Dep't of Just. v. Reps. Comm.*, 489 U.S. 749, 764 (1989)).

160. *See* First Amended Complaint, *supra* note 134, ¶ 66.

the police unions claimed that the City guaranteed confidentiality of unsubstantiated allegations.<sup>161</sup> Regarding substantiated complaints, many officers who accepted plea deals on guarantees of confidentiality may have instead vigorously defended themselves in an administrative trial to protect their reputations.<sup>162</sup> The unions argued that breaking the City’s longstanding practice was “arbitrary and capricious” and not justified by Section 50-a’s repeal.<sup>163</sup>

The unions painted a picture in which releasing unsubstantiated and pending allegations constituted an unwarranted invasion of privacy and was procedurally inadequate, even without the former protections of Section 50-a.<sup>164</sup> The next section discusses CAPA, one of two remaining protections for police records.

### *B. The City Administrative Procedure Act*

Chapter 45 of the Charter, which provides for CAPA, authorizes most City agencies to create rules for exercising their duties under the Charter.<sup>165</sup> With limited exceptions, any rule put forward by an agency must satisfy the procedural requirements of CAPA before it is adopted.<sup>166</sup> The process begins when an agency publishes the full text of the proposed rule in the City Record<sup>167</sup> at least thirty days before a public hearing.<sup>168</sup> In addition to prominently providing the proposed rule on its website,<sup>169</sup> the agency must provide a copy of the text to media outlets and civic organizations.<sup>170</sup> These actions advertise the proposed rule in order to engage public discourse.<sup>171</sup> New York City’s Corporation Counsel<sup>172</sup> must also review the proposed rule

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161. *See id.*

162. *See id.* Between January and September 2023, the CCRB reported that, of twenty-five administrative trials in which an officer did not accept a plea deal, seventeen were found not guilty of wrongdoing. *See* N.Y.C. CIVILIAN COMPLAINT REV. BD., EXECUTIVE DIRECTOR’S MONTHLY REPORT, OCTOBER 2023 (STATISTICS FOR SEPTEMBER 2023), at 34 (2023), [https://www.nyc.gov/assets/ccrb/downloads/pdf/policy\\_pdf/monthly\\_stats/2023/10112023-monthly\\_stats.pdf](https://www.nyc.gov/assets/ccrb/downloads/pdf/policy_pdf/monthly_stats/2023/10112023-monthly_stats.pdf) [<https://perma.cc/XV23-QHBG>].

163. First Amended Complaint, *supra* note 134, ¶ 5.

164. *See id.* ¶¶ 5, 45.

165. *See* N.Y. CITY CHARTER § 1043 (a)(1) (2023).

166. *See Understanding the Rulemaking Process*, NYC RULES, <https://rules.cityofnewyork.us/understand-the-rule-making-process/> [<https://perma.cc/ZMA8-XGTW>] (last visited Nov. 3, 2023).

167. The City Record is the official journal of New York City and provides information about public hearings and agency rule changes, among other information. *Agency Resources*, N.Y.C. DEP’T CITYWIDE ADMIN. SERVS., <https://www1.nyc.gov/site/dcas/about/agency-resources.page> [<https://perma.cc/FW5Z-3SAT>] (last visited Nov. 3, 2023).

168. N.Y. CITY CHARTER § 1043(b)(1).

169. *Id.* § 1043(b)(4).

170. *Id.* § 1043(b)(2).

171. *See Understanding the Rulemaking Process*, *supra* note 166.

172. New York City’s Corporation Counsel leads the New York City Law Department and is charged with providing legal representation to the City, the Mayor, elected City officials, and the City’s various agencies. *See About the Law Department*, N.Y. CITY L. DEP’T, <https://www.nyc.gov/site/law/about/about-the-law-department.page> [<https://perma.cc/T7RK-2GU6>] (last visited Nov. 3, 2023).

and ensure that it is within the authority delegated to the proposing agency.<sup>173</sup> Then, the New York City Law Department and the Office of the Mayor of New York City review the proposed rule to verify that it does not conflict with other applicable rules and is narrowly drawn to achieve its stated purpose;<sup>174</sup> they then certify the proposed rule.<sup>175</sup> Finally, the agency must present the proposed rule for public comment, including at a public hearing.<sup>176</sup>

City agencies may create rules without following the CAPA process in limited situations, such as when the rule is adopted pursuant to an emergency or when the agency is under a mandate from a newly enacted law.<sup>177</sup> Rules adopted in an emergency expire after sixty days unless the agency initiates a notice and comment procedure.<sup>178</sup> An additional exception allows agencies to bypass public comment if the public hearing would serve no public purpose.<sup>179</sup> All City agencies must follow this formidable CAPA process when proposing a new rule.<sup>180</sup>

After successful certification by the Corporation Counsel,<sup>181</sup> adopted rules are compiled in the Rules of the City of New York (RCNY).<sup>182</sup> The RCNY is extensive, dwarfing the Charter's text<sup>183</sup> and reflecting frequent rulemaking by City agencies.<sup>184</sup>

Aside from the Charter and the RCNY, City agencies can also exercise authority through the use of an interagency memorandum of understanding (MOU).<sup>185</sup> Although MOUs have become common practice,<sup>186</sup> it is unclear where authority to adopt them comes from because the Charter does not appear to provide for MOU provisions.<sup>187</sup>

173. N.Y. CITY CHARTER § 1043(c).

174. *Id.* § 1043(d)(1).

175. *Id.* § 1043(d)(2).

176. *Id.* § 1043(e).

177. *Id.* § 1043(d)(4).

178. *Id.* § 1043(i)(2).

179. *See id.* § 1043(e).

180. *See id.* § 1042(a)(1).

181. The Corporation Counsel is the final gatekeeper for rules that go through CAPA rulemaking. Aside from conducting a final certification, in which the Counsel has leave to edit and rearrange the rule for clarity and accuracy, it is also charged with compiling and maintaining the RCNY *See id.* § 1045(a)–(b).

182. *Id.* § 1045(b); *see also* RULES OF THE CITY OF N.Y. (2023).

183. *Compare* RULES OF THE CITY OF N.Y. (2023), *with* N.Y. CITY CHARTER (2023).

184. For 2023, eighty-six rules have been adopted through CAPA rulemaking as of October 15, 2023. *See Recently Adopted Rules*, NYC RULES, <https://rules.cityofnewyork.us/recently-adopted-rules/> [<https://perma.cc/N8GP-582C>] (last visited Nov. 3, 2023).

185. *See* N.Y.C., N.Y., ADMIN. CODE § 3-113.1 (2023).

186. *See, e.g., Memoranda of Understanding and Similar Agreements*, N.Y.C. PARKS, <https://www.nycgovparks.org/about/mous> [<https://perma.cc/QZS7-5ZRM>] (last visited Nov. 3, 2023); *Interagency Memoranda of Understanding (MOUs)*, N.Y.C. DEP'T CITYWIDE ADMIN. SERVS., <https://www1.nyc.gov/site/dcas/about/interagency-memoranda-of-understanding-mous.page> [<https://perma.cc/3F6P-8WPW>] (last visited Nov. 3, 2023).

187. The Charter does not reflect the authority to adopt MOUs. *See generally* N.Y. CITY CHARTER (2023). The RCNY similarly does not grant this authority, but it references a handful of MOUs that refer to specific programs. *See, e.g.,* RULES OF THE CITY OF N.Y. tit. 15, ch. 18, § 71 (2023); RULES OF THE CITY OF N.Y. tit. 19, ch. 55, § 41 (2023). This includes a

Currently, the CCRB exercises some of its authority under three joint CCRB-NYPD MOUs, all provided to the public. The first MOU (“Trials MOU”) purportedly grants the CCRB authority to prosecute substantiated<sup>188</sup> CCRB complaints when the CCRB recommends Charges be preferred against the subject police officer.<sup>189</sup> The second MOU (“BWC MOU”) grants the CCRB access to body-worn-camera recordings by NYPD officers to help investigate CCRB complaints.<sup>190</sup> The third MOU (“Matrix MOU”) provides that the NYPD will abide by a discipline matrix<sup>191</sup> when adjudicating substantiated CCRB complaints.<sup>192</sup>

MOUs are noteworthy for a few reasons. First, the New York City Administrative Code only started requiring agencies to publish MOUs in

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MOU that permits the CCRB to prosecute certain findings. See RULES OF THE CITY OF N.Y. tit. 38, ch. 15, § 1 (2023).

188. Generally, the CCRB will assign one of five dispositions regarding a fully investigated civilian complaint: “substantiated” (misconduct is found to be improper based on a preponderance of the evidence); “Unable to Determine” (there is not enough evidence to determine whether or not misconduct occurred); “unfounded” (a preponderance of the evidence suggests that the event or alleged act did not occur); “within NYPD guidelines” (the event did occur but the officer’s actions were determined to be lawful); or “officer unidentified” (the CCRB was unable to identify any of the officers accused of misconduct). *Data Transparency Initiative: Allegations*, N.Y.C. CIVILIAN COMPLAINT REV. BD., <https://www1.nyc.gov/site/ccrb/policy/data-transparency-initiative-allegations.page> [https://perma.cc/549V-VHGU] (last visited Nov. 3, 2023). Additionally, the complainant and police officer can consent to a mediation process in which the complaint is then classified as “mediated” and formal discipline is negated. *Id.* There are additional classifications for CCRB investigations that are not fully investigated, such as when the complainant withdraws their complaint (i.e., “complaint withdrawn”), a complainant or witness is unavailable (i.e., “complainant/victim/witness unavailable”), or a complainant or witness is uncooperative (i.e., “complainant/victim/witness uncooperative”). *Id.* The “[u]nable to determine” disposition is the CCRB’s new language that replaces the former “unsubstantiated” designation. See *infra* note 232 and accompanying text. For the purposes of this Note, “unsubstantiated” describes every disposition discussed above except for “substantiated.”

189. Memorandum of Understanding Between the Civilian Complaint Rev. Bd. & the Police Dep’t of the City of New York Concerning the Processing of Civilian Complaints (Apr. 2, 2012), [https://www1.nyc.gov/assets/ccrb/downloads/pdf/about\\_pdf/apu\\_mou.pdf](https://www1.nyc.gov/assets/ccrb/downloads/pdf/about_pdf/apu_mou.pdf) [https://perma.cc/B8FU-P92A].

190. Memorandum of Understanding Between the New York City Police Dep’t & the New York City Civilian Complaint Rev. Bd. (Nov. 21, 2019), [https://www1.nyc.gov/assets/ccrb/downloads/pdf/about\\_pdf/bwc\\_mou.pdf](https://www1.nyc.gov/assets/ccrb/downloads/pdf/about_pdf/bwc_mou.pdf) [https://perma.cc/HR4P-KLEP].

191. In compliance with a new city law, the NYPD created the “Disciplinary System Penalty Guidelines,” also known as the “Discipline Matrix.” See *Our Discipline Matrix*, NYPD ONLINE, <https://nypdonline.org/link/1024> [https://perma.cc/5YZ6-ZHKG] (last visited Nov. 3, 2023). The Discipline Matrix seeks to create transparency regarding internal discipline for police officers by providing presumptive penalties for specific acts of substantiated misconduct. *Id.* The Discipline Matrix was developed with input from various stakeholders, including the CCRB. *Id.*; see also N.Y.C. POLICE DEP’T, DISCIPLINARY SYSTEM PENALTY GUIDELINES (2021), [https://www1.nyc.gov/assets/nypd/downloads/pdf/public\\_information/disciplinary-system-penalty-guidelines-effective-01-15-2021-competi-.pdf](https://www1.nyc.gov/assets/nypd/downloads/pdf/public_information/disciplinary-system-penalty-guidelines-effective-01-15-2021-competi-.pdf) [https://perma.cc/EC2E-QMCC]; N.Y.C., N.Y., ADMIN. CODE § 14-186 (2023).

192. Memorandum of Understanding Between the New York City Police Dep’t & the New York City Civilian Complaint Rev. Bd. Concerning the NYPD Discipline Matrix (Feb. 4, 2021), [https://www1.nyc.gov/assets/nypd/downloads/pdf/public\\_information/nypd-ccrb-discipline-matrix-mou-final.pdf](https://www1.nyc.gov/assets/nypd/downloads/pdf/public_information/nypd-ccrb-discipline-matrix-mou-final.pdf) [https://perma.cc/BCM9-TNUC].

