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## The People's Business: The Case for Amending New York Civil Rights Law Section 50-a

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# The People’s Business

## THE CASE FOR AMENDING NEW YORK CIVIL RIGHTS LAW SECTION 50-A<sup>1</sup>

*“[A] free society is maintained when government is responsive and responsible to the public, and when the public is aware of governmental actions.”<sup>2</sup>*

### INTRODUCTION

In July of 2014, two plainclothes New York City Police Department (NYPD) officers approached and attempted to arrest forty-three-year-old Eric Garner.<sup>3</sup> Mr. Garner, a father of six and grandfather of two, stood accused of selling “loosies”—individual,

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<sup>1</sup> Immediately prior to publication, the New York State Legislature unexpectedly took action and repealed New York Civil Rights Law section 50-a. The Governor, Andrew M. Cuomo, signed the legislation days later on June 12, 2020, thereby rendering this note moot. 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/6V6M-HJXH>]. While the legal arguments and potential solution established in this note are no longer relevant, the author hopes that its continued publication will serve two helpful purposes. First, that it will represent an additional historical reference of the harms created by section 50-a; and second, that it will illustrate an alternate solution to address the statute’s longstanding issues. Notably, the legislature’s swift action was a direct result of the historic demonstrations that erupted in the wake of George Floyd’s death. Mr. Floyd, a forty-six-year-old Black man, was killed after a Minneapolis police officer “kept his knee on Mr. Floyd’s neck for eight minutes and 46 seconds.” See Evan Hill et al., *8 Minutes and 46 Seconds: How George Floyd Was Killed in Police Custody*, N.Y. TIMES (June 10, 2020), <https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html> [<https://perma.cc/B5CG-BM2U>]. Mr. Floyd, and the countless other Black Americans who have died at the hands of police should not have been forced to bear this burden. Let this serve as an example to America’s leaders that the desire for progress and equality should not hinge on the death of the innocent.

<sup>2</sup> N.Y. PUB. OFF. LAW § 84 (Freedom of Information Law (FOIL) legislative declaration).

<sup>3</sup> Joseph Goldstein & Nate Schweber, *Man’s Death After Chokehold Raises Old Issue for the Police*, N.Y. TIMES (July 18, 2014), <https://www.nytimes.com/2014/07/19/nyregion/staten-island-man-dies-after-he-is-put-in-chokehold-during-arrest.html> [<https://perma.cc/8RBD-9ZEY>].

untaxed cigarettes”<sup>4</sup>—a misdemeanor in New York State.<sup>5</sup> Despite the innocuous offense, this routine police encounter quickly turned deadly.<sup>6</sup> After pulling his hands free from the arresting officer, Mr. Garner was surrounded by additional members of the NYPD, including Officer Daniel Pantaleo.<sup>7</sup> Amid the rush, Officer Pantaleo “threw his arm around [Mr. Garner’s] neck and pulled him to the ground, holding him in . . . a chokehold.”<sup>8</sup> Additional officers then quickly piled on, forcibly pinning Mr. Garner to the pavement.<sup>9</sup> Underneath the swarm of officers, Mr. Garner could be heard repeating what would tragically become his last words: “I can’t breathe.”<sup>10</sup>

Within hours, cell phone video from a civilian bystander was obtained by a major media outlet and footage of the unarmed man’s death quickly spread across the nation.<sup>11</sup> An autopsy later confirmed what the video had shown: Mr. Garner died as a result of Officer Pantaleo’s chokehold—an arrest tactic that had long been prohibited by the NYPD.<sup>12</sup> While the nation wrangled with the circumstances surrounding Mr. Garner’s death,<sup>13</sup> his loss

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<sup>4</sup> Solange Uwimana, *How Illegal Cigarettes Get Smuggled and Sold in New York City*, VICE NEWS (Oct. 23, 2014, 3:00 PM), [https://www.vice.com/en\\_us/article/bn5333/i-spent-a-day-with-a-guy-selling-illegal-cigarettes-on-the-streets-of-nyc-1023](https://www.vice.com/en_us/article/bn5333/i-spent-a-day-with-a-guy-selling-illegal-cigarettes-on-the-streets-of-nyc-1023) [<https://perma.cc/QR3-E295>]; see Justin Wm. Moyer et al., *Protests in Support of Eric Garner Erupt in New York and Elsewhere*, WASH. POST (Dec. 4, 2014, 12:44 PM), <https://www.washingtonpost.com/news/morning-mix/wp/2014/12/04/after-grand-jury-doesnt-indict-police-officer-who-choked-eric-garner-protests-erupt-in-new-york-and-elsewhere/> [<https://perma.cc/F9KV-ULWY>].

<sup>5</sup> N.Y. TAX LAW § 1814(b).

<sup>6</sup> See Chris Francescani, *Loose Cigarette Arrests in NYC Drop in Year After Eric Garner’s Death*, WALL STREET J. (July 15, 2015, 8:02 PM), <https://www.wsj.com/articles/loose-cigarette-arrests-in-nyc-drop-in-year-after-eric-garner-death-1436992014> [<https://perma.cc/KER8-S53D>].

<sup>7</sup> Joseph Goldstein & Marc Santora, *Staten Island Man Died From Chokehold During Arrest, Autopsy Finds*, N.Y. TIMES (Aug. 1, 2014), <https://www.nytimes.com/2014/08/02/nyregion/staten-island-man-died-from-officers-chokehold-autopsy-finds.html> [<https://perma.cc/5LL7-Y4Q6>]; Goldstein & Schweber, *supra* note 3.

<sup>8</sup> Goldstein & Schweber, *supra* note 3.

<sup>9</sup> Ashley Southall, *Police Investigators Determined Officer Choked Eric Garner*, N.Y. TIMES (May 13, 2019), <https://www.nytimes.com/2019/05/13/nyregion/eric-garner-death-daniel-pantaleo-trial-chokehold.html> [<https://perma.cc/XK77-9YJR>]; Annie Karni et al., *GRAPHIC WARNING: Two Cops Pulled Off Streets, Staten Island DA Looking Into Death of Dad of Six After NYPD Cop Put Him in Chokehold During Sidewalk Takedown – EXCLUSIVE VIDEO*, DAILY NEWS (July 19, 2013 4:30 PM), <https://www.nydailynews.com/new-york/nyc-crime/staten-island-da-man-death-nypd-chokehold-article-1.1871946> [<https://perma.cc/YA34-JP4R>].

<sup>10</sup> Goldstein & Schweber, *supra* note 3.

<sup>11</sup> Ken Murray, *How the Daily News Acquired the Eric Garner Video*, N.Y. DAILY NEWS (July 11, 2015, 11:00 PM), <https://www.nydailynews.com/new-york/video-shows-fatally-choking-eric-garner-graphic-content-article-1.2289271> [<https://perma.cc/P9LL-3EQQ>].

<sup>12</sup> See Goldstein & Santora, *supra* note 7; Ian Fisher, *Kelly Bans Choke Holds by Officers*, N.Y. TIMES (Nov. 24, 1993), <https://www.nytimes.com/1993/11/24/nyregion/kelly-bans-choke-holds-by-officers.html> [<https://perma.cc/Q6FJ-AW5R>].

<sup>13</sup> Mr. Garner’s death brought about renewed concerns of potential racial biases in the criminal justice system. See Mara Gay et al., *Thousands Protest in Staten Island Over*

initiated a separate and more nuanced legal battle, which centered on the interpretation of a little-known New York State statute and persisted in the courts for more than two years.<sup>14</sup>

The controversy at the forefront of this litigation was whether New Yorkers were entitled to view Officer Pantaleo's NYPD "personnel record" (i.e., a record of his past on-the-job performance, which included any substantiated complaints of misconduct).<sup>15</sup> Pursuant to New York's Freedom of Information Law (FOIL), the Legal Aid Society initiated this request for Officer Pantaleo's records and included demands for the total number of substantiated civilian complaints filed against him prior to Mr. Garner's death.<sup>16</sup> Further, it sought any resulting disciplinary recommendations submitted to the police commissioner by the New York City Civilian Complaint Review Board (CCRB).<sup>17</sup> The Legal Aid Society argued that Officer Pantaleo's records were susceptible to the FOIL process by virtue of his public employment.<sup>18</sup> Despite the merit of such a claim,<sup>19</sup> the CCRB denied the request, citing New York Civil Rights Law section 50-a.<sup>20</sup>

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*Eric Garner's Death*, WALL STREET J. (Aug. 23, 2014, 8:56 PM), <https://www.wsj.com/articles/protesters-head-to-staten-island-for-al-sharptons-eric-garner-rally-1408807227> [<https://perma.cc/H6CA-5XRW>]; J. David Goodman, *On Staten Island, Thousands Protest Police Tactics*, N.Y. TIMES (Aug. 23, 2014), <https://www.nytimes.com/2014/08/24/nyregion/on-staten-island-thousands-protest-police-tactics.html> [<https://perma.cc/Z9B4-GZWA>].

<sup>14</sup> See N.Y. CIV. RIGHTS LAW § 50-a; *Luongo v. Records Access Officer*, 15 N.Y.S.3d 636 (Sup. Ct. 2015); *Luongo v. Records Access Officer*, 51 N.Y.S.3d 46 (App. Div. 2017); *Luongo v. Records Access Officer*, 93 N.E.3d 1213 (N.Y. 2017).

<sup>15</sup> *Luongo*, 15 N.Y.S.3d at 638–41.

<sup>16</sup> *Id.* at 638.

<sup>17</sup> *Id.* Despite being authorized to investigate allegations of police misconduct, the CCRB's oversight power is largely superficial. After making factual determinations about a particular incident, this independent city agency forwards its suggested disciplinary action to the NYPD commissioner. The commissioner, however, is under no legal obligation to heed the CCRB's recommendation, and in fact, often ignores it. See *About CCRB*, NYC.GOV, <https://www1.nyc.gov/site/ccrb/about/about.page> [<https://perma.cc/8WFH-NAGD>]; MEMORANDUM OF UNDERSTANDING BETWEEN THE CIVILIAN COMPLAINT REVIEW BOARD (CCRB) AND THE POLICE DEPARTMENT (NYPD) OF THE CITY OF NEW YORK CONCERNING THE PROCESSING OF SUBSTANTIATED COMPLAINTS 1–2; N.Y.C. DEPT. OF INVESTIGATION, OFFICE OF THE INSPECTOR GEN. FOR THE NYPD (OIG-NYPD), POLICE USE OF FORCE IN NEW YORK CITY: FINDINGS AND RECOMMENDATIONS ON NYPD'S POLICIES AND PRACTICES 4 (2015) (noting that over one-third of substantiated complaints of misconduct resulted in no disciplinary action).

<sup>18</sup> *Luongo*, 15 N.Y.S.3d at 639–40; see N.Y. PUB. OFF. LAW § 84 ("The people's right to know the process of governmental decision-making and to review the documents and statistics leading to determinations is basic to our society. Access to such information should not be thwarted by shrouding it with the cloak of secrecy or confidentiality. The legislature therefore declares that government is the public's business and that the public, individually and collectively . . . should have access of the records of government in accordance with the provisions of this article.")

