20-2789-v(L),

20-3177-cv(XAP)

IN THE

United States Court of Appeals for the Second Circuit

UNIFORMED FIRE OFFICERS ASSOCIATION, ET AL.,
Plaintiffs-Appellants-Cross-Appellees,

v.

BILL DE BLASIO, IN HIS OFFICIAL CAPACITY AS MAYOR OF THE CITY OF NEW YORK, ET AL.,
Defendants-Appellees,

COMMUNITIES UNITED FOR POLICE REFORM,
Intervenor-Defendant-Appellee-Cross-Appellant.
(full caption on inside cover)

On Appeal From The United States District Court For The Southern District Of New York
No. 20-cv-05441-KPF
Hon. Katherine Polk Failla

PRINCIPAL AND RESPONSE BRIEF FOR COMMUNITIES UNITED FOR POLICE REFORM

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UNIFORMED FIRE OFFICERS ASSOCIATION; UNIFORMED FIREFIGHTERS ASSOCIATION OF GREATER NEW YORK; POLICE BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC.; CORRECTION OFFICERS' BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC.; SERGEANTS BENEVOLENT ASSOCIATION; LIEUTENANTS BENEVOLENT ASSOCIATION; CAPTAINS ENDOWMENT ASSOCIATION, DETECTIVES' ENDOWMENT ASSOCIATION,

Plaintiffs-Appellants-Cross-Appellees,

v.

BILL DE BLASIO, IN HIS OFFICIAL CAPACITY AS MAYOR OF THE CITY OF NEW YORK, CITY OF NEW YORK, NEW YORK CITY FIRE DEPARTMENT, DANIEL A. NIGRO, IN HIS OFFICIAL CAPACITY AS THE COMMISSIONER OF THE FIRE DEPARTMENT OF THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF CORRECTIONS, CYNTHIA BRANN, IN HER OFFICIAL CAPACITY AS THE COMMISSIONER OF THE NEW YORK CITY DEPARTMENT OF CORRECTIONS, DERMOT F. SHEA, IN HIS OFFICIAL CAPACITY AS THE COMMISSIONER OF THE NEW YORK CITY POLICE DEPARTMENT, NEW YORK CITY POLICE DEPARTMENT, FREDERICK DAVIE, IN HIS OFFICIAL CAPACITY AS THE CHAIR OF THE CIVILIAN COMPLAINT REVIEW BOARD, CIVILIAN COMPLAINT REVIEW BOARD,

Defendants-Appellees,

COMMUNITIES UNITED FOR POLICE REFORM,

Intervenor-Defendant-Appellee-Cross-Appellant.

CORPORATE DISCLOSURE STATEMENT

Intervenor-Defendant-Appellee-Cross-Appellant Communities United for Police Reform states that it is a non-profit organization fiscally sponsored by the North Star Fund, a § 501(c)(3) non-profit registered in the State of New York. Neither entity has a parent corporation and no publicly-held corporation owns 10% or more of its stock.

Dated: October 29, 2020

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* As explained *infra* 68 n.6, this declaration is submitted per established practice for supplementing the record when appropriate to demonstrate Article III standing for purposes of an intervenor's appeal.

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INTRODUCTION

This case is about transparency. Until recently, there was none in New York when it came to officer misconduct and disciplinary records. Standing in the way was an infamous law, often referred to as simply "50-a." Section 50-a allowed police departments to deny public access to any information concerning misconduct complaints, ensuing investigations, and discipline. This secrecy destroyed public trust, especially in heavily policed communities, while concealing considerable wrongdoing. But in June, New Yorkers decided enough was enough. The legislature overwhelmingly voted to repeal § 50-a, rendering misconduct and disciplinary records "presumptively open for public inspection and copying" under the Freedom of Information Law (FOIL), *Gould v. N.Y.C. Police Dep't*, 675 N.E.2d 808, 811-12 (N.Y. 1996).

Plaintiffs in this case, the officers unions, have long opposed transparency. They pressed for ever-more expansive applications of § 50-a. They wielded their immense political influence against repeal. And when they lost in the legislature, they sued. They now seek a broad injunction over the vast majority of officer misconduct and disciplinary records in New York City's possession. Their theory is that

§ 50-a was largely superfluous all along; that, in fact, several other sources of law—from their collective bargaining agreements (CBAs), to the Due Process and Equal Protection Clauses, to New York's administrative procedure law (Article 78), to unidentified settlement agreements—require that over 90% of misconduct and disciplinary records remain confidential.

This is as dubious as it sounds. That is why the district court—in a 40-page ruling, based on lengthy briefing and hours of oral argument—rejected the Unions' arguments almost in full. The Unions lost on all of the preliminary injunction requirements. The court found that the factual record undermined their claimed irreparable harms to officer safety and job prospects, that their legal theories failed under settled law, and that extensive evidence of the urgent public interest in transparency outweighed the Unions' speculative claims of harm.

On appeal, the Unions must show that the district court committed a host of factual and legal errors and ultimately abused its discretion in denying injunctive relief. They cannot. They front an argument based on their CBAs, claiming that an anodyne provision about the contents of officers' "Personal Folders" can be read as a broad

prohibition on public access to records. Even if it could be read that way (it cannot), agreements to keep public records confidential are per se ineffective under settled New York law. *Infra* § I. The district court properly denied injunctive relief on the remainder of the Unions' claims for multiple independent reasons. *Infra* § II. And indeed, as discussed in the cross-appeal brought by intervenor Communities United for Police Reform (CPR), the only reversible error here was in *granting* a narrow injunction based on another CBA provision—a ruling that overlooked the same settled rule that agreements to keep public records private are per se ineffective. *Infra* § III.

At bottom, the Unions' appeal to the powers of equity is hollow. The legislature balanced the very same considerations the Unions advance here, and it overwhelmingly came down in favor of full transparency. The public—and particularly the communities that bear the daily brunt of violence and misconduct § 50-a for so long shrouded—has an urgent and long-overdue interest in that transparency. And there is no equity in delaying it another day.

The Court should affirm the denial of injunctive relief and reverse the limited grant of injunctive relief.