2011.<sup>193</sup> The amended administrative code provides that “[a]ll memoranda of understanding . . . entered into between city agencies that materially affect the rights of or procedures available to the public and could not be withheld from disclosure under article six of the public officers law shall be posted on the city’s website.”<sup>194</sup> This statutory text implies an understanding that agencies must publicly post MOUs that implicate the rights of City residents. Second, the law only mandated publication of the MOUs.<sup>195</sup> It did not authorize city agencies to create special provisions carrying the force of law amongst themselves, nor did it reference where this authority derived from.<sup>196</sup> In response to a 2001 inquiry, the Corporation Counsel wrote a letter to the CCRB’s Executive Director stating that the Charter allowed the CCRB to expand its role via a MOU, but it did not refer to the authorizing clause.<sup>197</sup> Third, although the MOUs are extensive, none appear to authorize carte blanche release of police records.<sup>198</sup> Instead, all three MOUs provide that the CCRB will maintain the confidentiality of records unless release is mandated by law or after consulting the NYPD.<sup>199</sup> The CCRB could not answer whether they consulted with the NYPD before releasing the complaint histories.<sup>200</sup>

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193. See N.Y.C., N.Y., ADMIN. CODE § 3-113.1(b)(1) (2023).

194. *Id.*

195. See *id.*

196. *Id.* The New York City Council recently adopted a law that suggests that there are no consequences for failing to comply with the MOU-posting law. See *id.* § 3-113.1(e). This suggests that the promise to post MOUs is illusory and represents another signal that City agencies do not have constitutional or statutory authority to adopt interagency MOUs.

197. See *Expanded Discipline Role for CCRB*, CITY L., Mar.–Apr. 2001.

198. See Memorandum of Understanding Between the Civilian Complaint Rev. Bd. & the Police Dep’t of the City of New York, *supra* note 189; Memorandum of Understanding Between the New York City Police Dep’t & the New York City Civilian Complaint Rev. Bd., *supra* note 190; Memorandum of Understanding Between the New York City Police Dep’t & the New York City Civilian Complaint Rev. Bd., *supra* note 192. A City statute provides that agencies do not have to post MOUs that would result in material adverse consequences for City agency operations. N.Y.C., N.Y., ADMIN. CODE § 3-113.1(b)(3). Assuming that a MOU regarding the complaint histories between the CCRB and NYPD exists pursuant to this statute, the agencies should explain how the MOU impacts agency operations, considering the public action in releasing the complaint histories.

199. See Memorandum of Understanding Between the Civilian Complaint Rev. Bd. & the Police Dep’t of the City of New York, *supra* note 189, ¶¶ 26–27; Memorandum of Understanding Between the New York City Police Dep’t & the New York City Civilian Complaint Rev. Bd., *supra* note 190, at 8; Memorandum of Understanding Between the New York City Police Dep’t & the New York City Civilian Complaint Rev. Bd., *supra* note 192, at 5.

200. The CCRB declined the author’s initial request for its communications with the NYPD regarding releasing the complaint histories. Email from donotreply@records.nyc.gov regarding “Request FOIL-2022-056-20307 Closed,” to author (Nov. 10, 2022, 08:48 EST) (on file with author). A subsequent request is currently pending and has been for nearly one year. Email from donotreply@records.nyc.gov regarding “Request FOIL-2022-054-00500 Submitted to [CCRB],” to author (Dec. 28, 2022, 16:10 EST) (on file with author). The CCRB has not fulfilled the request due to supposed technical difficulties with their archived records and suggested that they will provide the records in 2024. Email from donotreply@records.nyc.gov regarding “Request FOIL-2022-054-00500 Extended,” to author (July 13, 2023, 15:48 EST) (on file with author).

The most relevant of these MOUs is the Trials MOU because it most closely implicates the disciplinary records of NYPD officers.<sup>201</sup> It provides that disciplinary records received from the NYPD remain subject to Section 50-a and the Charter.<sup>202</sup> In that respect, the still active Trials MOU<sup>203</sup> is outdated because Section 50-a was repealed.<sup>204</sup> However, the protections under the Charter are still relevant. The Charter provides that “[n]o public servant shall disclose any confidential information concerning the property, affairs or government of the city which is obtained as a result of the official duties of such public servant and which is not otherwise available to the public.”<sup>205</sup> This arguably protected the records that the CCRB released in its database.

In addition, FOIL protected these records. The Matrix MOU, adopted after Section 50-a, provides that NYPD officer employment histories “may contain records . . . that constitute law enforcement disciplinary records, which may be withheld from public disclosure . . . within the meaning of New York Public Officers Law §§ 86(6-9), 87.”<sup>206</sup> The Matrix MOU also reiterates that the CCRB will not release records contained in employment histories without first notifying the NYPD’s legal bureau and providing an opportunity to challenge the release.<sup>207</sup> It also provides that none of its language abrogates the obligations of the NYPD or CCRB under the 2012 Trials MOU.<sup>208</sup>

Neither the MOUs nor CAPA authorize the CCRB’s release of NYPD complaint histories. Likewise, the CCRB-NYPD MOUs provide that the CCRB will maintain the confidentiality of NYPD records. The Matrix MOU also recognizes that NYPD records implicate FOIL. The next section considers FOIL, the second remaining protection of police personnel records.

### *C. FOIL as the New Authority on Police Personnel Records*

New York State’s FOIL provisions, which fall under Article 6 of the Public Officer Law (POL), constitute a statutory protection of police records.<sup>209</sup> These provisions acknowledge the right of the people to know the process of governmental decision-making and to permit the review of documents, within reason.<sup>210</sup>

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201. See Memorandum of Understanding Between the Civilian Complaint Rev. Bd. & the Police Dep’t of the City of New York, *supra* note 189.

202. See *id.* ¶¶ 25–26.

203. RULES OF THE CITY OF N.Y. tit. 38, ch. 15, § 12(a) (2023); *id.*, ch. 1, § 2(c).

204. See S.B. 8496, 203d Leg., Reg. Sess. (N.Y. 2020).

205. N.Y. CITY CHARTER § 2604 (b)(4) (2023).

206. Memorandum of Understanding Between the New York City Police Dep’t & the New York City Civilian Complaint Rev. Bd., *supra* note 192, at 5. The Freedom of Information Law for New York State can be found at N.Y. PUB. OFF. LAW §§ 84–90 (McKinney 2023).

207. Memorandum of Understanding Between the New York City Police Dep’t & the New York City Civilian Complaint Rev. Bd., *supra* note 192, at 5.

208. *Id.* at 6.

209. See N.Y. PUB. OFF. LAW §§ 84–90 (McKinney 2023).

210. See *id.* § 84.

For police personnel records, the most important FOIL provision is POL section 87(2)(b). It provides that agencies will generally make records available for public inspection, but they “may” deny access if disclosure “would constitute an unwarranted invasion of personal privacy.”<sup>211</sup> POL section 87(2)(c) states that records may be denied “if disclos[ure] would impair present or imminent contract awards or collective bargaining negotiations.”<sup>212</sup> POL section 87(2)(e) provides that records that would “interfere with law enforcement investigations or judicial proceedings” or “deprive a person of a right to a fair trial or impartial adjudication” may also be denied.<sup>213</sup> Additionally, POL section 87(f) states records that “could endanger the life or safety of any person” may be denied.<sup>214</sup> POL section 87(g) provides that interagency and intra-agency materials may generally be denied except, among other things, if they are “statistical or factual tabulations or data” or “final agency policy or determinations.”<sup>215</sup>

Another important FOIL provision is POL section 89(2), which, among other things, provides examples of what constitutes an unwarranted invasion of privacy. One example is a “disclosure of information of a personal nature when disclosure would result in economic or personal hardship to the subject party and such information is not relevant to the work of the agency requesting or maintaining it.”<sup>216</sup> Another clause provides that disclosure does not constitute an unwarranted invasion of privacy “when identifying details are deleted” or “when the person to whom [the] record pertains consents in writing to disclosure.”<sup>217</sup>

The Committee on Open Government (“the Committee”)<sup>218</sup> maintains the duties to “furnish to any agency advisory guidelines, opinions or other appropriate information” and to furnish “to any person advisory opinions or other appropriate information regarding [FOIL].”<sup>219</sup> The Committee is New York State’s primary authority on FOIL. Over the last three decades, the Committee has provided guidance regarding unsubstantiated police allegations.<sup>220</sup> Though conceding that FOIL operates under a presumption of access, the Committee has continually advised that when allegations are not substantiated or when records are irrelevant to the performance of official duties, disclosure would constitute an unwarranted invasion of a police

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211. *Id.* § 84(2)(b).

212. *Id.* § 87(2)(c).

213. *Id.* § 87(2)(e)(i)–(ii).

214. *Id.* § 87(2)(f).

215. *Id.* § 87(2)(g)(i), (iii).

216. *See id.* § 89(2)(b)(iv).

217. *Id.* § 89(2)(c)(i)–(ii).

218. The Committee on Open Government is a New York State organization with primary duties to oversee and advise entities regarding the state’s Freedom of Information Law. *See About the Committee on Open Government*, N.Y. ST. DEP’T ST., <https://dos.ny.gov/about-committee-open-government> [<https://perma.cc/FC4M-CEJ6>] (last visited Nov. 3, 2023).

219. N.Y. PUB. OFF. LAW § 89 (1)(b)(i)–(ii) (McKinney 2023).

220. *See, e.g.*, Letter from Robert J. Freeman, Exec. Dir., New York State Comm. on Open Gov’t, to Stephanie Gibbs (Mar. 10, 1993), <https://docs.dos.ny.gov/coog/ftext/f7602.htm> [<https://perma.cc/K5QQ-XAMP>].

officer's privacy.<sup>221</sup> The Committee has also conceded that public employees enjoy a lesser degree of privacy than others and that what constitutes an invasion of privacy may be open to interpretation.<sup>222</sup> However, it has noted that the courts have provided significant guidance in holding that records of pending or unsubstantiated misconduct allegations can be withheld.<sup>223</sup> The Committee has not changed its view subsequent to Section 50-a's repeal.<sup>224</sup> Instead, the Committee has put its thumb on the scale, advising government agencies to review unsubstantiated or unfounded complaints to determine if they constitute an unwarranted invasion of privacy before releasing them.<sup>225</sup>

New York's FOIL provisions are protective of unsubstantiated allegations against police officers. The next section reviews *Gannett*, a recent case that, unlike *De Blasio*, barred the release of unsubstantiated allegations.

#### D. *Gannett's Rebuke of De Blasio*

The court in *De Blasio* held that Section 50-a's repeal mandated the release of unsubstantiated allegations against NYPD police officers. The *Gannett* court disagreed, reaching a vastly different conclusion from the *De Blasio* court regarding FOIL and recognizing other protections for such records. Part II.D.1 discusses how the *De Blasio* court came to its holding. Part II.D.2 discusses the *Gannett* court's disagreement with the court in *De Blasio*.

##### 1. *De Blasio's Reasoning*

In *De Blasio*, the unions argued that releasing the unsubstantiated records violated collective bargaining agreements with the City that allowed officers

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221. *See id.*; Letter from Robert J. Freeman, Exec. Dir., New York State Comm. on Open Gov't, to George Freeman, Assistant Gen. Couns., New York Times (May 13, 1996), <https://docs.dos.ny.gov/coog/ftext/f9463.htm> [<https://perma.cc/BL83-P7H8>]; Letter from Robert J. Freeman, Exec. Dir., New York State Comm. on Open Gov't, to Robert Sanchez (Oct. 19, 1999), <https://docs.dos.ny.gov/coog/ftext/f11747.htm> [<https://perma.cc/8E6L-P6QD>]; Letter from Robert J. Freeman, Exec. Dir., New York State Comm. on Open Gov't, to Member of the Board of Comm'rs, New Castle Fire Dist. (Aug. 29, 2007), <https://docs.dos.ny.gov/coog/ftext/f16764.htm> [<https://perma.cc/8FKT-3PMV>].