<sup>19</sup> See Cynthia H. Conti-Cook, *A New Balance: Weighing Harms of Hiding Police Misconduct Information from the Public*, 22 CUNY L. REV. 148, 182 (2019) (noting that "police misconduct information is obviously a matter of public concern").

<sup>20</sup> *Luongo*, 15 N.Y.S.3d at 639; see N.Y. CIV. RIGHTS LAW § 50-a.

New York Civil Rights Law section 50-a (section 50-a) limits the release of personnel records for police officers, firefighters, paramedics, and correction officers.<sup>21</sup> Specifically, this statute provides that “all personnel records used to evaluate performance toward continued employment or promotion . . . shall be considered confidential and not subject to inspection or review without the express written consent of such [officers] . . . except as may be mandated by lawful court order.”<sup>22</sup> The New York Court of Appeals has consistently held that section 50-a applies broadly to police personnel records and prohibits the disclosure of any “[d]ocuments pertaining to misconduct or rules violations.”<sup>23</sup> Accordingly, it came as little surprise that the CCRB’s refusal to release Officer Pantaleo’s records was ultimately upheld by the courts.<sup>24</sup> In fact, in its final opinion, the Appellate Division held that the demands for Officer Pantaleo’s records fell “squarely within” the statutory provisions of section 50-a, and “thus [were] not subject to disclosure, under applicable precedent.”<sup>25</sup> The court’s invocation of section 50-a shielded Officer Pantaleo’s records from public scrutiny, denying New Yorkers and the Garner family vital information about the incident.<sup>26</sup>

This note argues that section 50-a harms New Yorkers by withholding information in the wake of police misconduct and should be amended.<sup>27</sup> Until remedied, this statute paradoxically provides New Yorkers the least amount of oversight over some of the state’s most powerful public employees.<sup>28</sup> Such a system scorns those who fall victim to misconduct because it denies them and

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<sup>21</sup> N.Y. CIV. RIGHTS LAW § 50-a.

<sup>22</sup> *Id.*

<sup>23</sup> *Prisoners’ Legal Servs. of N.Y. v. N.Y. State Dep’t of Corr. Servs.*, 535 N.E.2d 243, 245 (N.Y. 1988).

<sup>24</sup> See Alan Feuer, *Civil Rights Law Shields Police Personnel Files, Court Finds*, N.Y. TIMES (Mar. 30, 2017), <https://www.nytimes.com/2017/03/30/nyregion/civil-rights-law-section-50-a-police-disciplinary-records.html> [<https://perma.cc/FL37-R2KB>] (“The Appellate Division has reaffirmed the well-established legal principle that records generated by the police disciplinary process are protected from disclosure by [section] 50-a.” (quoting Austin Finan, a spokesman for New York City Mayor Bill de Blasio)); *Luongo v. Records Access Officer*, 51 N.Y.S.3d 46, 55 (App. Div. 2017).

<sup>25</sup> *Luongo*, 51 N.Y.S.3d at 55.

<sup>26</sup> See *id.*; Conti-Cook, *supra* note 19, at 153.

<sup>27</sup> See N.Y. STATE COMM. ON OPEN GOV’T, 2018 REPORT TO THE GOVERNOR AND STATE LEGISLATURE 3–5 (Dec. 2018); Conti-Cook, *supra* note 19, at 166; SANKAR SEN, ENFORCING POLICE ACCOUNTABILITY THROUGH CIVILIAN OVERSIGHT 40 (2010); Evan G. Hebert, *To Protect, Serve, and Inform: Freedom of Information Act Requests and Police Accountability*, 19 TEX. TECH. ADMIN. L.J. 271, 286 (2018).

<sup>28</sup> Erin E. Evans, *Police Secrecy Law Keeps Public in the Dark About Police Misconduct*, NBC NEWS (May 19, 2019, 3:29 AM), <https://www.nbcnews.com/news/us-news/police-secrecy-law-keeps-public-dark-about-police-misconduct-n1006786> [<https://perma.cc/F8XR-PBZF>].

their families essential information in their pursuit of justice.<sup>29</sup> Further, because police departments are poor self-regulators, it allows officer malfeasance to go unchecked, which results in more bad acts by police.<sup>30</sup> The section 50-a approach is not only undesirable from a public policy perspective because it perpetuates distrust and contributes to reduced levels of cooperation between law enforcement and the public,<sup>31</sup> but it directly conflicts with the legislative intent of New York's FOIL statute.<sup>32</sup>

Moreover, the dichotomy between New York's current system and a more transparent one is palpable. Consider the case of Laquan McDonald. In 2014, McDonald was shot sixteen times by a Chicago police officer.<sup>33</sup> When the officer's dash cam video was finally released pursuant to a freedom of information request, the video "contradicted nearly everything police said happened."<sup>34</sup> Further, it was not until after the video was released, and in the face of staggering public outcry, that the department fired and prosecutors ultimately charged the officers involved.<sup>35</sup> The motivating force behind this reaction was the public's reliance on the state's freedom of information statute.<sup>36</sup> New Yorkers, however, are deprived of a similar outcome due to section 50-a.<sup>37</sup> Rather than relying on FOIL's restorative nature to bridge the gap between law enforcement and the public, New York's section 50-a curtails transparency, which serves only to exacerbate the resulting harm.<sup>38</sup> In the aftermath of police misconduct, it is the victims and the public who need support—not police.

Thus, in order to correct this lapse of oversight, the New York State Legislature should amend section 50-a and provide

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<sup>29</sup> See Conti-Cook, *supra* note 19, at 153; Erica Garner & Reggie Harris, *All We Want Is Justice: Fighting for Eric Garner*, HUFFPOST (Dec. 6, 2017), [https://www.huffpost.com/entry/we-want-is-justice-fighting-for-eric-garner\\_b\\_8706124](https://www.huffpost.com/entry/we-want-is-justice-fighting-for-eric-garner_b_8706124) [<https://perma.cc/TX8J-RQR6>].

<sup>30</sup> See SEN, *supra* note 27, at 40.

<sup>31</sup> See Hebert, *supra* note 27, at 273 ("Lack of transparency regarding internal investigations has long fueled distrust of police departments in the United States."); SEN, *supra* note 27, at 40 ("Where there is transparency, community's cooperation is more assured and information more likely to [be] shared and this in turn is likely to help better crime control and maintenance."); Rachel Moran, *Police Privacy*, 10 U.C. IRVINE L. REV. 153, 186 (2019).

<sup>32</sup> See N.Y. PUB. OFF. LAW §§ 84–90; Hebert, *supra* note 27, at 286 ("[E]xemptions for [the disclosure of] police personnel files contravene the purpose of open records acts by improperly shielding investigations into police misconduct from the light of public scrutiny."); N.Y. STATE COMM. ON OPEN GOV'T, *supra* note 27, at 3–4.

<sup>33</sup> Jeremy Gerner & Jason Meisner, *FBI Investigating Death of Teen Shot 16 Times by Chicago Cop*, CHI. TRIB. (Apr. 14, 2015, 6:15 AM), <https://www.chicagotribune.com/news/ct-feds-probe-police-shooting-met-20150413-story.html> [<https://perma.cc/67H3-5LK9>].

<sup>34</sup> Hebert, *supra* note 27, at 284.

<sup>35</sup> See *id.*; Marlina Baldacci & Steve Almasy, *Chicago Police Move to Fire Officers in Laquan McDonald Shooting*, CNN (Aug. 31, 2016, 5:25 AM), <https://www.cnn.com/2016/08/30/us/chicago-police-laquan-mcdonald/index.html> [<https://perma.cc/ZDJ5-P4GE>].

<sup>36</sup> Hebert, *supra* note 27, at 284.

<sup>37</sup> See N.Y. STATE COMM. ON OPEN GOV'T, *supra* note 27, at 3–5.

<sup>38</sup> See SEN, *supra* note 27, at 8; Conti-Cook, *supra* note 19, at 190–91.

that nothing in the statute's section shall apply to FOIL requests, nor shall the statute's provisions prohibit the reapplication of a FOIL request previously denied pursuant to the statute.<sup>39</sup> This amendment would reaffirm FOIL's supremacy over the disclosure of police personnel files and facilitate increased public accountability over law enforcement.<sup>40</sup>

This note proceeds in the following parts. Part I establishes the scope of section 50-a's authority, analyzes applicable case law, and provides a brief overview of New York's FOIL statute. Part II illustrates the societal harms created by the section 50-a system. Part III provides a survey of the various disclosure processes adopted in other states. Finally, Part IV proposes and advocates for an amendment to section 50-a that would bar the statute's application to FOIL requests, thereby prioritizing the disclosure of police personnel records.

## I. NEW YORK CIVIL RIGHTS LAW SECTION 50-A AND THE EROSION OF NEW YORK'S FREEDOM OF INFORMATION LAW

New York Civil Rights Law section 50-a and New York's Freedom of Information Law serve fundamentally different ends. While section 50-a was devised to shield documents from the public, FOIL was designed to expose them.<sup>41</sup> In the last four decades, New York courts have repeatedly interpreted these conflicting statutes to determine their preeminence relative to

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<sup>39</sup> This note proposes amending section 50-a rather than repealing it because section 50-a also serves an additional function that should not be altered. Section 50-a places reasonable restrictions on an individual's ability to request a police officer's personnel record during the discovery phase of trial. Courts have interpreted section 50-a to require that a party demonstrate "how the requested material is relevant" to the specific legal proceeding, *King v. Conde*, 121 F.R.D. 180, 189 (E.D.N.Y. 1988), and establish with "a clear showing of facts," *People v. Harris*, 504 N.Y.S.2d 552, 553 (App. Div. 1986), why the intrusion into the officer's record is warranted. If the presiding judge finds the request meritorious, they may conduct an *in camera* review of the officer's files and choose to admit the record as evidence if it is "reasonably likely that the file will bear [relevant and material information] and that the quest for its contents is not merely a desperate grasping at a straw." *People v. Ruiz*, 66 N.Y.S.3d 400, 404 (N.Y. Crim. Ct. 2017) (alteration in original) (quoting *People v. Gissendanner*, 399 N.E.2d 924, 928 (N.Y. 1979)). While this process certainly hinders an individual's ability to compel the admittance of an officer's record at trial, Cynthia H. Conti-Cook, *Defending the Public: Police Accountability in the Courtroom*, 46 SETON HALL L. REV. 1063, 1074-78 (2016), these restrictions are reasonable and necessary. Without these provisions, criminal defense attorneys would be free to harass—and potentially impeach—a testifying officer during trial. Such a potentiality would threaten the judicial system, particularly a prosecutor's ability to successfully try criminal cases based on police testimony. Preserving the *in camera* review process thereby ensures that only judges (i.e., neutral and detached parties) review and adjudicate the value of admitting these consequential records.

<sup>40</sup> See SEN, *supra* note 27, at 31.