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1336. The district court denied in part and granted in part the Unions' preliminary injunction request on August 21, 2020. SPA1-44. The Unions appealed from that part of the order denying injunctive relief on August 24, 2020. JA2485. CPR appealed from that part of the order granting injunctive relief on September 21, 2020. JA2490. This Court has jurisdiction under 28 U.S.C. § 1292(a)(1).

STATEMENT OF ISSUES

1. The language of § 7(c) of the Unions' CBAs says nothing about restrictions on public access to records. And an agreement between a government agency and private party to keep public records confidential is per se ineffective anyway. Did the district court abuse its discretion in finding that the Unions were unlikely to establish in arbitration that § 7(c) is a blanket bar on disclosure of records?

2. The district court denied injunctive relief on the remainder of the Unions' claims because the Unions failed, as a matter of both fact and law, to establish a likelihood of irreparable harm; a likelihood of success on the merits or serious questions going to the merits; or that

the balance of hardships and public interest weighed in favor of relief. Did the district court abuse its discretion?

3. Did the district court err in granting injunctive relief based on § 8 of the CBAs in light of the prohibition on agreements between government agencies and private parties to keep public records secret?

STATEMENT OF THE CASE[1]

For Decades, § 50-a Conceals Police Misconduct And Disciplinary Records From Public View

Enacted in 1976, New York Civil Rights Law § 50-a barred public access to "records used to evaluate performance toward continued employment or promotion." Over the years, the provision "expanded … to allow police departments to withhold from the public virtually any record that contains any information that could conceivably be used to evaluate the performance of a police officer." State of N.Y., Dep't of State Comm. on Open Gov't, *Annual Report to the Governor and State Legislature* 3 (Dec. 2014), https://tinyurl.com/y6jgyvdz.

[1] We cite the Unions' Principal Brief "UB"; the Joint Appendix "JA[Page]"; and docket entries in this appeal "Dkt."

For years, the secrecy of the § 50-a regime and the policing practices it concealed visited tremendous damage on communities across the state. *See* JA2047-222 (witness declarations).

Section 50-a destroyed community trust in law enforcement and government. JA2073-75 (Councilman Donovan Richards); JA2064 (former Albany Police Chief Brendan Cox); JA2082-84 (Dr. Dolores Jones-Brown). As one elected official explained, "[i]t is impossible for the community to feel safe if we do not know, and … in fact, [are] prevent[ed] from knowing, if we are in an environment in which law enforcement engages in a pattern or form of behavior against the community's safety." JA2059 (Assemblyman Michael Blake); *see* JA2154 (Michael Gennaco) (explaining that secrecy damages trust).

Section 50-a also stood in the way of accountability for everything from policing policy (e.g., the departmental abuse of stop-and-frisk tactics) to misconduct and violence committed by particular officers. This hampered attempts to redress disciplinary issues, JA2082 (Dr. Jones-Brown), and seek reform. JA2171 (NYC Public Advocate Jumaane Williams). And for victims of police misconduct and their families, § 50-a stood athwart justice and basic humanity, preventing

access to "even very basic information" about those who harmed their loved ones. JA2176-77 (Senator Julia Salazar); *see* JA2146-51 (Kadiatou Diallo).

The above dynamics long conspired against the physical safety and basic freedoms of the very communities officers were supposed to serve. And the impact falls heaviest on communities of color and on those most often subjected to race-based or sexual violence. JA2170 (Public Advocate Williams); JA2050-53 (Andrea Ritchie).

The people in those communities and others urged § 50-a's repeal for years. One was Kadiatou Diallo. In 1999, four plainclothes officers fired 41 shots at her son, Amadou, killing him—he had done nothing wrong. JA2147. Try as she might, Ms. Diallo "was unable to get information from any official source" concerning the officers' disciplinary histories or any investigation into the killing. JA2148. So Ms. Diallo embarked on what would turn out to be decades fighting for transparency for herself and others. JA2149-51.

Yet § 50-a remained. There is little doubt why. The powerful officers "unions and departments stonewall[ed] all attempts at reform." JA2058 (Assemblyman Blake).

The Legislature Overwhelmingly Repeals § 50-a

In June 2020, the reform effort finally broke through when Governor Cuomo signed a bill fully repealing § 50-a. *See* N.Y. State Senate, Senate Bill S8946 (N.Y. 2020), https://tinyurl.com/ydcuxnms (last visited Oct. 29, 2020). The tally in the legislature was overwhelming. The Senate passed the full repeal bill by 40-22, *id.*; the Assembly by 101-43, N.Y. State Assembly, Summary of S8946, https://tinyurl.com/y2qehcyx (last visited Oct. 29, 2020).

As the district court observed, the repeal "was the product of extensive debates." SPA5. Before the legislature was meticulous documentation of the negative effects of § 50-a and the benefits of transparency.[2] As always, the officers unions opposed reform. They raised the exact same concerns about officer safety and reputation they raise in this litigation. JA1023-26; JA2178-80 (Senator Salazar). And they argued that the very categories of records at issue here should be exempted from any repeal. SPA5; JA1026-28.

[2] *See also* N.Y. State Senate Standing Comm. on Codes (N.Y. Oct. 17, 2019), https://tinyurl.com/yy9f2fuw; N.Y. State Senate Standing Comm. on Codes (N.Y. Oct. 24, 2019), https://tinyurl.com/yyeknsnr.

The legislature voted for full transparency. To address officer safety concerns and privacy interests, the repeal bill mandated redaction of certain personal information (home addresses, personal telephone numbers, personal email addresses, and information concerning the officer's mental health or substance abuse assistance). N.Y. Pub. Officers Law § 89(2-b)(a)-(d). But it otherwise erased § 50-a completely, rendering misconduct and disciplinary records across the state presumptively public under FOIL.

And lest the legislature leave any doubt about the fierce urgency of its action, § 5 of the bill dispelled it: "This act shall take effect immediately." Senate Bill, S8946 (N.Y. 2020), https://tinyurl.com/ydcuxnms.

The City Grants Public Access To Records

The City of New York heard the legislature clear as a bell. Mayor de Blasio immediately announced the planned release of "all records" pertaining to misconduct and discipline in a publicly-accessible online database. Bill de Blasio, Mayor of City of New York, Press Conference (June 17, 2020), https://tinyurl.com/y49btud8.