222. *See, e.g.*, Letter from Robert J. Freeman, Exec. Dir., New York State Comm. on Open Gov't, to Stephanie Gibbs, *supra* note 220; Letter from Kristin O'Neill, Assistant Dir., New York State Comm. on Open Gov't, to Anonymous Recipient (May 7, 2020), <https://docs.dos.ny.gov/coog/ftext/f19771.html> [<https://perma.cc/G2Z7-ZSSH>].

223. *See* Letter from Robert J. Freeman, Exec. Dir., New York State Comm. on Open Gov't, to Stephanie Gibbs, *supra* note 220; *see also* *Herald Co. v. Sch. Dist. of Syracuse*, 430 N.Y.S.2d 460, 464 (Sup. Ct. 1980) (holding that a school district did not have to release a teacher's identity in part because "[t]he name and charges are part and parcel of an unproved allegation of misconduct similar in substance to an unproved complaint before Civilian Complaint Review Board.").

224. The Committee reaffirmed its position that disclosure of unsubstantiated allegations was an invasion of personal privacy one month after Section 50-a's repeal. *See* Email from Shoshanah Bewlay, Exec. Dir., New York State Comm. on Open Gov't, to Anonymous Recipient (July 27, 2020), <https://docs.dos.ny.gov/coog/ftext/f19775.html> [<https://perma.cc/Y4XY-T3UH>].

225. *See id.*



to remove such records.<sup>226</sup> The Second Circuit countered that NYPD officers could still contractually request that the NYPD remove unsubstantiated records from their personnel files, regardless of whether other agencies, such as the CCRB, planned to release similar records.<sup>227</sup> The *De Blasio* court also reasoned that the unions could not bargain away their disclosure obligations under FOIL, apparently concluding that unsubstantiated records must be released under FOIL.<sup>228</sup>

The unions argued that diminished employment opportunities would result from releasing unsubstantiated records.<sup>229</sup> The court countered that disclosure would not mislead employers because NYPD dispositional outcomes would accompany the records.<sup>230</sup> On that basis, the court agreed with the district court that the unions' claim was speculative.<sup>231</sup> Arguably, the court's assumption that employers will not be misled was speculative.<sup>232</sup> The court also credited City evidence showing that other states make similar records available, considering this proof that unsubstantiated records did not result in harm.<sup>233</sup> This too seems speculative, and the court acknowledged

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226. *Uniformed Fire Officers Ass'n v. De Blasio*, 846 F. App'x 25, 30 (2d Cir. 2021).

227. *See id.* The court's reasoning renders the contractual bargaining moot. It is a fruitless exercise to seal records with one agency if they will nonetheless be released by another. It is unclear if the court considered this.

228. *See id.*

229. *Id.*

230. *See id.* at 30–31. Of note, the current format of CCRB-generated complaint histories contain two rows of dispositions, one row for board recommendations and one row for penalties, which may confuse some readers. *See infra* note 369 and accompanying text.

231. *De Blasio*, 846 F. App'x at 31.

232. One scholar notes that the public is not generally competent to accurately read such records. *See* Kate Levine, *Discipline and Policing*, 68 DUKE L. J. 839, 890 (2019). The point is supported by undefined terminology contained in some officer complaint histories. *See infra* note 369 and accompanying text. It is also supported by the CCRB's recent language change regarding unsubstantiated findings. Since February 2023, it classifies unsubstantiated records as "Unable to Determine." *See* N.Y.C. CIVILIAN COMPLAINT REV. BD., SEMI-ANNUAL REPORT: 2023, at 2 (2023), [https://www.nyc.gov/assets/ccrb/downloads/pdf/policy\\_pdf/annual\\_bi-annual/2023CCRBSEMI-AnnualReport.pdf](https://www.nyc.gov/assets/ccrb/downloads/pdf/policy_pdf/annual_bi-annual/2023CCRBSEMI-AnnualReport.pdf) [<https://perma.cc/WPX5-7UCP>]. The CCRB states that this terminology is legally inconsequential and makes dispositions more transparent. *Id.* This Note challenges the latter assertion. The author did not find a dictionary definition of "Unable to Determine," arguably making the phrase more ambiguous and subject to public misinterpretation, as opposed to a term like "unsubstantiated," which is defined in several dictionaries, as having a general meaning of "not proven to be true." *Unsubstantiated*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/unsubstantiated> [<https://perma.cc/T37L-FUJ4>] (last visited Nov. 3, 2023). Further, the CCRB reports "Unable to Determine" designations as unsubstantiated to the Police Commissioner. N.Y.C. CIVILIAN COMPLAINT REV. BD., *supra*, at 25 n.12. Additionally, parts of the CCRB website continue to reference "[u]nsubstantiated" as one of the CCRB's dispositions. *See, e.g., NYPD Member of Service Histories*, *supra* note 15. Likewise, the CCRB began classifying complaints in which officers acted properly as "Within NYPD Guidelines," as opposed to the former "Exonerated" designation. N.Y.C. CIVILIAN COMPLAINT REV. BD., *supra*, at 2. The former may obfuscate the full clearing of guilt formerly provided by the latter. *See Exonerate*, BLACK'S LAW DICTIONARY (11th ed. 2019). Public interpretation matters even if the changes are legally inconsequential, and citing the same disposition under multiple terms may create a window for misclassifying CCRB findings and confuse the public.

233. *See De Blasio*, 846 F. App'x at 31.

that other states made such records only “partially available.”<sup>234</sup> The decision also failed to consider local New York jurisdictions that did not release unsubstantiated records.<sup>235</sup> The court also stated that the unions failed to show irreparable harm, reasoning that diminished employment opportunities or severe financial distress did not suffice.<sup>236</sup> The unions also argued that plea agreements in disciplinary proceedings before Section 50-a’s repeal implicitly incorporated the law.<sup>237</sup> The court countered that absent specific statutory language, a contract does not transform a statutory requirement into a contractual obligation.<sup>238</sup> Regardless of whether Section 50-a implicates contract terms, the court in *De Blasio* assumed that releasing unsubstantiated records was statutorily required absent Section 50-a.

The unions also argued that publishing disciplinary records without an individualized review was arbitrary and capricious.<sup>239</sup> The court rejected that argument, concluding that the City was complying with FOIL even though it was failing to consider guidance that the Committee had provided regarding the law.<sup>240</sup>

The unions added that it was arbitrary and capricious of the City to change its longstanding practice of protecting unsubstantiated records from disclosure under the justification that disclosure was an unwarranted invasion of privacy.<sup>241</sup> The court also rejected that argument, giving ultimate discretion to Mayor De Blasio’s explanation for the change in position.<sup>242</sup> It does not appear that the court considered whether CAPA was implicated,<sup>243</sup> and Mayor De Blasio did not mention CAPA or FOIL when discussing the CCRB’s planned disclosure.<sup>244</sup>

## 2. The *Gannett* Position

In *Gannett*, the Oneida County Supreme Court barred the disclosure of unsubstantiated civilian complaints.<sup>245</sup> In that case, a news organization made a FOIL request for all allegations of misconduct and disciplinary proceedings against all police officers of the Herkimer Police Department between January 1, 1970 and June 15, 2020, three days after Section 50-a’s

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234. *Id.*

235. *See, e.g.*, N.Y. Civ. Liberties Union v. City of Syracuse, 148 N.Y.S.3d 866 (Sup. Ct. 2021) (holding in favor of the Syracuse Police Department in its practice of withholding pending and unsubstantiated complaint records).

236. *De Blasio*, 846 F. App’x at 31. The court did not consider that POL section 89 (2) permits denial of records for personal or economic hardships. *See* N.Y. PUB. OFF. LAW § 89 (2)(b)(iv) (McKinney 2023).

237. *De Blasio*, 846 F. App’x at 32.

238. *Id.*

239. *Id.*

240. *See id.*

241. *See id.*

242. *See id.*; *see also Transcript: Mayor De Blasio Holds Media Availability*, *supra* note 119.

243. *See generally De Blasio*, 846 F. App’x 25.

244. *See generally Transcript: Mayor De Blasio Holds Media Availability*, *supra* note 119.

245. *See Gannett Co. v. Herkimer Police Dep’t*, 169 N.Y.S.3d 503, 508 (Sup. Ct. 2022).

repeal.<sup>246</sup> The Herkimer Police Department provided the records except for any unsubstantiated records and records predating Section 50-a's repeal.<sup>247</sup> When the news organization's appeal for the remaining records was denied, it filed an action to compel full disclosure.<sup>248</sup> The news organization argued that the legislative history of Section 50-a's repeal and POL section 86(6)<sup>249</sup> mandated full disclosure of disciplinary records, including unsubstantiated claims.<sup>250</sup> However, the court held that the legislative history did not reference unsubstantiated claims and that the referenced FOIL provision regarded redaction rather than disclosure of police records.<sup>251</sup> The court conceded that Section 50-a's repeal removed a protective layer formerly applied to police records, but it held that FOIL applied and that disclosing unsubstantiated records would constitute an unwarranted invasion of privacy.<sup>252</sup> The court also acknowledged that although guidance from the Committee may not be binding, "[s]ince the Committee is . . . charged with administering [FOIL], its interpretation of the statute, if not irrational or unreasonable, should be upheld."<sup>253</sup>

The news organization also argued that Section 50-a should be given retroactive effect, but the court countered that the statute was repealed, not replaced by another requiring retroactive application.<sup>254</sup> The *Gannett* court cited authority from New York's high court that provided that retroactivity is not favored and that a statute should not be construed to apply retroactively without express instruction or clearly implied intent.<sup>255</sup> The court added that New York's General Construction Law<sup>256</sup> (GCN) recognizes that "repeal of a statute shall not effect or impair any right accrued or acquired prior to the time such repeal takes effect but the same may be enjoyed as fully and to the same extent as if such repeal had not been effected."<sup>257</sup> Additionally, the court pointed out that New York's high court had held that GCN section 93 applied with "special force to statutes which otherwise would deprive persons of substantial rights."<sup>258</sup>

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246. *Id.* at 505.

247. *Id.*

248. *Gannett*, 169 N.Y.S.3d at 505.

249. POL section 86(6) provides examples of "law enforcement disciplinary records," which include "the complaints, allegations, and charges against an employee." N.Y. PUB. OFF. LAW § 86(6)(a) (McKinney 2023).

250. *Gannett*, 169 N.Y.S.3d at 506.

251. *See id.* at 507–08.

252. *See id.*

253. *Id.* at 508 (quoting *Miracle Mile Assoc. v. Yudelson*, 417 N.Y.S.2d 142, 146 (App. Div. 1979); *see also* *Sheehan v. City of Binghamton*, 398 N.Y.S.2d 905, 906–07 (App. Div. 1977); *Howard v. Wyman*, 271 N.E.2d 528, 529 (N.Y. 1971).

254. *Gannett*, 169 N.Y.S.3d at 509.

255. *Id.*; *see also* *Majewski v. Broadalbin-Perth Cent. Sch. Dist.*, 696 N.E.2d 978, 980 (N.Y. 1998).

256. N.Y. GEN. CONSTR. LAW § 93 (McKinney 2023).

257. *Gannett*, 169 N.Y.S.3d at 509.

258. *Id.* at 509–10 (quoting *People v. Roper*, 182 N.E. 213, 213 (N.Y. 1932)); *see also* *People v. Francis*, 164 N.Y.S.3d 358, 365 (Sup. Ct. 2022).