<sup>41</sup> Compare N.Y. CIV. RIGHTS LAW § 50-a, with N.Y. PUB. OFF. LAW §§ 84-90.

one another.<sup>42</sup> After countless lawsuits, many of which concluded in the New York Court of Appeals, it is now clear which statute reigns: section 50-a supersedes FOIL and exclusively governs the disclosure of police personnel records in New York.<sup>43</sup>

A. *Judicial Interpretation of New York Civil Rights Law Section 50-a*

New York Civil Rights Law section 50-a was enacted in 1976 and primarily sought to protect testifying officers from “harassment and reprisals” during trial.<sup>44</sup> Specifically, the legislature designed section 50-a to shield an officer’s personnel records from “criminal defense attorneys who sought to impeach [the] officer’s [testimony] with unsubstantiated [complaints of] prior bad acts.”<sup>45</sup> Despite its intent, this ambiguously drawn statute has been interpreted well beyond its designed scope.<sup>46</sup> Instead of merely protecting officers from overreaching criminal defense attorneys, New York courts have broadened section 50-a’s reach to include the prohibition of almost all FOIL disclosures.<sup>47</sup> The judicial expansion of section 50-a’s authority has developed gradually over the last few decades, but is effectively represented by three New York Court of Appeals decisions.<sup>48</sup>

In *Prisoners’ Legal Services of New York v. New York State Dept. of Correctional Services*, the New York Court of Appeals established the definition of an officer’s “personnel records” with respect to section 50-a.<sup>49</sup> In addition, the court formalized section

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<sup>42</sup> See, e.g., *N.Y. Civil Liberties Union v. N.Y.C. Police Dep’t*, 118 N.E.3d 847, 849 (N.Y. 2018); *Daily Gazette Co. v. City of Schenectady*, 710 N.E.2d 1072, 1073–74 (N.Y. 1999); *Prisoners’ Legal Servs. of N.Y. v. N.Y. State Dep’t of Corr. Servs.*, 535 N.E.2d 243, 244 (N.Y. 1988).

<sup>43</sup> See *N.Y. Civil Liberties*, 118 N.E.3d at 854; *Daily Gazette Co.*, 710 N.E.2d at 1077–78; *Prisoners’ Legal Servs.*, 535 N.E.2d at 246.

<sup>44</sup> *Prisoners’ Legal Serv.*, 535 N.E.2d at 245; see N.Y. STATE COMM. ON OPEN GOV’T, *supra* note 27, at 3–4.

<sup>45</sup> N.Y.C. BAR, REPORT ON LEGISLATION BY THE CIVIL RIGHTS COMMITTEE AND THE CRIMINAL COURTS COMMITTEE 2 (2018) (referencing various sections of the “Governor’s Bill Jacket” for § 50-a); see also Conti-Cook, *supra* note 39, at 1070 (“The legislative history of section 50-a reveals a heavy lobbying effort by police unions and district attorneys, seeking specifically to prevent defense attorneys from impeaching officers by prior bad acts in the courtroom.”).

<sup>46</sup> See *Daily Gazette Co.*, 710 N.E.2d at 1074 (stating that “[i]t would undermine the paramount objectives of the Legislature” to apply an “exceedingly narrow interpretation” of § 50-a to FOIL requests); *N.Y. Civil Liberties*, 118 N.E.3d at 851–54 (holding that NYPD “disciplinary decisions . . . are quintessential ‘personnel records’ protected by . . . § 50-a[,] [and that] parties [seeking their release] cannot sidestep [§ 50-a’s] mandate through the expedient of redacted FOIL disclosure”).

<sup>47</sup> See, e.g., *Daily Gazette Co.*, 710 N.E.2d at 1074.

<sup>48</sup> See *N.Y. Civil Liberties*, 118 N.E.3d at 847; *Daily Gazette Co.*, 710 N.E.2d at 1072; *Prisoners’ Legal Servs.*, 535 N.E.2d at 243.

<sup>49</sup> *Prisoners’ Legal Servs.*, 535 N.E.2d at 245.



50-a's supremacy over the disclosure of these records.<sup>50</sup> The court first confronted whether reports of "inmate grievances against State correction officers and the administrative decisions" resulting from those inmate complaints, "constitut[ed] 'personnel records.'"<sup>51</sup> After establishing that the documents "contain[ed] personal, employment-related information" pertaining to on-the-job conduct of particular officers, the court held that the documents "clearly . . . evaluat[ed] the employee's performance" and, therefore, met the statutory definition of "personnel records."<sup>52</sup> Furthermore, the court held that section 50-a, rather than FOIL, governed the disclosure of these records because New York's FOIL includes a specific exception for records governed by other state statutes.<sup>53</sup> In essence, FOIL's own language mandates that the statute give way to others—in this case, to section 50-a.

Ten years later, the New York Court of Appeals expanded section 50-a's breadth in *Daily Gazette Co. v. City of Schenectady*.<sup>54</sup> In *Daily Gazette Co.*, the court considered whether section 50-a's reach extended to records of disciplinary actions taken against officers who were off-duty at the time of their misdeeds.<sup>55</sup> Additionally, it resolved whether section 50-a prevented FOIL disclosures for records sought by "news-gathering organization[s]" whose only intention was to "disseminat[e] information to the general public on a matter of legitimate societal concern."<sup>56</sup> These issues were raised with respect to a FOIL request from two local newspapers that sought the disciplinary records of eighteen law enforcement officers who, while off-duty and celebrating a fellow officer's bachelor party, "pelted [a] civilian[s] vehicle with raw eggs."<sup>57</sup> The court's majority, invoking *Prisoners' Legal Services*, first ruled that the requested records fell within section 50-a's definition of "personnel records" because any sanctions imposed by the police department were inherently related to the officers' performance and, therefore, were "relevant to [their] promotion or continued employment."<sup>58</sup> The majority rebuffed the petitioners' claims that

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<sup>50</sup> *Id.* at 244.

<sup>51</sup> *Id.*; N.Y. CIV. RIGHTS LAW § 50-a ("personnel records" are any records that could be "used to evaluate performance toward continued employment or promotion").

<sup>52</sup> *Prisoners' Legal Servs.*, 535 N.E.2d at 245 (citations omitted).

<sup>53</sup> *See id.* at 244–45; N.Y. PUB. OFF. LAW § 87(2)(a) ("Each agency shall, in accordance with its published rules, make available for public inspection and copying all records, except that such agency may deny access to records or portions thereof that[] are specifically exempted from disclosure by state or federal statute."); N.Y. CIV. RIGHTS LAW § 50-a.

<sup>54</sup> *Daily Gazette Co. v. City of Schenectady*, 710 N.E.2d 1072, 1077–78 (N.Y. 1999).

<sup>55</sup> *Id.* at 1073–74.

<sup>56</sup> *Id.* at 1077.

<sup>57</sup> *Id.* at 1073–74.

<sup>58</sup> *Id.* at 1077.

sought to differentiate the records of disciplinary actions taken against officers for off-duty, rather than on-duty actions.<sup>59</sup> Next, the court ruled that section 50-a shielded these records from FOIL disclosure because the potential for “abusive exploitation” of the officers “exists irrespective of how, at whose behest or for what purpose the information is released into the public domain.”<sup>60</sup> Thus, section 50-a governs FOIL disclosures whether or not the records are to be used in any pending or expected litigation.<sup>61</sup>

In 2018, the New York Court of Appeals expanded section 50-a’s jurisdiction to its modern breadth in *New York Civil Liberties Union v. New York City Police Department*.<sup>62</sup> In *New York Civil Liberties Union*, the court confronted whether section 50-a prohibited even redacted FOIL disclosures.<sup>63</sup> The court, in accordance with its elastic view of section 50-a, held that it did, and blocked the release of almost ten years’ worth of redacted NYPD misconduct records.<sup>64</sup> Further, the majority rejected the argument that because “an officer’s identifying information [was] adequately redacted” compliance with section 50-a was “unnecessary.”<sup>65</sup> In effect, the court downplayed section 50-a’s intended purpose of protecting individual officers from harassment, and instead stressed that the case was a “straightforward application” of precedent that “mandate[d] confidentiality.”<sup>66</sup>

While the court glossed over the significance of its ruling, *New York Civil Liberties Union* represents the culmination of a momentous expansion of section 50-a’s scope. In just over forty years, courts transformed the statute from a safeguard against marauding criminal defense attorneys to a shield against almost all forms of public disclosures.<sup>67</sup> The empowerment of section 50-a, however, required an equal and opposite curtailment of FOIL’s statutory authority.<sup>68</sup>

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<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 1074.

<sup>62</sup> *N.Y. Civil Liberties Union v. N.Y.C. Police Dep’t*, 118 N.E.3d 847 (N.Y. 2018).

<sup>63</sup> *Id.* at 855.

<sup>64</sup> *Id.* at 852–53.

<sup>65</sup> *Id.* at 849.

<sup>66</sup> *Id.* at 856.

<sup>67</sup> *See* N.Y.C. BAR, *supra* note 45, at 2; *N.Y. Civil Liberties Union*, 118 N.E.3d at 856.

<sup>68</sup> *See* *N.Y. Civil Liberties Union*, 118 N.E.3d at 855–56; *Daily Gazette Co. v. City of Schenectady*, 710 N.E.2d 1072, 1073–77 (N.Y. 1999); *Prisoners’ Legal Servs. v. N.Y. State Dep’t of Corr. Servs.*, 535 N.E.2d 243, 244–45 (N.Y. 1988).

*B. Overview of New York Public Officers Law Sections 84–90 (FOIL)*

Unlike section 50-a, New York’s Freedom of Information Law was designed to “make government transparent.”<sup>69</sup> Similar to the federal Freedom of Information Act,<sup>70</sup> this statute establishes a framework for public disclosures of government information.<sup>71</sup> For example, FOIL requires that New York State agencies make all records available for public dissemination, unless the records fall within a handful of reasonable exceptions.<sup>72</sup> Since its adoption, New Yorkers have consistently utilized this revolutionary statutory tool, resulting in the publication of a myriad of government documents.<sup>73</sup> A sampling of some of these compelled disclosures include, NYPD “Training Manuals for Prostitution Arrests,”<sup>74</sup> “lease negotiation[s]” for a state urban development corporation,<sup>75</sup> copies of the “winning proposals” for seven municipal golf courses,<sup>76</sup> city-wide “rules and regulations” for asbestos abatement programs,<sup>77</sup> and an “environmental review” for a proposed New York City monorail line.<sup>78</sup>

While some freedom of information disclosures may seem mundane, they are in fact a “structural necessity [of] a real democracy.”<sup>79</sup> Such routine and seemingly ordinary disclosures uphold the public’s inherent right to evaluate government actions.<sup>80</sup> This system not only promotes a more informed citizenry that is better equipped to make decisions about the direction of government,<sup>81</sup> but it also serves as an indispensable

<sup>69</sup> *N.Y. Civil Liberties Union*, 118 N.E.3d at 859 (Rivera, J., dissenting) (summarizing FOIL’s intent); see N.Y. PUB. OFF. LAW §§ 84–90.

<sup>70</sup> 5 U.S.C. § 552.

<sup>71</sup> William Tesler, *Gould Debunked: The Prohibition Against Using New York’s Freedom of Information Law as a Criminal Discovery Tool*, 44 N.Y.L. SCH. L. REV. 71, 72 (2000); see N.Y. PUB. OFF. LAW §§ 84–90.

<sup>72</sup> N.Y. PUB. OFF. LAW § 87. New York’s FOIL system recently received an innovative new upgrade with the establishment of “Open FOIL NY,” a central online forum where users can easily “submit, track, and receive” FOIL requests to over fifty state agencies. See *Governor Cuomo Announces Open FOIL NY*, GOVERNOR.NY.GOV (June 26, 2018), <https://www.governor.ny.gov/news/governor-cuomo-announces-open-foil-ny> [<https://perma.cc/S43L-Z32V>].