The "all" was crucial. To see why, consider the way the Civilian Complaint Review Board (CCRB) disposes of investigations of officer complaints that are within its jurisdiction. (The CCRB shares jurisdiction with the NYPD.) Most investigations result in one of the following dispositions:

- "Substantiated," meaning "there was a preponderance of evidence that the acts alleged occurred and constituted misconduct";
- "Unsubstantiated," meaning "there was insufficient evidence to establish whether or not there was an act of misconduct";
- "Unfounded," meaning "there was a preponderance of the evidence that the acts alleged did not occur";
- "Exonerated," meaning "there was a preponderance of the evidence that the acts alleged occurred but did not constitute misconduct"; or
- A number of dispositions in which an investigation could not be completed, often grouped under the term "Truncated."

38 RCNY § 1-33(e).

From 2006 through 2020, the percentage of "Substantiated" complaints per year has ranged from 4% to 14%. *See* City of New York, Data Transparency Initiative, https://tinyurl.com/y49xktmk (complaints by disposition; last visited Oct. 29, 2020). But that does not mean that the misconduct alleged in non-substantiated complaints did not occur or

is unimportant. As one expert testified, the number of substantiated complaints is suppressed because "objective evidence, in the form of independent witnesses or forensic evidence … is commonly very rare," JA2098 (Prof. Samuel Walker)—and per the definition of "unsubstantiated," the tie goes to the officer. "Exonerated" complaints, meanwhile, are those where the conduct did happen, but the department deemed it allowable—although perhaps it should not be. And some investigations just stall out.

In short, the "consensus of opinion among experts [is] that the vast number of complaints that are not sustained represent an important part of the overall picture." JA2098 (Prof. Walker). Zoom out to the precinct or departmental level, and public access to all records is critical to assessing the functioning and efficacy of the misconduct and disciplinary system as a whole. JA2155-56 (Gennaco).

Case in point: discriminatory profiling complaints. Such complaints are exclusively within the jurisdiction of the NYPD, so providing access even to all CCRB records would reveal nothing. But access to NYPD records would show that the NYPD received 2,946 profiling complaints between November 2014 and October 2019. Tenth

Report of the Independent Monitor at 73, *Floyd v. City of New York,* No. 08-cv-1034 (S.D.N.Y. Jan. 7, 2020), https://tinyurl.com/y33vabwe. It would also show how many profiling complaints the NYPD substantiated: Zero. Out of 2,946. *Id.*

The legislature went with full transparency for good reason.

The Unions Seek To Retrench § 50-a Through Litigation

A month after the City pledged to release records, the Unions sued. They sought to permanently bar release of all records for complaints that are "non-final, unsubstantiated, unfounded, exonerated, or resulted in a finding of not guilty," as well as certain records allegedly covered by "confidential settlement agreements." JA54.

The Unions alleged that release of records would violate the Due Process and Equal Protection Clauses of the United States and New York State Constitutions. JA54, 80. They also alleged that release is categorically barred by their CBAs—in particular, §§ 7(c) and 8 of Article XV of the agreements—on which the Unions had also initiated arbitration. *E.g.*, JA145 (CBA provisions); *see* JA2321 (arbitration grievance). And they alleged that the City's release of records is

"arbitrar[y] and capricious[]" under Article 78 of New York state law. JA54. The Unions moved for a preliminary injunction, asserting that release of any of the records at issue would cause irreparable harm to officer safety, reputation, and employment prospects, and that it would deprive them of the right to arbitrate disputes under their CBAs.

The Unions' litigation strategy was pure blunderbuss. The injunction they requested would cover the vast majority of records in the City's possession—by the Unions' own basis for estimating, "more than *92 percent*," UB7. They sought to enjoin release of several broad categories of records, some tied to dispositions of investigations (unsubstantiated, exonerated, etc.) and some based on the status of the misconduct and disciplinary process (e.g., non-final, a status that can persist in some instances for many years). They lump all of these categories together, recognizing no distinctions, and making no effort to tie particular records to particular legal claims. And perhaps the greatest oddity, while the Unions claim to be pressing a multitude of individual claims of officers, they provided testimony from not a single one nor pointed to a single actual record in order to move their allegations beyond barest abstraction.

Having lost before the legislature, the Unions came to court seeking to retrench § 50-a. And despite various opportunities to narrow or clarify the relief they sought, they have pursued only this singular aim.

The District Court Denies The Unions' Request For Injunctive Relief (With A Narrow Exception)

On July 22, 2020, the district court granted the Unions a temporary restraining order and set a preliminary injunction hearing for August 18, 2020. JA719-29. At the Unions' request, the court extended the usual 14-day maximum for holding a preliminary injunction hearing so that they could take discovery from the City. JA725-26.

The parties (including CPR[3]) filed extensive briefing on the preliminary injunction issues. The district court held a preliminary injunction hearing that lasted over three hours. JA2365-484. And on August 21, the court denied the Unions' request for preliminary relief nearly in full. In an oral ruling spanning 40 pages, the court found that

[3] The district court permitted CPR to oppose the Unions' preliminary injunction request pending the court's decision on CPR's motion to intervene, JA977, which the district court ultimately granted under Fed. R. Civ. P. 24(b), JA2487-89.

the Unions had failed to carry their burden on every required component of the preliminary injunction showing. There was no likelihood of irreparable harm, SPA11-19; no likelihood of success on the merits or even serious questions going to the merits, SPA8-11, 19-40; and no showing that the public interest and balance of hardships tipped in the Unions' favor, SPA40-43.

The district court did grant a "very limited injunction" tied to the narrower of the two CBA provisions the Unions invoked, § 8. That provision permits officers to request "expunge[ment]" of records related to "Schedule A command discipline violations for cases heard in the trial room, for which the ultimate disposition of the charge at trial, or on review or appeal, is other than guilty." SPA24. Finding the provision "not entirely clear," the court enjoined release of records that are or could be covered by § 8. SPA22.

The Unions appealed from the denial of injunctive relief and sought a stay. A motions panel (Sullivan, Jacobs, Lynch, JJ.) granted the motion, with Judge Lynch indicating that he would have denied it. Dkt. 171 at 2. CPR noticed a cross-appeal from the limited grant of injunctive relief pertaining to § 8.

SUMMARY OF THE ARGUMENT

I. The district court did not abuse its discretion in finding that the Unions were unlikely to succeed in arbitration on their § 7(c) claim.