Most New York cases considering disclosure of police records protected unsubstantiated records.<sup>259</sup> In *New York Civil Liberties Union v. City of Syracuse*,<sup>260</sup> a case cited by the *Gannett* respondents, the NYCLU made a FOIL request for several Syracuse Police Department (SPD) records, including pending and unsubstantiated complaints against its police officers.<sup>261</sup> SPD produced all records except for pending and unsubstantiated records, prompting the NYCLU to petition for full production on grounds that denial was unlawful after Section 50-a's repeal.<sup>262</sup> The court rejected the NYCLU's argument, reasoning that Section 50-a's repeal did not alter prior privacy considerations and that releasing unsubstantiated records was consistently held to constitute an unwarranted invasion of privacy under FOIL.<sup>263</sup> The court added that any public interest in unsubstantiated claims did not outweigh the privacy concerns of individual officers.<sup>264</sup>

The appellate court affirmed but modified the lower court's holding.<sup>265</sup> It rejected the lower court's position that FOIL's "personal privacy"<sup>266</sup> exemption categorically prohibited disclosure of unsubstantiated records.<sup>267</sup> The appellate court did not oppose the lower court's view that releasing unsubstantiated records would constitute an unwarranted invasion of privacy. Rather, the court applied POL section 89(2)(c),<sup>268</sup> which provides that records that would otherwise be deemed to constitute an unwarranted invasion of privacy would not be so "when identifying details are deleted" or "when the person to whom [the] record pertains consents in writing to disclosure."<sup>269</sup> The court held that the "identifying details" contained in the open and unsubstantiated complaints against officers "could . . . be redacted so as to not constitute an unwarranted invasion of personal privacy."<sup>270</sup> Importantly, the court ruled that agencies wanting to release open or

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259. *See, e.g.*, *United States v. Jackson*, No. 19-CR-356, 2020 WL 7385692 (E.D.N.Y. Dec. 16, 2020) (holding that a detective's privacy interest in speculative and unsubstantiated complaints outweighed the public interest); *Hudson Police Loc. 3979, N.Y. State L. Enf't Officers Union v. Bower*, 158 N.Y.S.3d 787 (Sup. Ct. 2021) (granting permanent injunction against the City of Hudson and its Police Department from releasing unsubstantiated allegations against police officers, except to criminal defendants); *United States v. Lopez*, No. 18-CR 609, 2022 WL 4134423 (E.D.N.Y. Sept. 12, 2022) (denying in part news organizations motion to unseal unsubstantiated claims against multiple police officers because such records implicated the privacy interests of the officers and presented a risk of unwarranted reputational harm). The *Gannett* petitioners cited only *De Blasio* and one other case supporting their position. *See Schenectady Police Benevolent Ass'n v. City of Schenectady*, No. 2020-1411, 2020 WL 7978093 (N.Y. Sup. Ct. Dec. 29, 2020).

260. 148 N.Y.S.3d 866 (Sup. Ct. 2021).

261. *Id.* at 868.

262. *See id.*

263. *Id.* at 873.

264. *Id.*

265. *See* N.Y. Civ. Liberties Union v. City of Syracuse, No. 21-00796, 2022 WL 16848033 (N.Y. App. Div. Nov. 10, 2022).

266. *See* N.Y. PUB. OFF. LAW § 87 (2)(b) (McKinney 2023).

267. *N.Y. Civ. Liberties Union*, 2022 WL 16848033, at \*1.

268. *See id.* at \*3.

269. N.Y. PUB. OFF. LAW § 89 (2)(c)(i)–(ii) (McKinney 2023).

270. *N.Y. Civ. Liberties Union*, 2022 WL 16848033, at \*3.

unsubstantiated claims must conduct individualized review of such records to identify those that would constitute an unwarranted invasion of personal privacy and redact such records before disclosure.<sup>271</sup>

In short, the *Gannett* court was unconvinced by the reasoning in *De Blasio* and declined to afford it any respect.<sup>272</sup> Additionally, several courts maintained a similar position after Section 50-a's repeal.<sup>273</sup> The next part considers the historical, statutory, and judicial framework discussed earlier to consider the problems that accompanied the release of NYPD complaint histories and possible remedies.

### III. AVOIDING PROCEDURAL ERRORS AND OTHER HARMS FROM PUBLISHING COMPLAINTS

There are several problems accompanying the indiscriminate release of civilian complaint records against NYPD police officers. Although Section 50-a's repeal diminished one protection of police records, two remained. Part III.A considers procedural and freedom of information issues associated with releasing civilian allegations against police officers. Part III.B offers possible solutions for both.

#### A. Problems with Disclosing Complaint Histories

The NYPD complaint histories implicate distinct problems under CAPA and FOIL. Part III.A.1 considers the problems under CAPA. Part III.A.2 considers the problem under FOIL.

##### 1. The CAPA Problems

Releasing unsubstantiated records of NYPD officers implicated citizens' rights and thus required rulemaking under CAPA.<sup>274</sup> First, the CCRB effectively acknowledged that the civilian complaint process implicates citizens' rights.<sup>275</sup> The NYPD and CCRB have three MOUs between them, the most significant of which—the Trials MOU—permits the CCRB to prosecute certain civilian complaints that it substantiates.<sup>276</sup> The agencies published all three MOUs under the requirement that MOUs affecting the

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271. *See id.* at \*4; *see also* N.Y. Civ. Liberties Union v. City of Rochester, No. 21-01191, 2022 WL 16848106 (N.Y. App. Div. Nov. 10, 2022) (holding that Rochester Police Department could redact then release records that would ordinarily constitute an invasion of personal privacy under FOIL).

272. *Gannett Co. v. Herkimer Police Dep't*, 169 N.Y.S.3d 503, 506 (Sup. Ct. 2022).

273. *See supra* notes 260–71 and accompanying text.

274. *See supra* Part II.B.

275. *See supra* notes 193–94 and accompanying text.

276. *See* Memorandum of Understanding Between the Civilian Complaint Rev. Bd. & the Police Dep't of the City of New York, *supra* note 189; Memorandum of Understanding Between the New York City Police Dep't & the New York City Civilian Complaint Rev. Bd., *supra* note 190; Memorandum of Understanding Between the New York City Police Dep't & the New York City Civilian Complaint Rev. Bd., *supra* note 192.

rights of City residents be public.<sup>277</sup> This suggests the CCRB’s understanding that citizen rights are implicated through its prosecutorial prerogative. The Charter supports this in providing that CCRB investigations are conducted “in the interest” of the citizenry.<sup>278</sup>

Second, civilian complaints also implicate certain rights of police officers. Recall that these records were previously concealed because Section 50-a’s adopters perceived that police officers had a right not to be publicly harassed or scrutinized.<sup>279</sup> Additionally, subject police officers maintain a right to defend against CCRB allegations that result in charges or findings the officer disagrees with.<sup>280</sup> Further, the court in *Gannett* recognized that releasing civilian complaint records implicated substantial rights of police officers.<sup>281</sup> The reasoning in *Gannett* demonstrates that the *De Blasio* court should have considered granting the union injunction—thereby blocking the release of NYPD complaint histories—under the GCN, which forbids depriving persons of previously acquired rights.<sup>282</sup>

Thus, the Charter, the Trials MOU, case law, and statutory authority all suggest that releasing the complaint histories impacted citizens’ rights, thus implicating CAPA. No evidence supports that the public release of the complaint histories fell into CAPA’s “no public purpose” exception<sup>283</sup> nor its emergency exception, which may have eliminated the need for rulemaking, at least temporarily.<sup>284</sup>

Before an administrative agency—like the CCRB—takes action impacting citizens’ rights, important considerations require procedural rulemaking. As discussed above, CAPA mandates following a regulatory procedure when agencies promulgate or amend their rules.<sup>285</sup> Proper regulatory procedure helps to facilitate government power but also constrains abuses of power by public authorities, which promotes public goals while protecting individual interests.<sup>286</sup>

Following procedure also helps ensure that agencies act within the law. Professor Giacinto della Cananea suggests that when a procedure exists, an agency’s decision not to follow it creates a prima facie case that the alternate

277. See Memorandum of Understanding Between the Civilian Complaint Rev. Bd. & the Police Dep’t of the City of New York, *supra* note 189; Memorandum of Understanding Between the New York City Police Dep’t & the New York City Civilian Complaint Rev. Bd., *supra* note 190; Memorandum of Understanding Between the New York City Police Dep’t & the New York City Civilian Complaint Rev. Bd., *supra* note 192.

278. See N.Y. CITY CHARTER § 440 (a) (2023).

279. See *supra* Part I.C.

280. See *supra* note 152 and accompanying text.

281. See *Gannett Co. v. Herkimer Police Dep’t*, 169 N.Y.S.3d 503, 509–10 (Sup. Ct. 2022); see also *N.Y. Civ. Liberties Union v. N.Y.C. Police Dep’t*, 118 N.E.3d 847, 854 (N.Y. 2018) (recognizing the substantial statutory protections afforded to police officers under Section 50-a).

282. See *Gannett*, 169 N.Y.S.3d at 509; N.Y. GEN. CONSTR. LAW § 93 (McKinney 2023).

283. See N.Y. CITY CHARTER § 1043(c) (2023).

284. See *id.* § 1043(d)(4).

285. See *supra* Part II.B.

286. GIACINTO DELLA CANANEA, DUE PROCESS OF LAW BEYOND THE STATE: REQUIREMENTS OF ADMINISTRATIVE PROCEDURE 17 (2016).

process followed was unlawful.<sup>287</sup> Thus, if an agency action is judicially challenged and the agency did not follow the process mandated under law, the agency should not receive judicial deference. Following CAPA would have allowed the New York City Law Department to review releases of the complaint histories for lawfulness.<sup>288</sup> Professor Nestor Davidson suggests that whether an agency follows a formal procedural process may depend on the particular government's structure.<sup>289</sup> However, he adds that courts tend to give greater agency deference the more a procedure is followed and less agency deference the less a procedure is followed.<sup>290</sup> Courts may show less deference in the context of complaint histories because of the lack of procedural safeguards.

Following an established procedure such as CAPA protects an agency from adopting rules outside of their delegated authority. New York City's Department of Health and Mental Hygiene (DOHMH) encountered this issue when Mayor Michael Bloomberg had the agency issue a regulation banning sales of sugary drinks exceeding sixteen ounces from certain retailers in 2012.<sup>291</sup> The ban was challenged in *New York Statewide Coalition of Hispanic Chambers of Commerce v. New York City Department of Health & Mental Hygiene*,<sup>292</sup> and the New York State Court of Appeals invalidated the regulation as beyond DOHMH's delegated powers.<sup>293</sup> Among other reasons, the court held that DOHMH was not permitted to make law as an agency and could only issue regulations carrying out laws that the New York City Council had enacted.<sup>294</sup> Having a consistent procedure in place helps to ensure agencies exercise their power in a way that limits arbitrariness,<sup>295</sup> a problem that the lower court found with DOHMH's unlawfully adopted regulation.<sup>296</sup> Similarly, the CCRB's release of NYPD complaint histories seems arbitrary, as there was no authorizing legislation to support the action.<sup>297</sup> Although the CCRB might argue that the action was taken in accordance with its overall mandate "to receive, investigate, hear, [and] make findings" regarding civilian complaints against the police,<sup>298</sup> DOHMH made a similar argument, which the court in *New York Statewide* rejected, reasoning that the Charter provision cited by the defendants in the case afforded them regulatory and not legislative authority.<sup>299</sup> Additionally,

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287. *Id.* at 33.

288. *See supra* notes 165–76 and accompanying text.

289. Nestor M. Davidson, *Localist Administrative Law*, 126 *YALE L.J.* 564, 612–13 (2017).

290. *See id.* at 614–15; *see also* *United States v. Mead Corp.*, 533 U.S. 218 (2001).

291. DANIEL L. FELDMAN, *ADMINISTRATIVE LAW: THE SOURCES AND LIMITS OF GOVERNMENT POWER* 56 (2016).

292. 16 N.E.3d 538 (N.Y. 2014).

293. *Id.* at 547; FELDMAN, *supra* note 291, at 56.

294. *N.Y. Statewide Coal. of Hisp. Chambers of Com.*, 16 N.E.3d at 549; FELDMAN, *supra* note 291, at 57.

295. *See* DELLA CANANEA, *supra* note 286, at 34.

296. *N.Y. Statewide Coal. of Hispanic Chambers of Com.*, 16 N.E.3d at 542.

297. *See* N.Y. CITY CHARTER §§ 440–441 (2023).

298. *Id.* § 440(c)(1).