<sup>73</sup> See N.Y. STATE COMM. ON OPEN GOV’T, *supra* note 27, at 19.

<sup>74</sup> *Urban Justice Ctr. v. N.Y. Police Dept.*, No. 400988, 2010 WL 3526045 (N.Y. Sup. Ct. Sept. 1, 2010).

<sup>75</sup> *West 41st St. Realty LLC v. N.Y. State Urban Dev. Corp.*, No. 103000/02, 2002 WL 34702228 (N.Y. Sup. Ct. July 8, 2002).

<sup>76</sup> *Empire Golf Mgmt. LLC v. Olivieri*, No. 100951/04, 2004 WL 5488002 (N.Y. Sup. Ct. Feb. 5, 2004).

<sup>77</sup> *Kalish v. City of N.Y.*, No. 5678/09, 2009 WL 2844530 (N.Y. Sup. Ct. June 30, 2009).

<sup>78</sup> *Riverkeeper, Inc. v. Port Auth. of N.Y. & N.J.*, 111 N.Y.S.3d 523, 525–26 (Sup. Ct. 2019).

<sup>79</sup> *Nat’l Archives & Records Admin. v. Favish*, 541 U.S. 157, 172 (2004).

<sup>80</sup> *Capital Newspapers Div. v. Burns*, 496 N.E.2d 665, 667 (N.Y. 1986).

<sup>81</sup> *Fink v. Lefkowitz*, 393 N.E.2d 463, 465 (N.Y. 1979).

check on government corruption.<sup>82</sup> Furthermore, by increasing public awareness and participation in government, freedom of information disclosures contribute to improved administrative responsiveness.<sup>83</sup> This system has led to a “quantum leap” in the realm of government accountability.<sup>84</sup> The New York Times, for example, has noted that some of its most significant reporting which led to the resignation of a cabinet official, was sourced with information obtained through Freedom of Information requests.<sup>85</sup> The Times revealed that it “certainly would not have been able to do as much . . . or tell the[se] kinds of stories” without it.<sup>86</sup> It is then unsurprising that every state in the nation has now enacted some form of a freedom of information statute.<sup>87</sup>

At its core, New York’s FOIL is a testament to the idea of self-government.<sup>88</sup> It seeks to ensure that public servants are elected, appointed, or hired to represent the people, and that it is the people who have the right to review their work.<sup>89</sup> FOIL’s legislative declaration states that “government is the public’s business and that the public, individually and collectively and represented by a free press, should have access to the records of government.”<sup>90</sup> The statute explicitly expounds that access to government information “should not be thwarted by shrouding it with the cloak of secrecy.”<sup>91</sup> While New York’s FOIL has reasonably lived up to this standard, the application of section 50-a has crippled one of its most important oversight roles: the dissemination of police officers’ misconduct records.<sup>92</sup> The resulting system has imposed serious consequences on both the people of New York and victims of misconduct.<sup>93</sup>

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<sup>82</sup> Nat’l Labor Relations Bd. v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978).

<sup>83</sup> See *FOIA Update: Costs and Benefits—FOIA*, U.S. DEPT. JUST., <https://www.justice.gov/oip/blog/foia-update-costs-and-benefits-foia> [<https://perma.cc/2WJX-8W78>].

<sup>84</sup> Paul M. Winters, Note, *Revitalizing the Sanctions Provision of the Freedom of Information Act Amendments of 1974*, 84 GEO. L.J. 617, 618 (1996).

<sup>85</sup> Jake Lucas, *How Times Reporters Use the Freedom of Information Act*, N.Y. TIMES (July 21, 2018), <https://www.nytimes.com/2018/07/21/insider/information-freedom-reporters-pruitt.html> [<https://perma.cc/UBA2-M98X>].

<sup>86</sup> *Id.*

<sup>87</sup> Mary M. Chen, *Making Freedom of Information Laws Actually Work: The Case of the District of Columbia*, 13 UDC/DCSL L. REV. 335, 335 (2010).

<sup>88</sup> See David Trausch, Comment, *Real Transparency: Increased Public Access to Police Body-Camera Footage In Texas*, 60 S. TEX. L. REV. 373, 375 (2019) (“Although laws providing for public access to government records are relatively recent, the purpose of such laws can be traced to fundamental principles of the American form of government.”).

<sup>89</sup> See THE DECLARATION OF INDEPENDENCE (1776) (“Governments are instituted among Men, deriving their just powers from the consent of the governed . . .”).

<sup>90</sup> N.Y. PUB. OFF. LAW § 84.

<sup>91</sup> *Id.*

<sup>92</sup> See N.Y. STATE COMM. ON OPEN GOV’T, *supra* note 27, at 3–5.

<sup>93</sup> *Id.*; see also Conti-Cook, *supra* note 19, at 151.

## II. THE SOCIETAL HARMS RESULTING FROM SECTION 50-A

The essential characteristics of a well-functioning police force are “responsiveness and accountability.”<sup>94</sup> Central to this ideal is a commitment to transparency.<sup>95</sup> The section 50-a system, however, suffers from a “corrosive absence of transparency,” which allows police misconduct to go unchecked by the general public.<sup>96</sup> This scheme harms New Yorkers because a lack of oversight enables misconduct to continue unpunished, jeopardizing a police department’s reputation in the community and undermining its overall performance.<sup>97</sup> Furthermore, by withholding police misconduct records, section 50-a exacerbates the existing trauma of victims and their families by shielding relevant information in their pursuit of justice.<sup>98</sup> As the New York Court of Appeals has gradually expanded the statute’s authority, so too has the suffering worsened for victims and their families.<sup>99</sup>

### A. *Injuries to the Public*

Police officers are undoubtedly granted enormous power in society.<sup>100</sup> They can arrest, search, detain, and use force when necessary, often “without prior review and control.”<sup>101</sup> While each of these functions is essential to maintaining order in a free society, they can also be abused.<sup>102</sup> For example, in 2018, 303 individual NYPD officers received disciplinary charges.<sup>103</sup> This figure includes twenty-eight cases of “misconduct involving public interaction[s],” twenty-five cases of “firearm[.]” related offenses, twenty-one cases linked to use of “force,” and twelve cases of providing “false statements.”<sup>104</sup> While the 303 charged

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<sup>94</sup> SEN, *supra* note 27, at 8 (referencing David Bayley, “a well-known scholar of international policing”).

<sup>95</sup> *Id.* at 31.

<sup>96</sup> N.Y. STATE COMM. ON OPEN GOV’T, *supra* note 27, at 5.

<sup>97</sup> See SEN, *supra* note 27, at 41; ROBERT J. KANE & MICHAEL D. WHITE, JAMMED UP: BAD COPS, POLICE MISCONDUCT, AND THE NEW YORK CITY POLICE DEPARTMENT 87 (2013); see also Conti-Cook, *supra* note 19, at 185 (“More transparency around police misconduct information may actually improve the collective reputation of the majority of officers who do not accumulate misconduct records.”).

<sup>98</sup> See Conti-Cook, *supra* note 19, at 153–59; Evans, *supra* note 28.

<sup>99</sup> See Conti-Cook, *supra* note 19, at 153–59.

<sup>100</sup> HERMAN GOLDSTEIN, POLICING A FREE SOCIETY 1 (1977); see also Conti-Cook, *supra* note 19, at 153 (“Police have incredible power to use physical force that, without a badge, would otherwise be considered violence.”).

<sup>101</sup> GOLDSTEIN, *supra* note 100.

<sup>102</sup> See *id.*; Matthew V. Hess, Comment, *Good Cop-Bad Cop: Reassessing the Legal Remedies for Police Misconduct*, 1993 UTAH L. REV. 149, 149 (1993) (noting that police misconduct “violate[s] the civil rights of those they are sworn to protect”).

<sup>103</sup> N.Y.C. POLICE DEPT., DISCIPLINE IN THE NYPD 8 (2018).

<sup>104</sup> *Id.* at 10.

officers account for a mere fraction of the NYPD's total workforce,<sup>105</sup> those charged represent less than 2 percent of the 15,786 allegations of misconduct filed against NYPD officers in the 2018 calendar year.<sup>106</sup> Thus, approximately 98 percent of misconduct allegations in 2018 went uncharged.<sup>107</sup> Such a statistic, however, is not on its own problematic.<sup>108</sup> What *is* troublesome, is that pursuant to section 50-a, the NYPD and police departments across the state can shield the records of officers who have been accused or administratively charged with misconduct.<sup>109</sup> This prevents New Yorkers from examining a police department's internal review process, stripping them of their essential "checking function" on police behavior.<sup>110</sup>

Criticism of the section 50-a system cannot be dismissed as merely procedural or formalistic dissatisfaction. The public's inability to review law enforcement's internal deliberations is particularly alarming for two reasons. First, police departments have historically been ineffective at self-regulation.<sup>111</sup> Leaked NYPD documents revealed that between 2001 and 2015 "at least 319 NYPD employees who had committed offenses serious enough to merit firing" were kept on the force.<sup>112</sup> These offenses include sexual harassment, excessive force, driving under the influence, lying under oath and on official reports, ticket-fixing, and threatening to kill someone.<sup>113</sup> In each instance, the NYPD commissioner opted only to impose a probationary period that had "few practical consequences."<sup>114</sup> Notably, Officer Pantaleo's leaked NYPD personnel records revealed fourteen allegations of misconduct prior to his role in Mr. Garner's death.<sup>115</sup> Moreover,

<sup>105</sup> The NYPD employed approximately 36,000 officers in 2018. *Id.* at 6.

<sup>106</sup> Civilian Complaint Review Bd., *Data Transparency Initiative: Allegations*, NYC.GOV, <https://www1.nyc.gov/site/ccrb/policy/data-transparency-initiative-allegation.s.page> [<https://perma.cc/C9P5-9653>].

<sup>107</sup> *Id.*

<sup>108</sup> While such a low charge rate appears on its face to be indicative of poor departmental oversight, the inverse is also possible: low numbers of charges may suggest an overall *improvement* in officer performance. See JULIA DAVIDSON & PETER GOTTSCHALK, *POLICE DEVIANCE AND CRIMINALITY: MANAGING INTEGRITY AND ACCOUNTABILITY* 152 (2012).

<sup>109</sup> See N.Y. STATE COMM. ON OPEN GOV'T, *supra* note 27, at 3–5.

<sup>110</sup> Conti-Cook, *supra* note 19, at 166.

<sup>111</sup> SEN, *supra* note 27, at 40.

<sup>112</sup> Kendall Taggart & Mike Hayes, *Here's Why BuzzFeed News Is Publishing Thousands of Secret NYPD Documents*, BUZZFEED NEWS (Apr. 16, 2018 5:33 AM), <https://www.buzzfeednews.com/article/kendalltaggart/nypd-police-misconduct-database-explainer#.gpp7BPXYZ> [<https://perma.cc/T3HX-GFCT>].