A. The Unions argue that § 7(c) is a prohibition on disclosure of records. Even if this were correct (it is not), settled law establishes that an agreement between a government agency and private party to keep public records confidential is void. Because the relief the Unions seek is impermissible as a matter of law, they are unlikely to succeed in arbitration, foreclosing a preliminary injunction.

B. As an independent basis for affirmance, the district court did not abuse its discretion in finding that § 7(c) cannot be read as a blanket bar on public disclosure of records.

1. The Unions have waived any challenge to the standard the district court applied in evaluating whether the Unions are likely to succeed in arbitration. In any event, the district court was sufficiently deferential to the arbitrator, and the Unions' claim is meritless under any standard.

2. Section 7(c) provides only a procedural right to have certain limited records "removed" from an officer's "Personal Folder." It

has nothing to do with public disclosure of records at all, nor can it be read to cover most of the records over which the Unions seek injunctive relief. The district court correctly found that the Unions are unlikely to succeed in arbitration.

II. The district court did not abuse its discretion in denying a preliminary injunction on the Unions' remaining claims because the Unions failed to carry their burden on each required component of a preliminary injunction showing.

A. The Unions did not demonstrate a likelihood of irreparable harm. They offered no evidence linking their claims of imminent harm to officer safety with any disclosure of records. They similarly failed to provide evidence showing that disclosure of records would imminently harm employment prospects, which would be remediable with money damages anyway. And their claims of harm to privacy interests fail because they identify no legally cognizable privacy interest, and because the legislature specifically adopted sufficient privacy protections.

B. As an independent ground for affirmance, the Unions are unlikely to succeed on the merits on any claim.

1. The Unions' due process "stigma plus" claims fail because they show neither stigma nor plus. They cannot show stigma because the records at issue are not false, and therefore not defamatory. They cannot show plus because disclosure of records involves no state-imposed burden—their claims of hypothetical harm to employment prospects are legally insufficient and factually baseless.

2. The Unions' Article 78 claim fails because they cannot show that the City's disclosures are "contrary to law" or "arbitrary and capricious." The district court correctly found, as a matter of fact, that the City continues to evaluate potentially applicable FOIL exemptions before disclosing records. And to the extent the City has modified its approach, those modifications are perfectly rational in light of the repeal of § 50-a.

3. The Unions' equal protection claim is a non-starter because rational bases for the City's planned disclosures abound. As the district court found, police officers' unique position and authority makes them differently situated from other public employees. And the City could rationally have relied on this difference, on the police department's historical hostility to transparency, or on the pressing

need to repair the NYPD's relationship with the community in deciding the appropriate degree of transparency.

4. The Unions' claim that pre-repeal settlement agreements implicitly incorporated § 50-a fails. Private agreements that conflict with FOIL are per se ineffective. In any event, there is a strong presumption against interpreting laws to create binding contractual commitments against the government in perpetuity, and nothing in the now-repealed § 50-a undermined this presumption.

C. As another independent ground for affirmance, the district court did not abuse its discretion in finding that the public interest and balance of hardships weigh strongly against injunctive relief. The record contains extensive evidence that transparency and accountability are essential to community trust and safety. The Unions do not even attempt to rebut the district court's weighing of this evidence, so the decision should be affirmed.

III. In CPR's cross-appeal, this Court should reverse the district court's limited grant of injunctive relief pending the Unions' arbitration on § 8 of their CBAs.

A. CPR, an intervenor, has Article III standing to bring this appeal because the relief the Unions are seeking—and, in the case of § 8, have obtained—has resulted in the improper denial of CPR's access to records. This relief also harms CPR's organizational interests by hampering its ability to pursue reform efforts and requiring diversion of resources. These injuries-in-fact are directly traceable to the Unions' lawsuit and will be redressed by a judgment denying the Unions the requested relief.

B. The Unions' claim that § 8 prohibits public disclosure of records fails because, as explained in connection with § 7(c), an agreement between a government agency and private party to keep public records confidential is per se ineffective. The district court erroneously thought this rule called for a case-specific balancing of the public interest in disclosure of the records at issue against private rights to arbitrate claims. It does not—any agreement that conflicts with FOIL is void, so the Unions have no likelihood of success in arbitration on their claim.

STANDARD OF REVIEW

This Court reviews a district court's decision to grant or deny a preliminary injunction for abuse of discretion. *Red Earth LLC v. United States*, 657 F.3d 138, 143 (2d Cir. 2011). "A district court abuses its discretion when its decision is arbitrary or is based on an error of law or a clearly erroneous finding of fact." *Id.* (cleaned up).

ARGUMENT

APPEAL

I. The District Court Properly Denied Injunctive Relief On § 7(c) Of The CBAs.

The Unions first argue that the district court abused its discretion in denying an injunction pending arbitration on the Unions' claim of breach of § 7(c) of the CBAs. UB13-22. In that arbitration, the Unions contend that § 7(c) broadly bars any public disclosure of the vast majority of records in the City's possession. *See* UB15. Strip out the rhetoric, and the Unions' argument is that this:

> "The [NYPD] will, upon written request to the Chief of Personnel by the individual employee, remove from the Personal Folder investigative reports, which, upon completion of the investigation, are classified 'exonerated' and/or 'unfounded,'" JA2327 (§ 7(c)),

actually bars the City from

> "publishing any information regarding unfounded, exonerated, unsubstantiated, unadjudicated, and non-final allegations of misconduct," JA2321,

and warrants an arbitral order permanently prohibiting

> "release[e] [of] any information to the public" concerning such allegations, JA2350, including by "production in response to a Freedom of Information Demand," JA2340.

As the district court found, "there is simply no way [in] which the argument being made can be made under the CBAs." SPA21.

The district court should be affirmed for either of two independent reasons. First, any agreement between a government agency and a private party to keep public records secret is per se void, so the Unions are unlikely to succeed in arbitration as a matter of law. *Infra* § A. Second, the district court correctly ruled that § 7(c)'s language cannot carry the Unions' meaning. *Infra* § B.

A. The Unions' § 7(c) claim is unlikely to succeed because government agencies and private parties cannot contract around FOIL.