299. DOHMH attempted to argue that the Charter mandate allowing it to "add to and alter, amend or repeal any part of the health code, . . . [to] publish additional provisions for security

following CAPA would have allowed the Corporation Counsel to determine if the CCRB's action was within the CCRB's delegated authority.<sup>300</sup>

A lack of procedure may negatively impact an agency's legitimacy.<sup>301</sup> The CCRB cited transparency as one reason for publishing the complaint histories but has not been transparent about the release process.<sup>302</sup> The *De Blasio* court initially granted a preliminary injunction to the unions partly because the court suspected collusion between the CCRB and NYCLU.<sup>303</sup> A procedural process could have increased transparency from a public perspective and helped show that the CCRB's action was legitimate. Similarly, a procedure that engages public participation, including notice and comment and consultation with agency partners, could foster better decision-making.<sup>304</sup> No evidence suggests that the CCRB sought public opinion or interagency collaboration in releasing the NYPD's complaint histories.

Deviation from procedure creates another weakness by obscuring the agency's reasons for taking action. When an agency explains its decisions, it supports better decision-making,<sup>305</sup> helps protect rights, and prevents inequality based on agency action.<sup>306</sup> Parties affected by an agency decision value the transparency provided by explanations, particularly when they feel that their rights have been encroached on.<sup>307</sup> In addition, giving reasons as part of the procedural process helps to limit arbitrariness in agency action that could protect the agency in subsequent litigation.<sup>308</sup> The CCRB and its supporters largely cited transparency as the reason for releasing the NYPD complaint histories.<sup>309</sup> However, the records released contain both substantiated and unsubstantiated records. It is not readily apparent how unsubstantiated records help to increase transparency, and the CCRB did not explain. Proper procedure may have helped in that respect.

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of life and health in the city and [to] confer additional powers on the [DOHMH] not inconsistent with the constitution, laws of this state or this charter" gave it the authority to adopt the ban on sugary drinks. *N.Y. Statewide Coal. of Hispanic Chambers of Com.*, 16 N.E.3d at 544; *see also* N.Y. CITY CHARTER § 558(b) (2023).

300. *See supra* notes 165–76 and accompanying text.

301. *See* Maria Ponomarenko, *Substance and Procedure in Local Administrative Law*, 170 PA. L. REV. 1527, 1570–71 (2022).

302. *See* McCarthy & Feis, *supra* note 114. The CCRB has previously been accused of lacking transparency in its rulemaking by not providing an opportunity for public comment. *See* Michael Meyers, President of the New York Civ. Rts. Coal., Remarks at Civilian Complaint Review Board Public Meeting 20 (May 11, 2022), [https://www.nyc.gov/assets/ccrb/downloads/pdf/about\\_pdf/board/2022/minutes/05112022\\_boardmtg\\_minutes.pdf](https://www.nyc.gov/assets/ccrb/downloads/pdf/about_pdf/board/2022/minutes/05112022_boardmtg_minutes.pdf) [<https://perma.cc/563J-VTP4>].

303. *See supra* note 138 and accompanying text; *see also* *Uniformed Fire Officers Ass'n v. De Blasio*, No. 20-CV-5441, 2020 WL 5640063, at \*1 (S.D.N.Y. Aug. 21, 2020), *aff'd*, 846 F. App'x 25 (2d Cir. 2021); *Uniformed Fire Officers Ass'n v. De Blasio*, 973 F.3d 41, 45–46 (2d Cir. 2020).

304. *See* Ponomarenko, *supra* note 301, at 1571–74.

305. *Id.* at 1556–58.

306. *See* DELLA CANANEA, *supra* note 286, at 63.

307. *See id.*

308. *See id.* at 64.

309. *See* McCarthy & Feis, *supra* note 114; Max, *supra* note 117.



A lack of procedure for hearing an adversely affected party in an adjudication or quasi-judicial action may also implicate due process issues.<sup>310</sup> Professor Della Cananea suggests that the more an administrative decision affects an individual and implicates their substantive rights, the more an administrative action should guarantee the individual's procedural rights.<sup>311</sup> Former ACLU division director Udi Ofer posits that building an effective civilian complaint board entails allowing police officers to contest civilian allegations and civilian investigative findings before imposing discipline.<sup>312</sup> He adds that police officers retain their due process rights as civil servants and, when a civilian complaint is substantiated, officers should have the right to appeal.<sup>313</sup> As discussed earlier, releasing the NYPD complaint histories implicates the rights of citizens and police alike.<sup>314</sup> The CCRB is empowered to hear and make findings<sup>315</sup> regarding civilian complaints.<sup>316</sup> The CCRB can also prosecute and plead out its findings.<sup>317</sup> The entire process appears to be adjudicatory, and following a procedure before releasing the complaint histories can protect individuals' due process rights.

Although informal agency action may be appropriate in some circumstances,<sup>318</sup> releasing the complaint histories was not a small action without consequences. The release involved substantial rights for both City residents and NYPD police officers. The CCRB should have complied with CAPA before releasing the records.

## 2. The FOIL Problem

Even if the CCRB can uphold the release of the complaint histories under CAPA, it must still pass muster under FOIL. The problem with the CCRB's release of the complaint histories is that it constitutes an invasion of personal

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310. See DELLA CANANEA, *supra* note 286, at 43, 45.

311. *Id.* at 45.

312. See Udi Ofer, *Getting It Right: Building Effective Civilian Review Boards to Oversee Police*, 46 SETON HALL L. REV. 1033, 1050 (2016).

313. See *id.*

314. See *supra* notes 274–84 and accompanying text.

315. N.Y. CITY CHARTER § 440 (c)(1) (2023).

316. See *NYPD Member of Service Histories*, *supra* note 15.

317. See OFF. OF THE N.Y. STATE COMPTROLLER, NEW YORK CITY CIVILIAN COMPLAINT REVIEW BOARD: COMPLAINT PROCESSING 8 (2022), <https://www.osc.state.ny.us/files/state-agencies/audits/pdf/sga-2023-20n9.pdf> [<https://perma.cc/J7RK-PF6P>].

318. Professor Davidson notes that local agencies, as opposed to federal agencies, frequently operate on an informal basis. See Davidson, *supra* note 289, at 572. Many local agencies are not bound by CAPA-like legislation, and their actions may thus blur the line where public participation would be warranted. Contrariwise, Professor Davidson also suggests that procedure need not always be rigid and formalistic, and that informality can play a role. *Id.* at 610–11. For example, if an informal agency action would not create inequity or involve independent policy conclusions, informal agency action may be appropriate. *Id.* at 614–15.

privacy for most NYPD police officers, as most have not had a single civilian complaint substantiated against them.<sup>319</sup>

The Committee, New York's governmental entity tasked with overseeing FOIL,<sup>320</sup> has long advised that disclosing unsubstantiated allegations constitutes an unwarranted invasion of a police officer's privacy.<sup>321</sup> The author found no evidence suggesting that the CCRB considered the Committee's view when deciding to publish unsubstantiated complaints. The police unions raised this view when seeking an injunction to block the release of the complaint histories,<sup>322</sup> but the *De Blasio* court held that such arguments lacked merit and denied the injunction.<sup>323</sup> The court did not provide support for its view that the Committee's guidance was without merit.<sup>324</sup> The court simply reasoned that the CCRB adequately explained its decision to release the complaint histories.<sup>325</sup> The court seemed to surmise that transparency was enough because that was the only support given for releasing the records.<sup>326</sup>

The *Gannett* court and most other New York courts that have considered unsubstantiated civilian complaints after Section 50-a's repeal have held they should be protected.<sup>327</sup> Several of these courts, particularly in two very recent appellate division holdings,<sup>328</sup> have expressly ruled that the release of such records constitutes an invasion of personal privacy under FOIL; thus, such records should either be withheld from disclosure or redacted to protect the identities of affected officers.<sup>329</sup>

Some scholars have considered the importance of police records after Section 50-a's repeal. Civil rights scholar Cynthia Conti-Cook states that, post-repeal, access to misconduct information about NYPD personnel has been invaluable to the public.<sup>330</sup> She makes two notable concessions, however. First, it is hard to know how many people access the complaint histories and how the public uses them.<sup>331</sup> Second, a non-CCRB

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319. The CCRB recently reported that 86 percent of active NYPD police officers had no civilian complaints substantiated against them. See N.Y.C. CIVILIAN COMPLAINT REV. BD., *supra* note 232, at 21; see also *supra* notes 148–53 and accompanying text.

320. See *About the Committee on Open Government*, *supra* note 218.

321. See *supra* Part II.C.

322. See First Amended Complaint ¶ 68, *supra* note 134.

323. *Uniformed Fire Officers Ass'n v. De Blasio*, 846 F. App'x 25, 33 (2d Cir. 2021).

324. See *id.* at 30.

325. See *id.* at 32; see also *Transcript: Mayor De Blasio Holds Media Availability*, *supra* note 119.

326. See *De Blasio*, 846 F. App'x at 32; see also *Transcript: Mayor De Blasio Holds Media Availability*, *supra* note 119.

327. See *supra* Part II.D.2.

328. See *N.Y. Civ. Liberties Union v. City of Syracuse*, No. 21-00796, 2022 WL 16848033 (N.Y. App. Div. Nov. 10, 2022); *N.Y. Civ. Liberties Union v. City of Rochester*, No. 21-01191, 2022 WL 16848106 (N.Y. App. Div. Nov. 10, 2022).

329. See *supra* notes 259–72 and accompanying text.

330. Cynthia Conti-Cook, *Digging Out from Under Section 50-A: The Initial Impact of Public Access to Police Misconduct Records in New York State*, 18 UNIV. SAINT THOMAS L.J. 43, 60 (2022).

331. *Id.* at 62.

organization constructed its own database<sup>332</sup> using the complaint histories by including only closed cases against current NYPD officers who had at least one substantiated CCRB complaint, and this newer database was a potential model for using civilian complaint data.<sup>333</sup> Regarding the first point, if the CCRB and other entities cannot point to why the public is accessing the complaint histories, the value of the complaint histories becomes debatable and a police officer's right to privacy arguably outweighs the public interest, at least with respect to unsubstantiated complaints. Regarding the second point, developing a refined model database containing only final and substantiated civilian complaints against current officers suggests a lack of significant public interest in unsubstantiated records or in police officers who retire or otherwise resign from the force.<sup>334</sup>

Professors Rachel Moran and Jessica Hodge observe that neither the view of the police (that disclosing misconduct records will eventually harm officers) nor the view of the CCRB (that disclosing records will improve accountability) is supported by significant data.<sup>335</sup> There has been little empirical study of either claim.<sup>336</sup> The scholars attempt to fill in some gaps by conducting several surveys and interviews. The surveys cited damage to reputation as the most frequent harm accompanying public access to misconduct records.<sup>337</sup> Additionally, most survey respondents did not believe that public disclosure of misconduct records made communities safer.<sup>338</sup> Survey respondents also indicated that an ongoing misconduct investigation or investigations in which misconduct was unfounded constituted the two most important reasons not to disclose police records.<sup>339</sup> Some survey respondents reasoned that when the media or public learn of unfounded complaints, they fixate on the accusation rather than on its unproven status.<sup>340</sup> The limited data on both the police and CCRB sides supports not adopting an extreme position in either direction. Releasing all civilian complaint records, including unsubstantiated allegations, constitutes an extreme position followed by only a minority of jurisdictions.<sup>341</sup> The

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332. *The NYPD Files: Search Thousands of Civilian Complaints Against New York City Police Officers*, PROPUBLICA (July 26, 2020), <https://projects.propublica.org/nypd-ccrb/> [<https://perma.cc/KAB8-QHY5>].

333. See Conti-Cook, *supra* note 330, at 62.

334. This point is reinforced by ProPublica's mission to act as investigative journalists in exposing abuses of power and betrayals of public trust by the government and other entities. See *About Us: The Mission*, PROPUBLICA, <https://www.propublica.org/about/> [<https://perma.cc/N4DN-D7GF>] (last visited Nov. 3, 2023).

335. Rachel Moran & Jessica Hodge, *Law Enforcement Perspectives on Public Access to Misconduct Records*, 42 CARDOZO L. REV. 1237, 1239 (2021).

336. See *id.*

337. *Id.* at 1258. Despite the acknowledgement of harm to officers, many of the survey participants felt the public benefit outweighed the harm. See *id.* at 1261.