<sup>113</sup> Kendall Taggart & Mike Hayes, *Secret NYPD Files: Officers Who Lie and Brutally Beat People Can Keep Their Jobs*, BUZZFEED NEWS (Mar. 5, 2018, 5:58 AM), <https://www.buzzfeednews.com/article/kendalltaggart/secret-nypd-files-hundreds-of-officers-committed-serious#.lsdEgN3JA> [<https://perma.cc/7APH-G3JW>].

<sup>114</sup> *Id.*

<sup>115</sup> Carimah Townes & Jack Jenkins, *EXCLUSIVE DOCUMENTS: The Disturbing Secret History of the NYPD Officer Who Killed Eric Garner*, THINK PROGRESS (Mar. 21,

four of these allegations “were substantiated” by the CCRB, indicating that the agency had “sufficient evidence” to prove misconduct.<sup>116</sup> Despite the CCRB’s recommendation for one of the department’s “harshest penalties,” the NYPD disregarded the review board’s guidance and instead docked Officer Pantaleo two vacation days and ordered that he receive additional training.<sup>117</sup> A close analysis by the Office of the Inspector General for the NYPD revealed that such mild penalties are fairly routine.<sup>118</sup> In fact, the Inspector General found that the NYPD imposed “no discipline” in approximately 36 percent of cases involving “substantiated” complaints of excessive force.<sup>119</sup> These statistics are concerning because officers who have previously “performed poorly” or have “civilian complaints” are statistically more likely to commit future bad acts.<sup>120</sup> While not dispositive, 2020 CCRB records indicate that less than 2 percent of NYPD officers have as many complaints with “substantiated” allegations as Officer Pantaleo did in 2014.<sup>121</sup> Thus, even before his involvement in Mr. Garner’s death, Officer Pantaleo likely had “among the worst CCRB disciplinary records” of any officer.<sup>122</sup>

The section 50-a system is additionally problematic because a lack of transparency “increases public skepticism and foments distrust” of law enforcement.<sup>123</sup> In the wake of Mr. Garner’s death, for example, protesters challenged the NYPD’s concealment of records and criticized the department’s failure to immediately fire Officer Pantaleo.<sup>124</sup> Protestors even chanted phrases suggesting that the department’s decisions were racially motivated.<sup>125</sup> Such demonstrations represent a profound distrust in the NYPD’s ability to handle allegations of potential misconduct.<sup>126</sup> Correspondingly, the Nassau County Police

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2017, 2:09 PM), <https://thinkprogress.org/daniel-pantaleo-records-75833e6168f3/> [<https://perma.cc/GPF2-YCFS>].

<sup>116</sup> These “substantiated” allegations stemmed from an “abusive vehicle stop and search” in 2011, and an “abusive stop and frisk” in 2012. *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> See N.Y.C. DEPT. OF INVESTIGATION, *supra* note 17, at 4.

<sup>119</sup> *Id.*

<sup>120</sup> KANE & WHITE, *supra* note 97, at 84–85.

<sup>121</sup> See Civilian Complaint Review Bd., *Data Transparency Initiative: Current NYPD Members of Service*, NYC.GOV, <https://www1.nyc.gov/site/ccrb/policy/data-transparency-initiative-mos.page> [<https://perma.cc/5Y6Z-AP3H>].

<sup>122</sup> Townes & Jenkins, *supra* note 115.

<sup>123</sup> N.Y STATE COMM. ON OPEN GOV’T, *supra* note 27, at 5; see also Conti-Cook, *supra* note 19, at 175 (“Hiding police disciplinary information . . . promotes distrust in justice systems.”).

<sup>124</sup> See sources cited *supra* note 13.

<sup>125</sup> See Moyer et al., *supra* note 4 (referencing protestors’ chants: “How do you spell ‘racist?’ [the crowd answered] ‘NYPD!’”).

<sup>126</sup> See *id.*

Department has faced similar skepticism over its utilization of section 50-a to block the release of a 700-page report detailing the department's failure to protect a domestic violence victim, resulting in the woman's death and a \$7.7 million settlement with her family.<sup>127</sup> Critics of the Nassau County police have suggested that the department is protecting the report because it has yet to correct the alleged problems.<sup>128</sup> Such intense skepticism and distrust of police is particularly damaging because it undermines police efforts and degrades public confidence in the rule of law more broadly.<sup>129</sup> Research suggests, "a strong correlation" between the public's trust in law enforcement and their willingness to cooperate with them.<sup>130</sup> The results of two empirical studies about the NYPD revealed that "legitimacy" was the single most influential variable orienting the public's readiness to comply or contribute to law enforcement's efforts.<sup>131</sup> Accordingly, when police establish trust with the public through open dialogue, policing becomes a shared community effort which results in improved crime control.<sup>132</sup> Section 50-a, however, prevents this outcome, likely contributing to a less safe New York.<sup>133</sup>

### B. *Injuries to Victims and Their Families*

Police misconduct is often deeply personal and painful.<sup>134</sup> Individuals who fall prey to unwarranted police violence are subjected to more than just physical brutality. They lose a sense of dignity and feel dehumanized by the experience.<sup>135</sup> Furthermore, the trauma from this violence contributes to a victim's sense of ostracization from the community.<sup>136</sup> This anguish also falls upon

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<sup>127</sup> See Matthew Chayes, *Police Report Still Secret in Jo'Anna Bird Case*, NEWSDAY (May 20, 2012, 11:40 PM), <https://www.newsday.com/long-island/police-report-still-secret-in-jo-anna-bird-case-1.3729449> [<https://perma.cc/76TK-39SD>]; Sid Cassese, *Nassau Oks \$7.7M Jo'Anna Bird Settlement*, NEWSDAY (Jan. 30, 2012, 10:16 PM), <https://www.newsday.com/long-island/nassau/nassau-oks-7-7m-jo-anna-bird-settlement-1.3491132> [<https://perma.cc/B325-U7WM>].

<sup>128</sup> See Chayes, *supra* note 127.

<sup>129</sup> Moran, *supra* note 31, at 185–86.

<sup>130</sup> *Id.* at 186.

<sup>131</sup> Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 LAW & SOC'Y REV. 513, 534 (2003).

<sup>132</sup> SEN, *supra* note 27, at 9.

<sup>133</sup> See Moran, *supra* note 31, at 186.

<sup>134</sup> See John Felipe Acevedo, *Restoring Community Dignity Following Police Misconduct*, 59 HOW. L.J. 621, 625–26 (2016).

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 649.



their families, particularly when misconduct results in the death of a loved one.<sup>137</sup>

In the aftermath of these violent episodes, individuals and their families naturally seek information about the offending officer.<sup>138</sup> At minimum, information can be therapeutic and may bring about a sense of closure.<sup>139</sup> Section 50-a, however, altogether blocks their path towards more information.<sup>140</sup> After Mr. Garner's death, his family became increasingly frustrated with the NYPD's lack of transparency and disparaged the department for keeping "everything so secret."<sup>141</sup> Similar sentiments have been expressed by other victims of misconduct in New York.<sup>142</sup> Besides this system's failure to provide closure, section 50-a also hinders the ability of victims and their families to make informed decisions about potential civil lawsuits and interferes with their appeal for public support.<sup>143</sup> Five years after Mr. Garner's death, his mother continued to stress that section 50-a was "harming" her and her family.<sup>144</sup> Mr. Garner's daughter similarly lamented that if her family was "going to move forward, [they would] need transparency."<sup>145</sup> At base, this system ensures that victims and their families will be harmed twice: first, by the initial misconduct, and second, by its concealment. Instead of mitigating harm, section 50-a allows police departments to double down on their officers' bad acts by prioritizing the officer's protection, rather than the victim's wellbeing.<sup>146</sup> Worse still, the consequences of this officer-centered approach are largely unaddressed by the state's current policies.<sup>147</sup>

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<sup>137</sup> See Conti-Cook, *supra* note 19, at 158.

<sup>138</sup> *Id.* at 153–54.

<sup>139</sup> *Id.*

<sup>140</sup> See *supra* Section I.A.

<sup>141</sup> Greg B. Smith & Graham Rayman, *Outgoing Commissioner Bill Bratton Says NYPD Won't Reveal Any Actions Against Cop Who Choked Eric Garner*, N.Y. DAILY NEWS, (Aug. 31, 2016, 8:01 PM), <https://www.nydailynews.com/new-york/nypd-won-reveal-actions-choked-garner-bratton-article-1.2773057> [<https://perma.cc/RBX9-TT3A>].

<sup>142</sup> See *At New York City Council Hearing Today, Families of Ramarley Graham, Saheed Vassell, and Delrawn Small Joined Police Reform Advocates to Call for Changes to NYPD Discipline System*, COMMUNITIES UNITED FOR POLICE REFORM (Feb. 7, 2019), <https://www.changethenypd.org/releases/new-york-city-council-hearing-today-families-ramarley-graham-saheed-vassell-and-delrawn> [<https://perma.cc/X4MZ-6AUK>]; see also Conti-Cook, *supra* note 19, at 158–59.

<sup>143</sup> Conti-Cook, *supra* note 19, at 154.

<sup>144</sup> Ryan Tarinelli, *NYPD Supports Changes to Disciplinary Records Law*, NBC NEWS N.Y. (Oct. 25, 2019, 1:55 AM), <https://www.nbcnewyork.com/news/local/NYPD-Supports-Changes-to-Disciplinary-Records-Law-563832281.html> [<https://perma.cc/W6VN-SLCP>].

<sup>145</sup> Garner & Harris, *supra* note 29.

<sup>146</sup> See Conti-Cook, *supra* note 19, at 153.

<sup>147</sup> See Acevedo, *supra* note 134, at 649.

### III. THE PROTECTION OF POLICE OFFICERS' RECORDS IN OTHER STATES

In order to determine the proper remedy for section 50-a, it is useful to first consider the disclosure processes used in other states. While each state differs in its approach to the dissemination of police personnel records, New York's approach represents the low end of the disclosure spectrum.<sup>148</sup> The following three states—Connecticut, Massachusetts, and California—represent a range of policy positions within that array.

#### A. *Connecticut: High Levels of Public Access to Police Records*

Unlike New York, Connecticut retains a highly transparent approach to the dissemination of police personnel records.<sup>149</sup> Rather than being controlled by an independent, law-enforcement-focused statute, such as section 50-a, police records in Connecticut are governed exclusively by the state's freedom of information statute.<sup>150</sup> Similar to most freedom of information laws, this statute mandates public disclosures of government information, with a few minor exceptions.<sup>151</sup> Connecticut courts have repeatedly applied this freedom of information statute to the dissemination of police records and have routinely ruled in favor of disclosure.<sup>152</sup> The only relevant exception is for records that "constitute an invasion of personal privacy."<sup>153</sup> This exception, however, has been narrowly construed and only applies to "entirely private matters" capable of creating "unreasonable publicity."<sup>154</sup> The Connecticut courts have stressed that this exception does not apply if the subject matter of the public employee's records is "of legitimate public concern."<sup>155</sup>

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<sup>148</sup> See Moran, *supra* note 31, at 176–77.

<sup>149</sup> Robert Lewis et al., *Is Police Misconduct a Secret in Your State?*, WNYC (Oct. 15, 2015), <https://www.wnyc.org/story/police-misconduct-records/> [<https://perma.cc/35QR-GNMT>].