Although the district court correctly denied injunctive relief based on § 7(c)'s text, the Unions' claim fails for a basic, antecedent reason: A private agreement barring disclosure of government records covered by FOIL is per se void. They therefore have no likelihood of success in arbitration, foreclosing injunctive relief. *See SG Cowen Sec. Corp. v.*

Messih, 224 F.3d 79, 81-84 (2d Cir. 2000) (requiring likelihood of success in arbitration). This settled rule resolves the Unions' appeal on § 7(c) and their settlement agreements, *infra* § II.B.4, and CPR's cross-appeal concerning § 8 of the CBAs, *infra* § III. And for reasons explained below (at 28-29), it is the easiest and best way to dispose of all of these claims.

1. "To promote open government and public accountability, the FOIL imposes a broad duty on government to make its records available to the public," *Gould,* 675 N.E.2d at 811, as well as a corresponding "public right" to these records, *M. Farbman & Sons, Inc. v. N.Y.C. Health & Hosps. Corp.*, 464 N.E.2d 437, 439 (N.Y. 1984). Government agencies "shall … make available for public inspection and copying all records" unless they fall into one of the specifically enumerated FOIL exemptions. N.Y. Pub. Officers Law § 87(2). And nothing in FOIL permits a government agency to refuse disclosure for any non-enumerated reason or to create non-statutory exemptions.

The Unions nevertheless claim that through § 7(c), the City has agreed never to disclose to the public the vast majority of disciplinary and misconduct records in its possession. They do not dispute, nor can

they, that these records are covered by FOIL. They do not dispute, nor can they, that the City's planned databases and responses to FOIL requests are efforts to make records "available for public inspection and copying" under FOIL, § 87(2). Instead, they claim a contractual trump card that supersedes both the public's rights and the City's obligations.

Courts have repeatedly rejected this.

In *Washington Post Co. v. New York State Insurance Department*, private insurance companies claimed that the state insurance department had promised that meeting minutes turned over for state inspection would never be disclosed to the public. 463 N.E.2d 604, 605-06 (N.Y. 1984). The Court of Appeals rejected the argument. The agency "had no authority to use its label of confidentiality to prevent disclosure of the minutes." *Id.* at 608.

In *LaRocca v. Board of Education of Jericho Union Free School District*, the respondent school district argued that a settlement agreement reached with a former employee could not be disclosed because of a promise of confidentiality in the agreement. 220 A.D.2d 424, 427 (2d Dep't 1995). The Second Department rejected the

argument because "the Board of Education cannot bargain away the public's right to access … public records." *Id.* at 427.

And in *City of Newark v. Law Department of New York*, the First Department rejected an arbitration panel's "confidentiality order" over documents related to an arbitration between New York City and the Port Authority. 305 A.D.2d 28, 29 (1st Dep't 2003). The court explained that "none of the statutory exemptions empowers a government agency to immunize a document from FOIL disclosure by designating it as confidential, either unilaterally or by agreement with a private party." *Id.* at 32. The confidentiality order was therefore ineffective insofar as "it purport[ed] to cut off the public's rights under FOIL." *Id.* at 33.

That a government agency lacks the power to circumvent what FOIL requires is not just a tenet of New York state law—it is the natural and obvious implication of any freedom of information law. *See Washington Post Co. v. U.S. Dep't of Health and Human Servs.*, 690 F.2d 252, 263 (D.C. Cir. 1982) ("[T]o allow the government to make documents exempt by the simple means of promising confidentiality would subvert FOIA's disclosure mandate.").

This basic rule controls and requires affirmance. Even if § 7(c) did represent a contractual promise from the City to the Unions never to release any of the records at issue in this case, that promise is void. The Unions are therefore unlikely to obtain relief in arbitration.

2. The Unions' strategy on appeal is to emphasize the flexibility of arbitration. They invoke the "broad scope and power afforded to an arbitrator … to fashion an equitable result." UB18 (internal quotation marks omitted). The notion is that even if their legal arguments under the CBA lack merit, they may yet find a way to convince an arbitrator to grant them relief anyway.

But this argument cannot help the Unions here. That is because the rule prohibiting confidentiality agreements between government agencies and private parties is categorical and inviolable—such an agreement is void "as a matter of public policy," *LaRocca*, 220 A.D.2d at 427. And as established law (including the very authority the Unions cite) holds, "an [arbitral] award which is violative of public policy will not be permitted to stand." *In re Sprinzen*, 389 N.E.2d 456, 459 (N.Y. 1979); *see* UB18-19 (relying on *Sprinzen*).

Where contracts on a particular subject or for a particular result are against "public policy," there are no exceptions—the law simply forecloses their effectiveness. For example, a closely related line of cases categorically forecloses government agencies from collective bargaining on certain topics. CBA provisions on such topics are automatically "unenforceable as against public policy." *Cohoes City Sch. Dist. v. Cohoes Teachers Ass'n*, 358 N.E.2d 878, 880-81 (N.Y. 1976) (CBA provision delegating authority of teacher tenure); *see Board of Educ., Great Neck Union Free Sch. Dist. v. Areman*, 362 N.E.2d 943, 946 (N.Y. 1977) (CBA provision relinquishing authority to inspect teacher personnel files); *Patrolmen's Benevolent Ass'n of N.Y., Inc. v. N.Y.S. Pub. Emp. Rels. Bd.*, 848 N.E.2d 448, 450 (N.Y. 2006) (CBA provision on police discipline).

The animating principle in these cases is that, by operation of law, public policy overrides government agreements that conflict with duties the government owes to the public. That is just what, under the Unions' interpretation, § 7(c) would do. As explained (at 23), FOIL imposes a mandatory duty to grant public access to records and a corresponding public right. A conflicting contractual obligation is in

effect an agreement to violate the law, as cases like *Washington Post*, *LaRocca*, and *City of Newark* hold. Such an agreement is therefore unenforceable as a matter of law, and—again, per the Unions' own cited authority—beyond the power of any arbitrator to recognize.

3. As noted, the district court resolved the § 7(c) claim on the contract language. This Court "may affirm, however, on any basis for which there is a record sufficient to permit conclusion of law." *Leon v. Murphy*, 988 F.2d 303, 308 (2d Cir. 1993). For three reasons, the best way to resolve the § 7(c) claim is by holding that the Unions' reading of § 7(c) is foreclosed by the settled rule discussed above.