338. See *id.* at 1263.

339. See *id.* at 1264–65.

340. *Id.* at 1282–83. Some of the earlier discussion in this Note supports this point. See *supra* notes 140–42 and accompanying text; *supra* note 365 and accompanying text.

341. North Dakota is currently the only state that mandates unrestricted disclosure of all complaints against police officers, including those that are wholly unsubstantiated. See

*Gannett* court and most other New York courts that have considered the issue have taken the middle road, opting to protect officers from unsubstantiated complaints under FOIL while allowing for public scrutiny of substantiated complaints.

Disclosing unsubstantiated complaints might invade officers' personal privacy under FOIL because, as suggested above, insufficient data supports the transparency argument raised by the CCRB and others.<sup>342</sup> Professor Kate Levine argues that transparency is the default argument raised regarding police discipline records but that it is not the policing cure that advocates proclaim it to be.<sup>343</sup> She notes that advocates use notorious police killings to attempt to correlate disclosure of police disciplinary records with accountability but that these advocates do not explain how such disclosures lead to accountability.<sup>344</sup> Meanwhile, disclosing officers' records comes with significant privacy tradeoffs.<sup>345</sup> Professor Levine also observes the similarities between publishing police disciplinary records and publishing criminal records.<sup>346</sup> Both implicate similar issues, including infringement on due process rights and reputational harm.<sup>347</sup> Criminal reform advocates have long noted that publishing criminal records permanently stains affected individuals, subjecting them to reputational harm and discrimination in employment opportunities.<sup>348</sup> The public's inability to competently assess criminal records compounds the issue.<sup>349</sup> To a lesser degree, Professor Levine advances the same arguments for police disciplinary records<sup>350</sup> and proposes a middle ground in which disciplinary records are made available to prosecutors, defense attorneys, and civil litigants in lieu of providing blanket public disclosure of these records.<sup>351</sup>

The discussion above supports not allowing FOIL's use as a vehicle to release unsubstantiated records against officers' interests. The following section discusses CAPA and FOIL solutions that can mitigate CCRB's release of complaint histories.

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Anjelica Hendricks, *Exposing Police Misconduct in Pre-trial Criminal Proceedings*, 24 N.Y.U. J. LEGIS. & PUB. POL'Y 177, 243–44 (2021).

342. See Moran & Hodge, *supra* note 335.

343. See Levine, *supra* note 232, at 844–45.

344. See *id.* at 872. Some advocates have contended that making police records available is a matter of life and death and that the public interest far outweighs the privacy interest of individual officers. *Id.* at 887. They support the point by advancing gripping stories of police brutality. *Id.* In doing so, however, the advocates fail to explain how publishing police records would have aided these victims. *Id.*

345. See *id.* at 873.

346. See *id.* at 880.

347. See *id.* at 897.

348. See *id.* at 890–92.

349. See *id.* at 892.

350. See *id.* at 890.

351. See *id.* at 900, 905.

### B. Rolling Back Complaint Histories

CAPA and FOIL implicate distinct problems that necessitate different solutions. Part III.B.1 considers solutions to make the complaint histories CAPA compliant. Part III.B.2 discusses FOIL solutions that allow disclosures while protecting police officer privacy.

#### 1. The CAPA Solutions

This Note proposes several solutions that would put the CCRB in compliance with CAPA regarding future record releases and help mitigate further harm from the nondiscriminatory release of NYPD complaint histories.

First, the CCRB should stop publicly releasing all complaint histories until it can establish its statutory authority to release such records. As mentioned earlier, the CCRB's only broad public disclosure power under the Charter is informing the public about its board of directors and its duties.<sup>352</sup> The CCRB also has the authority to promulgate rules regarding how to notify individual members of the public about a complaint made against a police officer.<sup>353</sup> A similar authorizing statute would be sensible regarding the blanket release of complaint histories. In the absence of this, publicly releasing the complaint histories is not provided for in the Charter or the rules of the City,<sup>354</sup> nor can either document imply the authority to release.<sup>355</sup> Additionally, although the CCRB may argue otherwise, the complaint histories are quintessentially NYPD records, and it is arguable that the NYPD is the proper agency to engage in rulemaking to determine the propriety of releasing the records.<sup>356</sup>

Second, assuming *arguendo* that the CCRB has implied authority to make rules regarding the complaint histories, the CCRB should conduct rulemaking under CAPA. Doing so would alleviate several concerns raised

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352. *See supra* Part I.B; *see also* N.Y. CITY CHARTER § 440(c)(7) (2023).

353. N.Y. CITY CHARTER § 440(c)(2); *see also* RULES OF THE CITY OF N.Y. tit. 38-A, ch. 1, § 35 (2023).

354. *See* N.Y. CITY CHARTER §§ 440–441; RULES OF THE CITY OF N.Y. tit. 38-A.

355. Generally, legislatures delegate rulemaking authority to administrative agencies and must minimally provide an outline by which the agency must act in carrying out its duties with respect to a particular statute. Agencies may be given rulemaking authority to fill in small gaps within a statute, but the promulgated rules must be consistent with the enabling legislation. *See* 2 N.Y. JUR. 2D *Administrative Law* § 37(2) (2023). Although an agency's power to act under a statute does not always need to be explicitly defined, it must be clearly implied from the statute. *See id.* § 48.

356. The CCRB complaint process can only begin after a civilian interaction with an NYPD police officer has occurred. *See About CCRB, supra* note 14. As part of its investigatory process, the CCRB relies on NYPD cooperation to retrieve records and conduct interviews of NYPD personnel, and it submits findings to the NYPD Police Commissioner to implement discipline when appropriate. *See* N.Y. CITY CHARTER §§ 440(c)(1), (d)(1); RULES OF THE CITY OF N.Y. tit. 38-A, ch. 1, §§ 24, 42(a). The CCRB had agreed not to release certain NYPD records without consulting the NYPD's Deputy Commissioner of Legal Matters pursuant to the Trials MOU. The author has requested and is awaiting confirmation of such communications. *See supra* note 200 and accompanying text. This history and statutory authority strongly suggests that complaints coming to the CCRB are *de jure* NYPD records.

above.<sup>357</sup> For one, it could help confirm that the CCRB's action was not against its delegated authority.<sup>358</sup> Additionally, conducting rulemaking could help ensure that the CCRB is not acting against the law.<sup>359</sup> Engaging in rulemaking could also legitimize the CCRB's future releases of complaint histories by increasing the CCRB's transparency, helping to remove hints of impropriety, and allowing for public participation.<sup>360</sup> Public participation in the CAPA rulemaking process could thereby support the CCRB's position that releasing the complaint histories was a good decision.<sup>361</sup>

A CAPA rulemaking process could also help the CCRB explain the release of unsubstantiated civilian complaints to the public.<sup>362</sup> It is not enough to advance that releasing unsubstantiated records improves transparency. The CCRB should explain how unsubstantiated records differ from substantiated records from the transparency perspective. Making records of founded police wrongdoing available for public review could achieve the goal of increasing accountability,<sup>363</sup> but this justification does not apply for unfounded or alleged acts.<sup>364</sup> As part of the rulemaking process, the CCRB should provide support for their view that publishing unsubstantiated records helps their goals in a way that substantially outweighs the individual officers' privacy interests in avoiding harm from the release of the records. When either the individual interest of police officers in preventing harm outweighs the public interest in disclosure or the two interests counterbalance fairly evenly, an unsubstantiated record should not be released. A close call after balancing or a conclusion that the police interest is greater than the public interest both support nondisclosure, as unsubstantiated records are likely to remain public in perpetuity and some have used such records to imply negative connotations against both active and retired police officers.<sup>365</sup>

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357. See *supra* Part III.A.1.

358. See *supra* notes 291–99 and accompanying text.

359. See DELLA CANANEA, *supra* note 286, at 33.

360. See *supra* notes 301–03 and accompanying text.

361. See Ponomarenko, *supra* note 301, at 1571–74.

362. See *supra* notes 305–07 and accompanying text.

363. For example, Massachusetts Governor Charlie Baker introduced a 2020 bill that would create a licensing system and public database for police officers in the state. See Shira Schoenberg & Sarah Betancourt, *Baker Releases Plan to Decertify Police for Misconduct*, COMMONWEALTH MAG. (June 17, 2020), <https://commonwealthmagazine.org/criminal-justice/baker-releases-plan-to-decertify-police-for-misconduct/> [<https://perma.cc/TMY8-MMPC>]; see also S.B. 2963, 191st Gen. Ct., Reg. Sess. (Ma. 2020). The database is partly an effort to increase accountability and would provide certification status for police officers as well as provide records of *confirmed* misconduct infractions committed by officers. See Schoenberg & Betancourt, *supra*. One police chief noted that the bill could help enhance professionalism and increase trust. *Id.*

364. See Moran & Hodge, *supra* note 335, at 1239.

365. For example, former tennis star James Blake was tackled to the ground by current NYPD police officer James Frascatore in 2015 after a witness pointed Blake out as a perpetrator in a fraud ring. Peter Szekely, *New York City Settles with Former Tennis Star Roughed Up by Cop*, REUTERS (June 21, 2017, 4:08 PM), <https://www.reuters.com/article/us-new-york-police-blake/new-york-city-settles-with-former-tennis-star-roughed-up-by-cop-idUSKBN19C2SI> [<https://perma.cc/92GL-P598>]. The incident garnered worldwide attention when several articles, most of them unflattering of Frascatore, were published. See, e.g., *id.*; Benjamin Mueller & Nate Schweber, *Officer Who Arrested James Blake Has History of Force*

Third, assuming *arguendo* that proper rulemaking determined that releasing complaint histories—including unsubstantiated records—is within the CCRB’s domain, the NYPD and the CCRB should collaborate to create a system that more fairly accounts for individual officers’ interests. The system should be dual-pronged, having separate processes for substantiated records and unsubstantiated records. As suggested above, substantiated civilian complaints against police officers deserve less protection than unsubstantiated records.<sup>366</sup> Nonetheless, substantiated complaints should only be published on public-facing databases when finalized. Although the complaint histories website claims that the CCRB does not publish “open allegations,” it fails to define what an open allegation is.<sup>367</sup> Essentially, an allegation is something asserted as true but not yet proven.<sup>368</sup> Currently, the CCRB website publishes dispositional findings on the complaint history website before police officers have had a chance for a hearing or have accepted a plea.<sup>369</sup> This Note considers such publications to be open

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*Complaints*, N.Y. TIMES (Sept. 11, 2015), <https://www.nytimes.com/2015/09/12/nyregion/video-captures-new-york-officer-manhandling-tennis-star-during-arrest.html> [https://perma.cc/X8DM-F9AE]. Officer Frascatore’s CCRB allegations were arguably used as a tool to muddy him up in the media. One article pointed out that he had been named in several civilian complaints. *Cop Suing NYPD, Tennis Star for Defamation After Being Cast as ‘Racist’ in False Arrest*, POLICE1 (Oct. 5, 2017), <https://www.police1.com/arrests-sentencing/articles/cop-suing-nypd-tennis-star-for-defamation-after-being-cast-as-racist-in-false-arrest-a5cWAYp2aQcr3PaF/> [https://perma.cc/JU3Y-EV4D]. Another noted that Frascatore had three civilian complaints for excessive force filed against him in one year alone and that a pattern of mistreatment could be inferred. Mueller & Schweber, *supra*. Although the latter article accurately stated that Frascatore received three complaints during one particular year, only two of those complaints were for alleged force and neither was substantiated. *James Frascatore*, 50-A.ORG, <https://www.50-a.org/officer/3D2V> [https://perma.cc/2FRW-4LZT] (last visited Nov. 3, 2023). Neither article provided the context for the unsubstantiated records. Officer Frascatore reported that his family had received death threats in the wake of the situation and that a panic button and police radio were installed in his home. Stephanie Pagonis, *Cop Who Tackled James Blake Says His Family Received Numerous Death Threats*, N.Y. POST (July 31, 2018), <https://nypost.com/2018/07/31/cop-who-tackled-james-blake-says-his-family-received-numerous-death-threats/> [https://perma.cc/5834-8Y5F]; *cf. supra* notes 140–42 and accompanying text (discussing similar harassment of another NYPD officer). Recall that the *De Blasio* court partly held against the police unions because it believed any prospective harm from unsubstantiated records would be mitigated by juxtaposed dispositional outcomes. *See Uniformed Fire Officers Ass’n v. Blasio*, 846 F. App’x 25, 30–31 (2d Cir. 2021). The court did not cite support for this conclusion, nor did it account for prospective media misuse of the records. *Id.*

366. *See supra* notes 363–64 and accompanying text.