<sup>150</sup> See CONN. GEN. STAT. § 1-210. This statute is enforced, in part, through a state "Freedom of Information Commission," which reviews and investigates any potential Freedom of Information Act violations. See CONN. GEN. STAT. § 1-205.

<sup>151</sup> See CONN. GEN. STAT. § 1-210.

<sup>152</sup> See *City of Hartford v. Freedom of Info. Comm'n*, 201 Conn. 421, 435 (1986); *Kirschner v. Freedom of Info. Comm'n*, No. CV 970567162, 1998 WL 27829, at \*3 (Conn. Super. Ct. 1998).

<sup>153</sup> *Perkins v. Freedom of Info. Comm'n*, 228 Conn. 158, 173 (1993).

<sup>154</sup> *Id.* ("[E]ntirely private matters [include] [s]exual relations . . . family quarrels, many unpleasant or disgraceful or humiliating illnesses, most intimate personal letters, most details of a [person's] life in [their] home, and some of [their] past history that [they] would rather forget.").

<sup>155</sup> *Id.* ("[D]isclosures relating to the employees of public agencies are presumptively legitimate matters of public concern.").

The Supreme Court of Connecticut cited these principles when it upheld a freedom of information disclosure for a Hartford Police Department internal investigative report into alleged police misconduct.<sup>156</sup> The court rejected the department's claims that such a disclosure would be an invasion of privacy and instead noted that the public had a "legitimate interest" in the report because it concerned the department's "integrity."<sup>157</sup> The majority recognized the public's need to review how the department "investigate[d] and evaluate[d]" misconduct complaints.<sup>158</sup> In a consolidated case, the court relied on the "legitimate public concern" exception to uphold the disclosure of an investigative report concerning a citizen's complaint against a Connecticut State Trooper for an alleged assault and use of excessive force.<sup>159</sup> The same decision, however, blocked the release of a different report relating to another trooper's alleged inappropriate personal relationship.<sup>160</sup> This second report was distinguished from the first because it did not concern the trooper's official duties; thus, the public had no "legitimate interest" in its disclosure.<sup>161</sup> The Connecticut disclosure system, therefore, is highly preferential towards public dissemination of law enforcement records.<sup>162</sup>

Notably, many of the issues created by section 50-a in New York would be neutralized under the Connecticut system.<sup>163</sup> Rather than rushing to suppress information, Connecticut focuses its state resources on mending community relations by facilitating the publication of relevant law enforcement records.<sup>164</sup> This approach is an ideal remedy to section 50-a because it places the needs of injured parties and the public ahead of police, and does so without disclosing arbitrary or unnecessary department documents.<sup>165</sup>

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<sup>156</sup> *City of Hartford v. Freedom of Info. Comm'n*, 201 Conn. 421, 431-35 (Conn. 1986).

<sup>157</sup> *Id.* at 435.

<sup>158</sup> *Id.*

<sup>159</sup> *Dep't of Public Safety, Div. of State Police v. Freedom of Info. Comm'n*, 242 Conn. 79, 89 (Conn. 1997).

<sup>160</sup> *Id.* at 90.

<sup>161</sup> *Id.* at 89.

<sup>162</sup> *See Lewis et al., supra* note 149.

<sup>163</sup> *See supra* Section I.A.

<sup>164</sup> *See* CONN. GEN. STAT. § 1-210.

<sup>165</sup> *See SEN, supra* note 27, at 9; *Dep't of Public Safety*, 242 Conn. at 89.

*B. Massachusetts: Moderate Levels of Public Access to Police Records*

Similar to Connecticut's freedom of information statute, Massachusetts law provides that government records must be available for public review "without unreasonable delay."<sup>166</sup> While Massachusetts has no "blanket exemption" for the dissemination of police records,<sup>167</sup> state statutes draw a distinction between general law enforcement information (i.e., "public record[s]") and an individual officer's employment related information (i.e., "personnel file[s]").<sup>168</sup> Public records include any law enforcement documents that "serve a public purpose," while personnel files are limited to "work evaluations, disciplinary documentation and [any other files pertaining to an officer's] promotion, demotion, or termination."<sup>169</sup> While public records must be disclosed, personnel files are to be kept secret.<sup>170</sup> The distinction between these types of records in Massachusetts has led to the disclosure of less law enforcement records than Connecticut, yet still more than New York.<sup>171</sup>

The Appeals Court of Massachusetts applied these statutes to a newspaper's request for Worcester Police Department documents pertaining to an officer's alleged on-the-job misconduct.<sup>172</sup> The court granted the request for the department's "internal affairs [investigative] report," but denied the newspaper's demands for the officer's "disciplinary report."<sup>173</sup> The majority distinguished these two documents based on their end use.<sup>174</sup> Specifically, it noted that the investigative report existed primarily to address civilian complaints of misconduct, while the disciplinary report was useful only in making employment-related decisions about the individual officer.<sup>175</sup> The publication of the investigative report was deemed essential because it contributed to the public's "trust and confidence in the integrity" of the police force.<sup>176</sup> The disciplinary report, however,

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<sup>166</sup> MASS. GEN. LAWS ch. 66, § 10; MASS. GEN. LAWS ch. 4, § 7(26).

<sup>167</sup> Dist. Attorney of Norfolk Dist. v. Flatley, 646 N.E.2d 127, 130 (Mass. 1995).

<sup>168</sup> See Worcester Telegram & Gazette Corp. v. Chief of Police of Worcester, 787 N.E.2d 602, 606 (Mass. App. Ct. 2003); see also MASS. GEN. LAWS ch. 4, § 7(26).

<sup>169</sup> MASS. GEN. LAWS ch. 4, § 7(26).

<sup>170</sup> See Worcester Telegram, 787 N.E.2d at 609–10.

<sup>171</sup> Compare Worcester Telegram, 787 N.E.2d at 608, with Dep't of Public Safety, Div. of State Police v. Freedom of Info. Comm'n, 242 Conn. 79, 89 (Conn. 1997), and N.Y. Civil Liberties Union v. N.Y.C. Police Dep't, 118 N.E.3d 847, 855 (N.Y. 2018).

<sup>172</sup> Worcester Telegram, 787 N.E.2d at 604.

<sup>173</sup> Id. at 608.

<sup>174</sup> Id. at 608–09.

<sup>175</sup> Id. at 607–08.

<sup>176</sup> Id. at 607.

was afforded no such finding; instead, the court held that it fell under the personnel file exception and should be concealed.<sup>177</sup> In effect, the court differentiated between the factual record of the misconduct and the department's internal response to it, of which the former is subject to mandatory statutory release, whereas the latter is statutorily prevented from the same.<sup>178</sup> The court acknowledged that such a distinction appeared to be an "unlikely splitting of hairs," but noted it was confident that the Massachusetts Legislature intended for such a nuanced difference.<sup>179</sup> This balance between public and private police documents represents a moderate approach to the dissemination of law enforcement information.<sup>180</sup>

While the Massachusetts system provides for the release of more police records than New York, this structure is not an ideal cure to the section 50-a problem.<sup>181</sup> By protecting departments' internal disciplinary reports, this disclosure scheme fails to afford both victims and the public adequate information in the wake of police misconduct.<sup>182</sup> Without evidence, victims and the public have no way of knowing if the offending officer was properly disciplined. Thus, at the very least, this system fails to bridge the credibility gap created by section 50-a.<sup>183</sup>

### C. *California: Now Minimal Levels of Public Access to Police Records*

On January 1, 2019, SB 1421 took effect in California, overriding the state's notorious police secrecy laws.<sup>184</sup> Until this bill's passage, California was home to some of the nation's most restrictive police disclosure statutes, which were roughly equivalent to New York's section 50-a.<sup>185</sup> While California's Public Records Act underscored the importance of government

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<sup>177</sup> *Id.* at 608.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* at 609 ("[I]t is not at all illogical that the Legislature would intend the bricks and mortar of the investigation and the documenting of its results . . . to fall outside the exemption for 'personnel [file] or information,' but would intend the actual order and notice of disciplinary action issued . . . to be exempt." (third alteration in original)).

<sup>180</sup> *See* Lewis et al., *supra* note 149.

<sup>181</sup> *See id.*

<sup>182</sup> SEN, *supra* note 27, at 9.

<sup>183</sup> *See* N.Y. STATE COMM. ON OPEN GOV'T, *supra* note 27, at 5.

<sup>184</sup> *See* Marco della Cava, *When Police Misconduct Occurs, Records Often Stay Secret. One Mom's Fight to Change That*, USA TODAY (Oct. 14, 2019), <https://www.usatoday.com/in-depth/news/2019/05/23/police-brutality-misconduct-california-cop-records-sb-1421/3555785002/> [<https://perma.cc/9KKU-EEH6>].

<sup>185</sup> *See id.*; Moran, *supra* note 31, at 157–58.

transparency,<sup>186</sup> other statutes carved out exceptions for law enforcement records.<sup>187</sup> These exceptions included information pertaining to an officer's "advancement, appraisal, or discipline"; documents containing "[c]omplaints, or investigations of complaints"; and any other information that would constitute an "unwarranted invasion of personal privacy."<sup>188</sup> Furthermore, the state had a "catchall"<sup>189</sup> statute that prevented the publication of an officer's record if a court determined that concealment "outweighed the public[']s interest" in disclosure.<sup>190</sup>

The Supreme Court of California applied these principles to a request from the Los Angeles Times for the names of two Long Beach police officers who mistakenly shot and killed an unarmed civilian.<sup>191</sup> The court first noted that the names of the two officers amounted to merely "factual information" about the incident.<sup>192</sup> Accordingly, absent a more detailed request, the documents could not constitute disciplinary or investigative reports.<sup>193</sup> Nor did these "facts" amount to an invasion of personal privacy because the officers' names alone could not be linked to other confidential or protected information.<sup>194</sup> The state's catchall statute was also dismissed after the court determined that concealment failed the public interest balancing test.<sup>195</sup> While the court granted the disclosure of the two officers' names, it emphasized that a more specific request for information, such as disciplinary or investigative documents, would meet the standard of exempt material.<sup>196</sup> Further, it noted that its holding should not be read to require the automatic publication of an officer's name anytime it was sought via a public record request.<sup>197</sup> Instead, courts are

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<sup>186</sup> California's Public Records Act is equivalent to a freedom of information statute. CAL. GOV'T CODE § 6250 ("[A]ccess to information concerning the conduct of the people's business is a fundamental and necessary right of every person in the state.").

<sup>187</sup> See CAL. GOV'T CODE § 6250; CAL. GOV'T CODE § 6255; CAL. PENAL CODE § 832.7(a) (amended 2019); CAL. PENAL CODE § 832.8(d)–(f) (amended 2019).

<sup>188</sup> CAL. PENAL CODE § 832.8(d)–(f) (amended 2019).

<sup>189</sup> *Long Beach Police Officers Assoc. v. City of Long Beach*, 325 P.3d 460, 469 (Cal. 2014).

<sup>190</sup> CAL. GOV'T CODE § 6255.

<sup>191</sup> The officers thought the man was holding a gun, but he was in fact holding a garden hose with a spray nozzle. *Long Beach Police Officers Assoc.*, 325 P.3d at 462.

<sup>192</sup> *Id.* at 467 ("Disclosure [of the officers names] would merely communicate a statement of fact that the named officers were involved in the incident.").