First, by resolving the § 7(c) claim on this basis, this Court can avoid the Unions' kitchen-sink appeal on the provision's text—replete with forfeited arguments about the proper standard, obfuscation on the scope of the injunction they are requesting, and misdirection concerning the text of the CBAs.

Second, in all events, this Court must confront the rule prohibiting agreements that conflict with FOIL to decide CPR's cross-appeal on § 8 of the CBAs. The district court briefly considered and declined to apply the rule to § 8, but did so on the basis of an easily

corrected misconception. It thought that application of the "against public policy" rule under cases like *LaRocca* called for a case-specific balancing of the public interest in disclosure against private contractual interests. SPA21-22. For reasons explained above (at 26-27) and below (at 71-73), no such balancing is appropriate. By so ruling, this Court can at once dispose of the Unions' appeal as to § 7(c) and alleged settlement agreements, as well as CPR's cross-appeal as to § 8.

Third, ruling based on this well-settled legal principle will prevent future attempts to wield CBA provisions against the public's FOIL rights. The officers unions should not be permitted to mire public records in bilateral arbitration over tenuous interpretations of CBA provisions. And while the City acknowledges here that it cannot collectively bargain around FOIL, other government agencies may find it irresistible to trade public FOIL rights for union concessions. This Court should apply settled law meant to foreclose just that.

B. The § 7(c) claim is also unlikely to succeed because the provision's language does not bar disclosure of records.

This Court can also affirm on the independent basis adopted by the district court. The district court held that the Unions have no likelihood of success in arbitration because the language of § 7(c) cannot

be read to "prevent the disclosure of [records]." SPA20. This was not an abuse of discretion—it was correct.

1. The Unions' argument that the district court applied the incorrect legal standard is forfeited, wrong, and immaterial.

The Unions begin by arguing that the district court applied the wrong standard in evaluating their request for an injunction in aid of arbitration. UB18-19 (Unions' "First" and "Second" points). They concede that in order to get an injunction, they were required to show a "likelihood of success on the merits of the arbitration claim." UB17. But, they note, this Court has explained that this factor will have "greatly reduced influence" because of the "great flexibility" often afforded arbitrators. UB17 (citing *S.G. Cowen*, 224 F.3d at 84). They accuse the district court of "disregard[ing] the broad scope and power afforded to an arbitrator" and "disregard[ing] the reduced influence of the likelihood-of-success factor." UB18-19 (internal quotation marks omitted).

To begin with, the argument is forfeited. The Unions placed over 50 pages of briefing before the district court in support of their injunction request. JA592-628 (initial request for injunctive relief);

JA2189-221 (supplemental brief "incorporat[ing] [the initial brief] by reference"). They said not a single word about the standard they now advance. And they cited none of the cases they rely upon here.

Instead, the Unions specifically told the Court—after listing out the usual likelihood of success, irreparable harm, and balance of the hardship factors applicable to preliminary injunctions—that "[t]he same three-factor test for a preliminary injunction outlined above … also governs the issuance of a preliminary injunction [in aid of arbitration] under CPLR § 7502(c)." JA604. The Unions cannot complain on appeal that the district court "disregarded" points they never made. *See In re Kingate Mgmt. Ltd. Litig.*, 746 F. App'x 40, 43 (2d Cir. 2018) (Summary Order) (appellant forfeited argument as to applicable legal standard); *Dynamic Concepts, Inc. v. Tri-State Surgical Supply & Equip. Ltd.*, 716 F. App'x 5, 17-18 (2d Cir. 2017) (Summary Order) (same).

The argument is also meritless because the district court was quite deferential to the arbitrator. It specifically described its task as evaluating "whether [the § 7(c) claim] is something that is more properly given to the arbitrator." SPA21. And on the § 8 claim, it *did* defer to the arbitrator merely because that provision's text "gave [it]

more pause," and because "the CBAs are not entirely clear" on the issue. SPA21-22. The moment the district court perceived the slightest ambiguity in the CBAs, it granted injunctive relief to permit the arbitrator to resolve the question.

And finally, the argument is immaterial. The Unions did not lose on § 7(c) because the district court applied too stringent a standard. As the district court explained, "[t]his is not a situation … where the Court would be nullifying relief an arbitrator might be able to provide because the relief sought is simply nowhere to be found in the CBA." SPA21.

2. The district court properly ruled that the language of § 7(c) does not prohibit disclosure of records.

The district court was correct in ruling that § 7(c) could never be read to bar public release of records.

"The best evidence of what parties to a written agreement intend is what they say in their writing." *Slamow v. Del Col*, 594 N.E.2d 918, 919 (N.Y. 1992). "Where the contract is unambiguous, courts must effectuate its plain language." *Seabury Constr. Corp. v. Jeffrey Chain Corp.*, 289 F.3d 63, 68 (2d Cir. 2002). The Unions' preferred interpretation of § 7(c) strains the provision's language far past the

breaking point. Two particular aspects of § 7(c) doom any attempt to read it as a sweeping provision prohibiting public release of the vast majority of records in the City's possession.

"remove from the Personal Folder." The first is that § 7(c) provides only that officers may lodge a "written request to the Chief of Personnel" to "*remove from the Personal Folder*" certain records. JA2327 (emphasis added). (More on *which* records below at 36-38.) On its face, that has nothing to do with public disclosure of records. These parties knew words like "confidential," "public," "release," "publish," "FOIL request," "disclosure," and so forth. They did not use them in § 7(c) because that provision is not about those things. It is about a particular person (the "Chief of Personnel") "remov[ing]" a particular record (an "investigative report") from a particular location (a "Personal Folder").

The context of the provision confirms the text's narrow focus. *See Aetna Cas. & Sur. Co. v. Aniero Concrete Co.*, 404 F.3d 566, 598 (2d Cir. 2005) (contractual provisions must be "examined [in] the context of the entire integrated agreement"). The larger section in which § 7(c) appears is titled "Personal Folder." Subsection (a) requires the

"Personnel Bureau" to give the Unions "a list of categories of items included in the Personal Folder," while indicating which items "an employee is not permitted to review." JA2327. Subsection (b) specifies the particular days and times ("normal business days between [9 and 5]"), as well as the particular physical location ("Personnel Bureau, 10th Floor, Police Headquarters") where officers may review their folders. These are anodyne guidelines focused on a specific physical repository of documents. JA2327. So is § 7(c).