367. *See NYPD Member of Service Histories, supra* note 15. Similarly, neither the Charter nor the RCNY define “open complaint.”

368. *See Allegation*, BLACK’S LAW DICTIONARY (11th ed. 2019).

369. *See supra* notes 148–53 and accompanying text; *see also NYPD Member of Service Histories, supra* note 15. For an example, visit the web page, select “Active” in the “Status” caption, enter “Dorian” for “First Name,” and enter “Thompson” for “Last Name.” Click on the “Dorian Thompson” result, which will generate a PDF of Mr. Thompson’s CCRB history. *See CIVILIAN COMPLAINT REV. BD., CCRB NYPD OFFICER HISTORY FOR DET. DORIAN THOMPSON AS OF NOV. 6, 2023* (2023), <https://perma.cc/G2MJ-7FA5>. This reveals that Mr. Thompson has substantiated CCRB allegations from an incident that occurred on October 12, 2021 with an NYPD disposition of “APU – Decision Pending”—a term that the public likely will not understand when looking at Mr. Thompson’s complaint history. *Id.* (The term probably means that a department trial is pending with the CCRB’s Administrative

allegations since they are not yet finalized. Waiting for substantiated allegations to be finalized—meaning that there are both CCRB and NYPD dispositions—supports the CCRB’s mission while ensuring individual police officers receive due process before a public disclosure.<sup>370</sup> Under this substantiated prong, if the officer opts for an administrative trial and is found not guilty, the record should not be published because it would serve no known purpose and could be unfairly used against the officer.<sup>371</sup>

Alternatively, under the substantiated prong, the NYPD and CCRB could provide officers a time frame—for example, forty-five days—during which they would have the opportunity to enter an administrative interlocutory appeal of the CCRB finding. If an officer appeals the substantiated finding, the record would remain under seal until the claim is disposed of at an administrative trial or the officer accepts a plea deal. If the claim is substantiated at trial, the CCRB could release the record. If the officer is found not guilty, there is no benefit to publication and the CCRB should not release the record. If the officer does not file the appeal, they can be deemed to have given up a right to keep the pending record under seal.

Under the unsubstantiated prong, not publishing unsubstantiated records under any circumstances is the pragmatic solution. Alternatively, when individual officers’ interests outweigh the public benefit of disclosing particular unsubstantiated records, the CCRB should obtain express permission from affected officers when it wants to publish such records. This can be facilitated through the process that the CCRB uses to notify NYPD officers of allegation findings.<sup>372</sup> There are at least two possible ways to request permission. First, the CCRB could ask individual NYPD officers to sign a waiver permitting it to publish the unsubstantiated record. Second, the CCRB could adopt a presumptive right-of-release process. For example, the CCRB could timely notify officers of unsubstantiated findings with instructions that, unless they object within a certain timeframe, such as sixty days, the CCRB may publish the record. Should the officer fail to object, the CCRB would have a presumptive right to publish the unsubstantiated record.

Substantively adopting the above CAPA solutions would help alleviate the procedural concerns accompanying the release of NYPD complaint histories. The next section considers possible solutions under FOIL, the second protective layer for police records.

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Prosecution Unit, though the author could not find a definition on the CCRB or NYPD websites). As of the time of this Note’s publication, these dispositions have been published on the complaint history database without Mr. Thompson having had an opportunity for a hearing or accepting a plea deal.

370. *See supra* notes 307–17 and accompanying text.

371. *See supra* note 365 and accompanying text.

372. The CCRB notifies police officers in writing within ten days of making findings in certain cases. *See* RULES OF THE CITY OF N.Y. tit. 38-A, ch. 1, § 37(b) (2023).



## 2. The FOIL Solutions

The earlier discussion suggests that there is no justification to release all civilian complaints against NYPD officers outright under FOIL.<sup>373</sup> Any standard for releasing such records should begin with this premise.

Assuming that the CCRB has satisfied its CAPA obligations,<sup>374</sup> this Note takes no issue with publishing substantiated records. If the CCRB fails to establish authority to release substantiated records under CAPA, such records are presumably eligible for disclosure under FOIL.<sup>375</sup> Regarding unsubstantiated complaints, however, neither the CCRB nor courts can reasonably ignore guidance from the Committee, which has consistently advanced the position that disclosing unsubstantiated allegations would violate the individual privacy of police officers.<sup>376</sup> Similarly, the CCRB cannot reasonably ignore guidance from most New York courts that considered the issue post-Section 50-a and have upheld protections for unsubstantiated complaints.<sup>377</sup> Therefore, the first FOIL approach that this Note recommends is to bar the release of unsubstantiated civilian complaint records.

This Note contends that the first recommendation is the superior approach. However, if the CCRB can present convincing evidence that unsubstantiated civilian complaints provide an important public benefit in some circumstances, this Note alternatively proposes a balancing test to determine whether a particular civilian complaint record should be released under FOIL. Under the first prong of the three-part test, the CCRB would review the status of a requested civilian complaint. If the complaint is both substantiated and finalized, the agency should release the record under FOIL. If the complaint is substantiated but not yet finalized, the agency should not release the record under FOIL and may either keep the request on file pending the outcome or direct the requestor to resubmit when the complaint is finalized. If the complaint is unsubstantiated, the CCRB should presume that they will not release the record under FOIL and proceed to the second prong of the test. This prong requires the requestor to present a compelling reason for disclosing an unsubstantiated civilian complaint.<sup>378</sup> If the requestor

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373. *See supra* Part III.A.1.

374. *See supra* Part III.B.1.

375. In such a circumstance, the burden shifts to the individual party to make a FOIL request for a particular substantiated record rather than a carte blanche release of such records by the CCRB.

376. *See supra* notes 220–25 and accompanying text. The state legislature reaffirmed FOIL's purpose to protect officers from unwarranted invasions of privacy in its 2016 attempt to repeal Section 50-a. Assemb. B. 9332, 201 Leg., 2d Sess. (N.Y. 2016).

377. *See supra* Part II.D.2.

378. The compelling reason should be material and particularized to the requestor. Materiality could be, for example, when the record would provide the requestor with a substantive benefit based on a specific interaction involving the police officer or when such record might be useful in a bona fide, quasi-judicial proceeding. Mere transparency or general policy reasons would not constitute a material reason for purposes of this test. A reason is particularized to the requestor if the requestor would be directly affected by receiving the

presents no reason or an unconvincing reason, the record should not be released. If the requestor presents a compelling reason, the burden switches to the agency to determine if the requestor's interest substantively outweighs the individual officer's interest in privacy under the third prong of the test. If the officer's interest is weightier, the record should not be released. Similarly, if the officer's interest and the requestor's interest are fairly equal, the record should not be released. If the requestor's interest is substantively weightier than the police officer's interest, the agency should release the civilian complaint record.

Importantly, this second approach pertains to unredacted civilian complaint records. As discussed earlier, when an agency has taken care to redact information that would identify an officer in an unsubstantiated record, then there is no invasion of personal privacy.<sup>379</sup> As such, the third approach this Note recommends is releasing unsubstantiated complaints redacted of identifying information. Two New York appellate courts have advanced this position,<sup>380</sup> and neither the CCRB or other advocates have posited why such records should contain officer information. This is the most balanced of the FOIL solutions offered by this Note. It protects police officer privacy and allows the public and the CCRB to use the unsubstantiated records for any purpose, other than negatively against individual officers. For instance, the POL explicitly envisions using certain materials for "statistical or factual tabulations or data."<sup>381</sup> NYPD officers or the unions would need to provide a material reason for why unsubstantiated but redacted records should be withheld.

Implementing one of the three approaches mentioned above would likely allow the CCRB to conduct its duties while respecting both the spirit of FOIL as well as police officers' interests. These approaches would also abate several of the criticisms mentioned above,<sup>382</sup> including the lack of data supporting over-transparency and protecting police officers against possible invasions of privacy. The next section briefly discusses some policy considerations regarding the usefulness of unsubstantiated civilian complaints in the aggregate.

### *C. Unsubstantiated at the Margins*

A few final points about the utility of complaint histories should be considered. First, the CCRB should not release unredacted civilian complaint records concerning retired NYPD officers under CAPA or FOIL. Neither the CCRB nor any advocates have proposed a public interest in

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record. Generally, a reason on behalf of a third party would not be considered particularized under the second prong of this test.

379. N.Y. PUB. OFF. LAW § 89 (2)(c)(i) (McKinney 2023).

380. See *N.Y. Civ. Liberties Union v. City of Syracuse*, No. 21-00796, 2022 WL 16848033, at \*4 (N.Y. App. Div. Nov. 10, 2022); *N.Y. Civ. Liberties Union v. City of Rochester*, No. 21-01191, 2022 WL 16848106, at \*1 (N.Y. App. Div. Nov. 10, 2022).

381. N.Y. PUB. OFF. LAW § 87(2)(g)(i) (McKinney 2023).

382. See *supra* Part III.A.2.

having such records available.<sup>383</sup> Retired records serve no purpose other than providing an opportunity to harass affected members in their future endeavors.<sup>384</sup> One exception to this general rule is for NYPD officers transitioning to different police agencies.<sup>385</sup> In such circumstances, substantiated records should be relayed to new employers in an agency-to-agency transaction.<sup>386</sup> In the public sphere, however, records of retired members should not be released, particularly for officers who accepted plea deals in reliance on confidentiality guarantees.<sup>387</sup> Further, when active members retire or depart from the force, the CCRB should seal their complaint histories.

Second, the CCRB and the NYPD should think about what the concept of disciplinary records entails. One dictionary defines “discipline” as “[p]unishment intended to correct or instruct.”<sup>388</sup> Another defines the same term as “[p]unishment.”<sup>389</sup> Both definitions imply that wrongdoing is an element of discipline. When a civilian complaint is unsubstantiated, there is no finding of wrongdoing.<sup>390</sup> Therefore, does an unsubstantiated civilian complaint constitute a disciplinary record subject to public review? The CCRB and courts should ask this question. This point is bolstered by scholarship discussed above, which is mostly or solely concerned with substantiated misconduct, including from pro-disclosure scholars.<sup>391</sup>

Third, some ancillary CCRB problems should be considered in light of the agency’s broad NYPD oversight authority. Perhaps the biggest of these problems is the length of time it takes the CCRB to investigate and close a case.<sup>392</sup> The CCRB’s goal is to close cases within ninety days,<sup>393</sup> yet a recent report shows that current CCRB cases are taking, on average, sixteen months to close.<sup>394</sup> Although the NYPD is responsible for some of the delays, an

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383. The author did not locate any evidence that the CCRB distinguished a particular need for retired officer records. Although the *De Blasio* court opined that the CCRB’s reasons for releasing the records was adequately explained by Mayor De Blasio, he only expressed interest in releasing records of active police officers, not retired officers. See *Uniformed Fire Officers Ass’n v. De Blasio*, 846 F. App’x 25, 30 (2d Cir. 2021); *Transcript: Mayor De Blasio Holds Media Availability*, *supra* note 119.

384. See *supra* notes 140–42 and accompanying text.

385. See Levine, *supra* note 232, at 903–04.

386. See *id.*

387. See *supra* notes 160–63 and accompanying text.

388. *Discipline*, BLACK’S LAW DICTIONARY (11th ed. 2019).

389. *Discipline*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/discipline> [<https://perma.cc/3Y7Y-Y9AN>] (last visited Nov. 3, 2023).

390. See *Data Transparency Initiative: Allegations*, *supra* note 188.

391. See, e.g., Patterson, *supra* note 24; Ofer, *supra* note 312; Conti-Cook, *supra* note 330; Moran & Hodge, *supra* note 335.

392. See Yoav Goan, *CCRB Police Misconduct Investigations Now Take, on Average, More than 19 Months to Close*, *New Data Show*, CITY (Oct. 6, 2022 5:00 AM), <https://www.thecivity.nyc/2022/10/6/23390090/ccrb-police-misconduct-investigations-state-comptroller> [<https://perma.cc/VKM5-E369>].