<sup>193</sup> *Id.* at 468 ("[D]isclosing the names of officers involved in various shootings would not imply that those shootings resulted in disciplinary action against the officers . . .").

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* at 469 ("Generally, the balance of interest favors disclosing the names of peace officers involved in on-duty shootings.").

<sup>196</sup> *Id.* at 466–70.

<sup>197</sup> *Id.* at 469.

required to weigh the factors for and against disclosure on a case-by-case basis.<sup>198</sup>

Prior to the repeal of this system, California's record disclosure laws rivaled New York's section 50-a in their relentless suppression of law enforcement records.<sup>199</sup> California's new amended Code, however, has relaxed many of these policies.<sup>200</sup> Police departments are now required to release any investigative reports related to a "use of force" incident that resulted in a civilian's "death or great bodily injury."<sup>201</sup> Departments are also obligated to publish any information pertinent to an oversight agency's "sustained finding" of dishonesty by a police officer in reporting or investigating a crime.<sup>202</sup> Although these amendments represented a long-awaited shift in the state's policies, several police departments have responded with fierce backlash.<sup>203</sup> In a recent case, for example, a California Court of Appeal ruled against numerous departments that sought to block the retroactive application of these laws.<sup>204</sup>

Despite the unsettled nature of these amendments, New York's legislators should look to California for guidance. Much like New York, California previously maintained an oppressively secretive approach to the dissemination of law enforcement records.<sup>205</sup> *Unlike* New York, however, California was willing to change. After years of criticism, the state's legislature finally overhauled its system and implemented a more transparent approach.<sup>206</sup> While the California system still protects more records than the desired Connecticut structure, California's capacity for change should be admired.<sup>207</sup>

#### IV. A LEGISLATIVE REMEDY FOR SECTION 50-A

In one of the final paragraphs of the Appellate Division's opinion in the Garner case, the court addressed critics of the

<sup>198</sup> *Id.*

<sup>199</sup> *See* Moran, *supra* note 31, at 157–58; della Cava, *supra* note 184.

<sup>200</sup> *See* CAL. PENAL CODE § 832.7.

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *See* della Cava, *supra* note 184; Lisa Fernandez, *Interactive Map: Who Is Releasing Police Personnel Files Under New Law, And Who Is Not*, KTVU (Oct. 3, 2019), <https://www.ktvu.com/news/interactive-map-who-is-releasing-police-personnel-files-und-er-new-law-and-who-is-not> [<https://perma.cc/VG5Z-NFZF>].

<sup>204</sup> *Walnut Creek Police Officers' Assoc. v. City of Walnut Creek*, 245 Cal. Rptr. 3d 398, 399 (Ct. App. 2019).

<sup>205</sup> *Compare* N.Y. CIV. RIGHTS LAW § 50-a, *with* CAL. GOV'T CODE § 6250; CAL. GOV'T CODE § 6255; CAL. PENAL CODE § 832.7(a) (amended 2019); CAL. PENAL CODE § 832.8(d)–(f) (amended 2019).

<sup>206</sup> *See* della Cava, *supra* note 184.

<sup>207</sup> *See* Section III.A.

section 50-a system.<sup>208</sup> It noted that under New York's tripartite form of government, the remedy for unsatisfactory laws lies not with courts, but with the legislature.<sup>209</sup> After all, the legislature is the "policy making branch of government,"<sup>210</sup> and is designed to be responsive to the public's needs.<sup>211</sup> In accordance with these principles, the New York State Legislature should amend section 50-a and stipulate that nothing in the statute's section shall apply to FOIL requests, nor shall the statute's provisions prohibit the reapplication of a FOIL request previously denied pursuant to the statute.<sup>212</sup> This amended system would guarantee that all police personnel files are susceptible to the FOIL process, just like any other government document.<sup>213</sup> This amendment would serve to address the societal harms resulting from section 50-a, while respecting law enforcement's legitimate concerns about changes to the system.<sup>214</sup>

#### A. *The Amended System*

The proposed amendment to section 50-a would dramatically alter the publication of police records in New York. Rather than being governed by section 50-a's strict non-disclosure structure, police personnel files would instead be subject to FOIL's overwhelming preference for transparency.<sup>215</sup> The resulting system would mandate that police departments make personnel files and misconduct reports available for public dissemination, absent certain narrow exceptions.<sup>216</sup> These exceptions would include documents that, if released, constitute

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<sup>208</sup> *Luongo v. Records Access Officer*, 51 N.Y.S.3d 46, 58 (App. Div. 2017).

<sup>209</sup> *Id.*; Hebert, *supra* note 27, at 286 (determining which police records are released to the public is a "matter for legislators, rather than courts").

<sup>210</sup> *Luongo*, 51 N.Y.S.3d at 58; N.Y. CONST. art. 3, § 1.

<sup>211</sup> Laura Schenck, *Freedom of Information Statutes: The Unfulfilled Legacy*, 48 FED. COMM. L.J. 371, 373 (1996) ("[L]egislators compose the branch that most comprehensively represents the will of the people.").

<sup>212</sup> As previously stated, this amended system would not interfere with section 50-a's additional function of protecting police officers' personnel records during the discovery phase of trial. Interfering with this aspect of section 50-a would be detrimental to the justice system and allow criminal defense attorneys to discredit an officer's testimony in front of the jury. While this undoubtedly shields the disclosure of some police records, the statute has a built-in safeguard which allows documents to be admitted at trial if the presiding judge decides they are relevant. *See supra* note 39.

<sup>213</sup> *See* N.Y. PUB. OFF. LAW §§ 84–90.

<sup>214</sup> *See* N.Y. STATE COMMITTEE ON OPEN GOV'T, *supra* note 27, at 3–5; Dan M. Clark, *State Lawmakers Press for Reforms Aimed at Police Accountability, Transparency*, POLICE BENEVOLENT ASSOC. N.Y. (Apr. 9, 2019, 5:19 PM), <https://www.nycpba.org/news-items/new-york-law-journal/2019/state-lawmakers-press-for-reforms-aimed-at-police-accountability-transparency/> [https://perma.cc/8GM8-R3GT].

<sup>215</sup> *See* N.Y. PUB. OFF. LAW §§ 84–90; N.Y. CIVIL RIGHTS LAW § 50-a.

<sup>216</sup> N.Y. PUB. OFF. LAW § 87(2).



an unwarranted invasion of an officer's privacy, interfere with an ongoing police investigation or judicial proceeding, identify a confidential law enforcement source, reveal nonroutine criminal investigative procedures, or endanger the life or safety of an officer.<sup>217</sup> While police departments would initially have the authority to determine which, if any, exceptions apply, their decisions would ultimately be subject to judicial review.<sup>218</sup> Any concerns regarding a department's ability to self-regulate would be alleviated by the inclusion of judicial oversight.<sup>219</sup> Moreover, the New York courts would no longer be bound by the existing interpretations of section 50-a, and could instead rigorously and objectively weigh each party's argument for, and against, disclosure pursuant to FOIL's provisions.<sup>220</sup> Courts would also be permitted to order redacted disclosures at their own discretion (an option also prohibited under the current system).<sup>221</sup> This amended disclosure structure would provide a high level of public accessibility to police records, ensuring that past and future allegations of police misconduct are susceptible to the FOIL process.

### B. *Adoption of the Connecticut System*

As previously noted, the current section 50-a system suffers from a detrimental lack of transparency that perpetuates misconduct and contributes to increased distrust of police.<sup>222</sup> Furthermore, section 50-a exacerbates the trauma of those who have already fallen victim to police misconduct.<sup>223</sup> This note's proposed amendment seeks to remedy these concerns by instituting a highly transparent disclosure structure that reasserts public supervision over law enforcement.<sup>224</sup> While

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<sup>217</sup> N.Y. PUB. OFF. LAW § 87(2)(b); N.Y. PUB. OFF. LAW § 87(2)(e)(i), (iii), (iv); N.Y. PUB. OFF. LAW § 87(2)(f).

<sup>218</sup> Although this is already permitted under current law, section 50-a has prevented the New York courts from exercising real judicial review over police departments' disclosure decisions pursuant to FOIL. *See e.g.*, *Daily Gazette Co. v. City of Schenectady*, 710 N.E.2d 1072, 1077 (N.Y. 1999) (“[W]hen access to an officer's personnel records relevant to promotion or continued employment is sought under FOIL, nondisclosure will be limited to the extent reasonably necessary to effectuate the purposes of Civil Rights Law § 50-a.”).

<sup>219</sup> *See Conti-Cook, supra* note 19, at 160–61.

<sup>220</sup> *See Hebert, supra* note 27, at 276 (noting that “that state statutes exempting entire classes of documents can prevent meaningful judicial review of whether release is proper”); N.Y. PUB. OFF. LAW §§ 84–90.

<sup>221</sup> *See N.Y. Civil Liberties Union v. N.Y.C. Police Dep't*, 118 N.E.3d 847, 855 (N.Y. 2018); N.Y. PUB. OFF. LAW §§ 84–90.

<sup>222</sup> *See N.Y. STATE COMM. ON OPEN GOV'T, supra* note 27, at 3–5; *SEN, supra* note 27, at 41; *KANE & WHITE, supra* note 97, at 87; *Conti-Cook, supra* note 19, at 175.

<sup>223</sup> *See Conti-Cook, supra* note 19, at 153–59; *Evans, supra* note 28.

<sup>224</sup> *See SEN, supra* note 27, at 9.

numerous states, such as Massachusetts and California, operate a more transparent system than New York's current approach, these policies do not go far enough and would prove ineffective at addressing the significant societal harms resulting from section 50-a.<sup>225</sup> Moreover, although several bills have been proposed in the New York State Legislature addressing the section 50-a problem, these too appear inadequate. In the last ten years, only six distinct bills have been introduced on the topic,<sup>226</sup> including one that called for a complete repeal (an option already rejected as indefensible by this note).<sup>227</sup> The five other options include: an exception for police body camera footage (which fails to address the public's broad concerns);<sup>228</sup> special protections to protect undercover police officers (which are already provided for under FOIL);<sup>229</sup> an allowance for the CCRB to petition the court for certain disclosures (which ultimately proves too meager);<sup>230</sup> an administrative review process that, upon completion, would allow for disclosures (a system which unnecessarily delays disclosure);<sup>231</sup> and an amendment that adds potentially ambiguous language to the statute (which could initiate years of unpredictable litigation).<sup>232</sup> The only appropriate remedy, therefore, lies in a system much like the one used in Connecticut.<sup>233</sup>

The Connecticut system is the ideal model for New York's overhaul of section 50-a because it provides for the greatest amount of transparency.<sup>234</sup> Information, after all, is power, and is the most effective guarantee against police misconduct and departmental mismanagement.<sup>235</sup> This amended disclosure

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<sup>225</sup> See Sections III.B–C.

<sup>226</sup> This number is determined by counting “same as” Senate and Assembly bills as one. Furthermore, this number does not recount bills that have been introduced in multiple sessions. See S.B. 3695/Assemb. B. 2513 (N.Y. 2019) (complete repeal); S.B. 3398/Assemb. B. 1685 (N.Y. 2019) (body camera exception); Assemb. B. 851 (N.Y. 2019) (redefining “personnel records” to protect undercover police officers); S.B. 4214/Assemb. B. 2671(N.Y. 2019) (granting the CCRB power to petition the court for disclosures); S.B. 4213 (N.Y. 2019) (authorizing disclosure after the administrative review process); S.B. 4215 (N.Y. 2019) (adding potentially ambiguous language). See *Legislative Retrieval System*, N.Y. STATE, <https://nyslrs.state.ny.us/racfssl.html> [<https://perma.cc/YJ2X-F49H>].