The district court's careful analysis recognized this. SPA20-21. As the Court explained, the provision's text "gives the officer the right to request that an investigative report be removed from a personnel file," not a "right to have the investigative report removed from the public record." SPA21. No matter what public access the City elects to grant to records in its possession, the court explained, "it remains the case that officers can and will be able to exercise their rights under this provision to have specified investigative reports removed from their personnel or personal folder, and it remains the case that the NYPD can remove such reports." SPA21.

The Unions' counter begins with the word "remove." UB19 (Unions' "Third" point). They argue that "[c]ontrary to the court's interpretation, the ordinary meaning of 'remove' is not limited to 'move to a different place,'" and they point to dictionary definitions that it can also mean "to get rid of" or "eliminate." UB19. This is a red herring. The meaning of "remove" is not what matters. What matters is *from where* the record is removed—the "Personal Folder." Whether the particular record in the Personal Folder is removed or gotten rid of or eliminated, § 7(c) says nothing about the public's right to access records that either remain in that folder or that the City holds elsewhere.

Perhaps recognizing this flaw, the Unions next note that "the term 'Personal Folder' in § 7(c) is not defined in the CBA." UB20. They attempt no definition. But the idea appears to be that "Personal Folder" could be interpreted to refer to every possible place where a copy of the record could be located. This is belied by the surrounding context of § 7(c) discussed above (at 33-34). It is also belied by the Unions' statement in their own arbitration grievance. They concede that the "Personal Folder" is a "central repository for the personnel records of a police officer throughout his or her career." JA2331. That

is, it is a particular location, and all § 7(c) does is provide a right to request removal of a record from that location.

The Unions' last argument does not focus on contract language at all. They argue that "under the court's interpretation, § 7(c) becomes meaningless" and "has no purpose or point." UB21 (Unions' "Fourth" point). But this begs the question as to what § 7(c)'s purpose is in the first place. The Unions play coy here, but again their own grievance gives them away. There, they recognize the purpose and point is "personnel decisions, including determinations relating to promotions, transfers, detail assignments, and overtime eligibility." JA2331. Section 7(c) is a right to request that certain records be "removed" from consideration for personnel decisions, which are based on records in the Personal Folder. This benefit "remain[s] available." SPA21.

"investigative reports"; "'exonerated' and/or 'unfounded.'"

Even if the Unions were right that § 7(c) is a prohibition on public access to records, that provision covers a far narrower class of records than the Unions suggest.

Section 7(c) refers only to "investigative reports, which … are classified 'exonerated' and/or 'unfounded.'" JA2327. Yet the Unions

have repeatedly claimed that the provision supports injunctive relief over "*any information* regarding unfounded, exonerated, *unsubstantiated*, *unadjudicated*, and *non-final* allegations of misconduct"—that is, not limited to "investigative reports" or "exonerated and/or non-final" allegations. JA2321 (grievance; emphasis added); *see* JA54-56, 77 (complaint); JA633-34 (affirmation supporting preliminary injunction request); JA2206-07 (supplemental brief requesting injunctive relief); *see* SPA7 (district court recognizing Unions' position).

The Unions have had every opportunity to explain how this could possibly be. Failing that, nothing stopped them from seeking a narrower injunction confined to the actual records described in § 7(c). Instead the Unions tried to smuggle an elephant through a mousehole. And on appeal, they continue to ask this Court to give it the same overbroad "injunctive relief requested in the Complaint," UB61, which § 7(c) could never come close to sustaining.

The only mention the Unions make of the term "investigative reports" is the imagined critique that "the district court was wrong when it apparently concluded that the term 'investigative reports' did

not apply to NYPD charges and specifications." UB22 (Unions' "Fifth" and final point). This is misdirection. Fine parsing of the term "investigative reports" was never at issue below because the Unions insisted that the term meant "any information," JA2321—which of course it cannot.

The district court was right to reject the Unions' request for a sweeping injunction based on § 7(c). This Court should affirm.

II. The District Court Did Not Abuse Its Discretion In Denying Preliminary Relief On The Unions' Remaining Claims.

The Unions' remaining claims are subject to the traditional preliminary injunction analysis. A movant seeking the "extraordinary remedy" of a preliminary injunction must make a "clear showing" that "he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20, 22 (2008). The district court carefully evaluated these independent requirements and correctly concluded that the Unions failed on each.

A. The Unions failed to demonstrate a likelihood of irreparable harm.

To satisfy the irreparable harm requirement, plaintiffs "must demonstrate that absent a preliminary injunction they will suffer an injury that is neither remote nor speculative, but actual and imminent, and one that cannot be remedied if a court waits until the end of trial to resolve the harm." *Freedom Holdings, Inc. v. Spitzer*, 408 F.3d 112, 114 (2d Cir. 2005) (cleaned up). The Unions claim three such injuries: officer safety, reputation and employment, and privacy. All three are speculative, unsupported by the factual record, and fail as a matter of law.

Officer Safety. The Unions first contend that public disclosure of misconduct and disciplinary records will lead to "increasing threats of violence and harassment against officers." UB24. They invoked this specter repeatedly before the legislature in opposing § 50-a's repeal. The legislature asked them directly for evidence of their claimed threats to officer safety. JA2178. The Unions "*admitted* to not having any." JA2179.

The Unions did no better in the district court. Their whole showing was a six-page affidavit from NYPD officer and union vice

president Joseph Alejandro. Alejandro stated that release of misconduct and disciplinary records "would constitute a danger to the life and safety of ... officers and their families." JA2359. Most of his affidavit, however, was devoted to recounting the "readily apparent dangers of police work" generally, while noting some heinous acts of violence against officers or threats to officers. JA2360-61.

As the district court found, there is no evidence that these incidents "were attributable to the repeal of Section 50-a." SPA16. Nor is there any evidence that "an increased risk of harm to officers or their families ... can be fairly tied to the disclosure" of records. SPA16. The Unions therefore failed to prove that their claimed injury is likely to occur in the absence of an injunction.

The Unions complain that the district court held them "to an unreasonably high burden" by requiring a link between their claimed irreparable injury (harm to officers) and the action they seek to enjoin (record disclosures). UB25. But they do not contest the requirement of a "clear showing" that "the absence of a preliminary injunction" will "likely" cause them "to suffer irreparable harm." *Winter*, 555 U.S. at 22. The district court applied that precise standard; it simply concluded

that the Unions evidentiary showing was bare "speculation" about what *might* occur. SPA16.