393. OFF. OF THE N.Y. STATE COMPTROLLER, *supra* note 317, at 1.

394. THE CITY OF N.Y. MAYOR ERIC L. ADAMS, *MAYOR’S MANAGEMENT REPORT: SEPTEMBER 2023*, at 97 (2023), [https://www.nyc.gov/assets/operations/downloads/pdf/mmr-2023/2023\\_mmr.pdf](https://www.nyc.gov/assets/operations/downloads/pdf/mmr-2023/2023_mmr.pdf) [<https://perma.cc/P7NJ-YY5X>].

audit placed the root blame on the CCRB's insufficient process for monitoring and mitigating delays.<sup>395</sup> This harms both legitimate CCRB complainants and police officers whose allegations remain public for extended periods before they receive an opportunity to be heard.

A related concern is the nature of the CCRB's personnel. Current and former CCRB investigators have described their experiences working for the agency in an anonymous internet forum.<sup>396</sup> Many investigators shared positive remarks, but many shared relevant concerns.<sup>397</sup> Some note a high turnover rate for investigators whereas others mention low pay and being overworked.<sup>398</sup> One mentioned insufficient training whereas others expressed the view that the agency is a beginner job rather than a long-term career.<sup>399</sup> CCRB dispositions can have significant implications for NYPD officers,<sup>400</sup> and one would expect seasoned and dedicated investigators to be handling cases. If these investigators' accounts are true, then waiting for finality before publishing substantiated complaints and either redacting or not publishing unsubstantiated complaints would be more appropriate.

Another related concern is the ease of filing CCRB complaints. CCRB complainants do not have to offer any evidence<sup>401</sup> or swear to the accuracy of their complaints.<sup>402</sup> Meanwhile, subject officers must swear to the veracity of their statements at subsequent CCRB interviews, at risk of substantial penalty.<sup>403</sup> The CCRB's duty of impartiality<sup>404</sup> should require parity in this dynamic. Both sides should share some of the burden. At minimum, requiring that complaints be sworn could discourage some bad faith complaints.<sup>405</sup> Another step that the CCRB could take to show impartiality is to anonymously highlight instances in which evidence proved

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395. OFF. OF THE N.Y. STATE COMPTROLLER, *supra* note 317, at 11–12.

396. *See, e.g., Working at New York City Complaint Review Board: 33 Reviews*, INDEED: COMPANY REVIEWS, <https://www.indeed.com/cmp/Civilian-Complaint-Review-Board/revie> pws [https://perma.cc/V6RT-SY8Y] (last visited Nov. 3, 2023).

397. *See id.*

398. *Id.*

399. *Id.*

400. *See, e.g., supra* notes 140–42, 310–17 and accompanying text.

401. *See supra* notes 150–51 and accompanying text.

402. CCRB complainants “affirm” the accuracy of their complaints “to the best of [their] knowledge” rather than swearing to them at risk of penalty. *See File a Complaint of Police Misconduct*, N.Y.C. CIVILIAN COMPLAINT REV. BD., <https://www.nyc.gov/site/ccrb/complaints/file-a-complaint/file-online.page> [https://perma.cc/TT8R-97BC] (last visited Nov. 3, 2023).

403. *See* POLICE DEP'T CITY OF N.Y., NYPD PATROL GUIDE, Procedure No. 203-03 (2019), [https://www.nyc.gov/html/nypd/downloads/pdf/public\\_information/public-pguide1.pdf](https://www.nyc.gov/html/nypd/downloads/pdf/public_information/public-pguide1.pdf) [https://perma.cc/7GSK-M8LF]; POLICE DEP'T CITY OF N.Y., NYPD PATROL GUIDE, Procedure No. 211-14 (2013), [https://www.nyc.gov/html/nypd/downloads/pdf/public\\_information/public-pguide2.pdf](https://www.nyc.gov/html/nypd/downloads/pdf/public_information/public-pguide2.pdf) [https://perma.cc/4ELP-FE2Z]; N.Y.C. POLICE DEP'T, *supra* note 191, at 32.

404. *See* N.Y. CITY CHARTER § 440(a) (2023).

405. *See* Judge Sarah Hennesy, *From the Bench: Taking an Oath in the Courtroom*, ALEXANDRIA ECHO PRESS (Aug. 26, 2014, 11:00 AM), <https://www.echopress.com/news/from-the-bench-taking-an-oath-in-the-courtroom> [https://perma.cc/JYB7-EULS].

a complaint to be false, just as it highlights certain substantiated complaints as part of its regular reporting.<sup>406</sup>

Finally, the CCRB and the NYPD should consider what quality of police officer they seek. Given the NYPD's reputation as a model crime-fighter,<sup>407</sup> it should hire and retain model officers. However, a large segment of its current police officers no longer wish to work for the agency.<sup>408</sup> Although many agencies across the country are experiencing some issues with officer retention,<sup>409</sup> it is most significant in larger cities like New York City.<sup>410</sup> Additionally, the NYPD cannot find enough candidates willing to replace outgoing officers.<sup>411</sup> Low pay might be one explanation for both the departures and low hiring,<sup>412</sup> but the department had previously maintained its ranks despite pay issues.<sup>413</sup> The CCRB's oversight methods are likely a contributing factor, with many officers complaining about bias in the agency's practices.<sup>414</sup> The bias claims may have some merit, as New York City Police Commissioner Keechant Sewell had overruled at least seventy CCRB dispositions before reaching a full year in office in 2022.<sup>415</sup> To

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406. See, e.g., N.Y.C. CIVILIAN COMPLAINT REV. BD., *supra* note 232, at 15–17.

407. See Mac Donald, *supra* note 2.

408. Some officers cited anti-police sentiment, low morale, and mental abuse by the NYPD as reasons for no longer wishing to be part of the agency. See Gabrielle Fonrouge, Tina Moore & Craig McCarthy, *Forced Overtime, Nepotism, Low Morale: 'Perfect Storm for Disaster' at NYPD*, N.Y. POST (Nov. 6, 2022), <https://nypost.com/2022/11/06/nypd-struggles-impact-all-aspects-of-police-life-for-its-officers/> [<https://perma.cc/L2JY-DV4Z>].

409. Audrey Conklin, *These Police Departments Are Seeing Some of the Worst Staffing Shortages in the US Ahead of 2023*, FOX NEWS (Oct. 27, 2022, 2:00 AM), <https://www.foxnews.com/us/these-police-departments-seeing-some-worst-staffing-shortages-us-ahead-2023> [<https://perma.cc/E4T3-87Y6>].

410. James Barron, *Why Police Officers Are Leaving: Low Pay, Overwork and High Costs*, N.Y. TIMES (Dec. 14, 2022), <https://www.nytimes.com/2022/12/14/nyregion/nypd-pay-work-costs.html> [<https://perma.cc/CWL2-VK CZ>].

411. See David Ushery, *NYPD Struggles to Find New Recruits as Retirements Also Rise*, NBC (May 4, 2021), <https://www.nbcnewyork.com/news/local/nypd-struggles-to-find-new-recruits-as-retirements-also-rise/3034454/> [<https://perma.cc/6UGZ-RVX7>].

412. See Barron, *supra* note 410.

413. The NYPD's headcount decreased from nearly 37,000 in 2019 to 33,822 in 2023. See Dean Balsamini, *NYPD Exodus: Police on Pace to Quit, Retire in Record Numbers*, N.Y. POST (June 12, 2022), <https://nypost.com/2022/06/11/nypd-cops-on-pace-to-quit-retire-in-record-numbers/> [<https://perma.cc/4SXS-S556>]; Dean Balsamini, Joe Marino, Craig McCarthy & Steven Vago, *NYPD Cops Resigning in New Year at Record-Breaking Pace with a 117% Jump from 2021 Numbers*, N.Y. POST (Mar. 10, 2023), <https://nypost.com/2023/03/10/nypd-cops-resigning-from-force-in-2023-at-record-pace/> [<https://perma.cc/XNZ3-NAG4>].

414. See *Bias at the Civilian Complaint Review Board*, POLICE BENEVOLENT ASS'N CITY N.Y., <https://www.nycpba.org/news/pba-issues/ccrb/> [<https://perma.cc/SU6G-CUJH>] (last visited Nov. 3, 2023).

415. Police Commissioner Sewell's seventy-plus overruled decisions in less than one year nearly matched the just over eighty overruled decisions by the previous Police Commissioner, Dermot Shea, during his more than two-year tenure. Commissioner Sewell pointed out that some discipline recommended by the CCRB was manifestly unfair, which prompted her to propose changes to the Discipline Matrix that the CCRB heavily influenced. See Craig McCarthy, *NYPD to Change Disciplinary Guidelines After Cases 'Manifestly Unfair' to Cops*, N.Y. POST (Dec. 14, 2022), <https://nypost.com/2022/12/14/police-commissioner-to-change-disciplinary-guidelines-after-manifestly-unfair-penalties/> [<https://perma.cc/G7MN-LVUR>].

combat retirements and the inability to find qualified candidates, the NYPD has moved to lowering standards<sup>416</sup> and hiring candidates with poor character.<sup>417</sup> This is against the City’s interests and is something both the NYPD and the CCRB should consider. It is difficult to fault the talented individual officer who does not appreciate their treatment under the NYPD or the CCRB and chooses to move on to a different police department or another career. That officer should be able to freely do so without the taint of unsubstantiated complaints following them in perpetuity. The CCRB can help the retention issue by showing that they are conducting their duties fairly. One way is by redacting or sealing unsubstantiated civilian complaints.

#### CONCLUSION

Although this Note could serve as a case study for the CCRB-NYPD dynamic, the concepts herein can easily be applied more broadly across agencies and disciplines. The CCRB serves an important public role in helping victims of police abuse seek redress. It must conduct this duty “fairly” and in a manner by “which [both] the public and the police department have confidence.”<sup>418</sup> This entails following the rules that any other City agency must follow in promulgating rules in accordance with existing requirements and recognizing that the disclosure of certain records may violate the rights of individual police officers. Even if the public may have some confidence in the manner in which the CCRB released the complaint histories, NYPD police officers do not. The process for determining when to disclose civilian complaints should fairly balance all stakeholders’ interests. The solutions discussed above—including establishing the CCRB’s authority to release complaint histories, prospective rulemaking, working with the NYPD to account for individual officer interests, and following governmental and judicial guidance on FOIL—are pragmatic options that reasonably balance all interests and represent reasonable pathways forward.

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416. See Chris Sommerfeldt, *Mayor Adams Looking at Dropping NYPD College Credit Requirement*, N.Y. DAILY NEWS (Mar. 18, 2022, 6:10 PM), <https://www.nydailynews.com/news/politics/new-york-elections-government/ny-nyc-mayor-eric-adams-nypd-college-credit-requirement-20220318-pyikz445izewllhcdhdp5hg6cq-story.html> [https://perma.cc/5PQW-SRPQ]; Tina Moore & Bruce Golding, *NYPD Makes Fitness Tests Easier After Increased Retirements*, N.Y. POST (July 5, 2022), <https://nypost.com/2022/07/05/nypd-makes-fitness-tests-easier-after-increased-retirements/> [https://perma.cc/J6E5-79NC]; Bill Carey, *NYPD Drops 1.5-Mile Run Requirement as Department Struggles to Attract Recruits*, POLICE1 (Mar. 2, 2023), <https://www.police1.com/police-recruiting/articles/nypd-drops-15-mile-run-requirement-as-department-struggles-to-attract-recruits-tWX3hovU52s8C4e4/> [https://perma.cc/KJG2-PTS7].

417. See, e.g., Larry Celona, Georgett Roberts, Tina Moore, Melissa Klein & Craig McCarthy, *Two NYPD Recruits Suspended After Tryst in Police Academy Bathroom: Sources*, N.Y. POST (Dec. 17, 2022), <https://nypost.com/2022/12/17/nypd-recruits-suspended-after-having-sex-at-police-academy/> [https://perma.cc/LX4V-9H68].

418. N.Y. CITY CHARTER § 440(a) (2023).