<sup>227</sup> S.B. 3695/Assemb. B. 2513 (N.Y. 2019).

<sup>228</sup> S.B. 3398/Assemb. B. 1685 (N.Y. 2019).

<sup>229</sup> Assemb. B. 851 (N.Y. 2019).

<sup>230</sup> S.B. 4214/Assemb. B. 2671(N.Y. 2019).

<sup>231</sup> S.B. 4213 (N.Y. 2019).

<sup>232</sup> S.B. 4215 (N.Y. 2019).

<sup>233</sup> See CONN. GEN. STAT. § 1-210.; CONN. GEN. STAT. § 1-205.

<sup>234</sup> See *City of Hartford v. Freedom of Info. Comm'n*, 201 Conn. 421, 435 (1986) (holding that police misconduct records were subject to freedom of information disclosures because they spoke to the department's “integrity”).

<sup>235</sup> See SEN, *supra* note 27, at 31 (“Information is also a powerful tool to ensure police accountability.”); see also Hebert, *supra* note 27, at 285 (freedom of information disclosures “can be a tool for addressing police misconduct at both the individual and institutional levels”).

structure is critical because the dissemination of information shifts oversight “downwards” from police departments to “the disaggregated public.”<sup>236</sup> Civilians, unlike police departments, are much less tolerant of misconduct and have proven far more efficient at eradicating it.<sup>237</sup> In the aftermath of Laquan McDonald’s death, for example, Chicago police fought to suppress the release of dash camera video that captured the teenager’s murder.<sup>238</sup> It was only after a court order had compelled the disclosure that the public became aware of the department’s blatant inaccuracies about the incident.<sup>239</sup> Further, it took until after the video was released and in response to overwhelming public outcry for the department to finally fire and charge the offending officers.<sup>240</sup> Without this pressure, it is unlikely that the department would have taken such meaningful action.<sup>241</sup>

This note’s proposed amendment seeks to ensure that New Yorkers could assert equal authority over their police departments by increasing transparency and strengthening public oversight. This new system would contribute to an overall reduction in misconduct rates,<sup>242</sup> and instill greater levels of public trust and confidence in law enforcement.<sup>243</sup> In the aftermath of Mr. Garner’s death, for example, much of the public’s outrage focused on a perceived distrust in the NYPD’s ability to adequately police the city.<sup>244</sup> The disclosure of relevant law enforcement information would have helped quell these

<sup>236</sup> SEN, *supra* note 27, at 8.

<sup>237</sup> SEN, *supra* note 27, at 33 (“The unique pressures and professional demands upon police officers compound the challenge of impartiality. Police culture . . . demands loyalty, allegiance, and a high priority on team values. . . . Furthermore, policing relies upon a hierarchical command structure that requires cohesive group action . . . . This emphasis on unanimity and allegiance to the group creates further challenges to ‘impartiality’ when a fellow officer is placed in jeopardy, as through the police complaint process.”).

<sup>238</sup> See Baldacci & Almasy, *supra* note 35; Mitch Smith & Julie Bosman, *Jason Van Dyke Sentenced to Nearly 7 Years for Murdering Laquan McDonald*, N.Y. TIMES (Jan. 18, 2019), <https://www.nytimes.com/2019/01/18/us/jason-van-dyke-sentencing.html> [https://perma.cc/884P-ZT3V].

<sup>239</sup> See Hebert, *supra* note 27, at 284; Baldacci & Almasy, *supra* note 35.

<sup>240</sup> Hebert, *supra* note 27, at 284.

<sup>241</sup> *Id.*; see also Conti-Cook, *supra* note 19, at 172–73 (“When the police do not tightly monopolize [] information, such as in Chicago following the death of Laquan McDonald, the family, community, and police reform advocates retain more power and capacity to call for change from elected officials.”).

<sup>242</sup> KANE & WHITE, *supra* note 97, at 85.

<sup>243</sup> Hebert, *supra* note 27, at 273 (“Lack of transparency regarding internal investigations has long fueled distrust of police departments in the United States.”); Don Babwin, *Chicago Releases Watchdog Probe of Laquan McDonald Shooting*, ASSOCIATED PRESS (Oct. 9, 2019), <https://apnews.com/db8890a3e5654250af06c23cf7504679> [https://perma.cc/JL75-V8YB] (noting that Chicago’s Inspector General Joseph Ferguson “applauded the release of the [Laquan McDonald shooting] documents, [because that was] the only way the public [would] have confidence in government”).

<sup>244</sup> See Moyer et al., *supra* note 4.

feelings by, at the very least, presenting the NYPD as less than a “single seat of power” unaccountable to the people.<sup>245</sup>

An amended section 50-a that subjects police personnel files to the FOIL process would also help mitigate the injuries suffered by victims of misconduct.<sup>246</sup> Rather than leaving victims and their families in a state of uncertainty, unable to move past the injustice, this new system would guarantee that departments acknowledge when misconduct occurs.<sup>247</sup> While this minor remedy would not rectify the previously inflicted misconduct, it would at least save victims and their families from undergoing the additional trauma of the police ignoring their anguish.<sup>248</sup> In 2006, for example, Sean Bell was unarmed when he was shot and killed by police in Queens, New York.<sup>249</sup> His mother Valerie later noted that “[t]he part that was terrible was not getting answers . . . [and] [n]ot being able to get answers was like losing Sean over and over again.”<sup>250</sup> In the wake of police misconduct, it is the victims and their families who need protection—not law enforcement. For too long, the reverse has been true in New York. Families like the Garners and the Bells and countless others deserve respect and information about their loved ones, not secrecy. This proposed amendment ensures that victims and their families receive the necessary information to aid their healing process and gain access to the tools necessary to challenge such misconduct going forward.<sup>251</sup>

### C. *Law Enforcement's Concerns*

Police unions have historically opposed attempts to amend the section 50-a system.<sup>252</sup> For years, they have successfully used their robust power to derail any efforts that would compel transparency.<sup>253</sup> While these unions often cite privacy or safety concerns in their opposition, their worries would be mitigated by FOIL's reasonable statutory exemptions.<sup>254</sup> FOIL already exempts

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<sup>245</sup> SEN, *supra* note 27, at 9.

<sup>246</sup> See Conti-Cook, *supra* note 19, at 153–59; Evans, *supra* note 28.

<sup>247</sup> See Conti-Cook, *supra* note 19, at 157–58; Evans, *supra* note 28.

<sup>248</sup> See Conti-Cook, *supra* note 19, at 157–58.

<sup>249</sup> Erin Durkin, *De Blasio Does Not Support Full Repeal of Police Secrecy Law*, POLITICO (Oct. 17, 2019, 2:01 PM), <https://www.politico.com/states/new-york/albany/story/2019/10/17/de-blasio-does-not-support-full-repeal-of-police-secrecy-law-1225652> [<https://perma.cc/ZN3C-4683>].

<sup>250</sup> *Id.*

<sup>251</sup> Conti-Cook, *supra* note 19, at 154 (“Transparency facilitates healing. Without transparency, fear of future harm continues.”).

<sup>252</sup> *Id.* at 175.

<sup>253</sup> *Id.*

<sup>254</sup> See *id.*; Clark, *supra* note 214 (“Broad disclosure of the false or unsubstantiated allegations in a police officer's confidential personnel file would serve only to smear that

from disclosure any documents that constitute an unwarranted invasion of an officer's privacy, interfere with an ongoing police investigation or judicial proceeding, identify a confidential law enforcement source, reveal nonroutine criminal investigative procedures, or endanger the life or safety of an officer.<sup>255</sup> Under the proposed system, courts could redact an officer's identifying information if there was a legitimate concern about the disclosure. These various procedures, therefore, serve as a guardrail against potential abuse or harassment of law enforcement.

Although section 50-a has prevented New York courts from applying these exceptions to law enforcement records, under the amended system they could be applied thoughtfully and justly.<sup>256</sup> The Connecticut courts, which serve as a model for this note's proposed system, prohibited a freedom of information disclosure pertaining to a state trooper's alleged inappropriate personal relationship.<sup>257</sup> The court reasoned that such information fell under the personal privacy exception because it did not concern the trooper's official duties.<sup>258</sup> While this ruling holds no influence over future New York court decisions, it represents the type of objective analysis that this note's amended system seeks to impose.<sup>259</sup> This new disclosure structure would guarantee police transparency while relying on FOIL's statutory exceptions to protect law enforcement from unreasonable harassment and danger.

## CONCLUSION

New York's law enforcement officers are some of the most recognized representatives of government power.<sup>260</sup> By and large, they serve with honor, dignity, and respect, and do so under constant threat of danger.<sup>261</sup> While the work of these officers is essential to public safety and ought to be respected, they are not immune from public oversight.<sup>262</sup> When an officer makes a mistake, or ignores their training, New Yorkers deserve to know

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officer's reputation and derail any court proceeding in which he or she is even tangentially involved." (quoting NYPD PBA President Patrick J. Lynch); N.Y. PUB. OFF. LAW § 87.

<sup>255</sup> See N.Y. PUB. OFF. LAW § 87(2)(b); N.Y. PUB. OFF. LAW § 87(2)(e)(i), (iii), (iv); N.Y. PUB. OFF. LAW § 87(2)(f).

<sup>256</sup> N.Y. CIV. RIGHTS LAW § 50-a.

<sup>257</sup> Dep't of Public Safety, Div. of State Police v. Freedom of Info. Comm'n, 242 Conn. 79, 89 (1997).

<sup>258</sup> *Id.*

<sup>259</sup> Jeffrey C. Dobbins, *Structure and Precedent*, 108 MICH. L. REV. 1453, 1460-61 (2010) (noting that vertical and horizontal precedent only apply within the same jurisdictions).

<sup>260</sup> SEN, *supra* note 27, at 10.

<sup>261</sup> Less than one percent of NYPD officers received disciplinary charges in 2018. See N.Y.C. POLICE DEP'T., *supra* note 103, at 6-8.

<sup>262</sup> SEN, *supra* note 27, at 8.

about it. Amending section 50-a would ensure that the public is properly notified of police misconduct and adequately equipped to defeat it.<sup>263</sup> It would guarantee that families like the Garners or the Bells no longer have to face the death of a loved one without any information. For years, New York's police departments have been left to govern themselves and have proven overwhelmingly unfit for the task.<sup>264</sup> Departments have repeatedly put officers' reputations and careers ahead of the public's best interest.<sup>265</sup> Transparency alone can remedy this issue. The New York State Legislature should adopt the amended system and declare that police records, like all government documents, belong to the people.<sup>266</sup>

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<sup>263</sup> See *supra* Sections III.A–B.

<sup>264</sup> See *supra* Part II.

<sup>265</sup> SEN, *supra* note 27, at 33.

<sup>266</sup> *Id.* at 8 (“[Transparency] improves the quality of governance.”).

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