The Unions also fail to confront the district court's evidentiary findings that the claimed harm is unlikely to occur. The district court found that "there are numerous states with more robust disclosure practices than New York's have been, with no correlative uptick in violence or threats of violence to officers and their families." SPA17. It found that the Chicago Police Department, a "fair comparator to the NYPD," makes tens of thousands of misconduct records available "in a comprehensive searchable format," "with no evidence of increased violence or threat of violence because of the disclosures." SPA16-17; *see* JA2140-42 (describing Chicago database). Thus, the only actual evidence in the record directly refuted the Unions' contentions.

Nor does case law support the Unions' argument. The only case they advance as analogous—*Luongo v. Records Access Officer, Civilian Complaint Review Bd.*—in fact proves how fundamentally misplaced the officer safety arguments are here. 150 A.D.3d 13 (1st Dep't 2017). *See* UB26. *Luongo* involved the "extensively publicized arrest and death of Eric Garner" at the hands of Officer Daniel Pantaleo, 150

A.D.3d at 15, who was filmed choking Mr. Garner as Mr. Garner repeated, 11 times, "I can't breathe." As a result, "hostility and threats against Officer Pantaleo ha[d] been significant enough to cause NYPD's Threat Assessment Unit to order around-the-clock police protection for him and his family." *Id.* at 26. There is nothing remotely like this here.

Reputational harm. The Unions next claim that disclosure of disciplinary and misconduct records would irreparably damage officers' "professional reputations and long-term career prospects." UB26-28.

Again, their showing is based on a thin affidavit, this one submitted by criminal justice professor Dr. Jon Shane. Dr. Shane offered his "opinion that ... publication of Unsubstantiated and Non-Final Allegations are likely to have an unfairly damaging and stigmatizing effect on a police officer's future employment prospects." JA2245.

Again, the district court made quick work of the Unions' shoddy evidence, entering contrary fact-findings that the Unions do not claim are clearly erroneous. The district court rightly noted that "Dr. Shane presents no empirical evidence to support his findings" and "not one law enforcement officer's statement to substantiate his claim." SPA13.

Without such evidence, the district court explained, Dr. Shane's "opinion at base is rumination." *Id.*

The district court also specifically credited "far more compelling" evidence from a former police chief, who testified to prospective employers' "ability to contextualize [misconduct and disciplinary records] properly." SPA14-15. Prospective law enforcement employers are able to "appreciate the dispositional designations used by agencies such as the CCRB" and are capable of "interpret[ing] law enforcement reports from other jurisdictions." SPA14-15.

If the Unions' failure of proof were not enough, it is also well settled that in cases about employment, reputational harm generally "falls far short of the type of irreparable injury which is a necessary predicate to the issuance of a temporary injunction." *Stewart v. I.N.S.*, 762 F.2d 193, 200 (2d Cir. 1985) (internal quotation marks omitted). *Stewart* involved an INS employee suspended for improperly using his firearm while off-duty. *Id.* at 196-97. He claimed this caused him irreparable harm by "degrading and humiliating him in the eyes of his peers, family, and community, thereby damaging his reputation and self-esteem." *Id.* at 200. This Court held that "[s]uch unfortunate

effects either alone or in combination do not constitute irreparable harm sufficient to justify injunctive relief." *Id*.

None of the four cases the Unions cite (at 26-27) is to the contrary. Two involve breaches of private contracts and noncompete agreements where it would be "very difficult to calculate monetary damages that would successfully redress the loss of a relationship with a client that would produce an indeterminate amount of business in years to come." *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 404 (2d Cir. 2004); *see also Ticor Title Ins. Co. v. Cohen*, 173 F.3d 63, 68-69 (2d Cir. 1999) (same).

The other two involve denial of unique business opportunities with indeterminate damages. *See Dino DeLaurentiis Cinematografica, S.p.A. v. D-150, Inc.*, 366 F.2d 373, 375 (2d Cir. 1966) ("[T]he defendant seeks also to recover losses resulting from denial of the opportunity to launch" proprietary cinematography process); *Madison Square Garden Boxing, Inc. v. Shavers*, 434 F. Supp. 449, 452 (S.D.N.Y. 1977) (granting injunction based in part on potential loss of future boxing promotion opportunities). These cases are outside the employment context, where

damages are readily determinable, and where reputational harm claims are foreclosed by binding precedent.

Privacy. The Unions also allege that disclosure of records will cause "irreparable damage to officers' privacy interests," UB26, without explaining what those interests are. As it turns out, there is no generalized privacy right inherent in misconduct records, "even where the allegations of misconduct are 'quasi criminal' in nature or not substantiated." *Thomas v. N.Y.C. Dep't of Educ.*, 103 A.D.3d 495, 498 (1st Dep't 2013).

The Unions' cases, by contrast, involve private data belonging to private persons or corporations and are thus plainly inapposite. *See Airbnb, Inc. v. City of New York*, 373 F. Supp. 3d 467, 484 (S.D.N.Y. 2019) (confidential customer information); *Providence J. Co. v. FBI*, 595 F.2d 889, 889 (1st Cir. 1979) (records of illegal wiretap of private citizen's place of business); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bishop*, 839 F. Supp. 68, 72 (D. Me. 1993) (confidential financial records of bank clients); *Metro. Life Ins. Co. v. Usery*, 426 F. Supp. 150, 154 (D.D.C. 1976) (confidential company hiring data).

In any event, as the district court noted, the legislature specifically addressed any privacy concerns by "requir[ing] redaction of certain information in law enforcement disciplinary histories, including … medical history, home address, personal telephone number, personal email address, and mental health service." SPA38.

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The district court did not abuse its discretion in finding no likelihood of irreparable harm, which is itself sufficient to affirm its decision denying injunctive relief on the non-CBA claims.

B. The Unions failed to show a likelihood of success on the merits.

This Court can also affirm on the fully independent ground that the Unions failed to demonstrate either a likelihood of success on the merits or substantial questions going to the merits.

At the outset, the Unions contend that the district court "erred in failing to apply the 'serious questions' standard." UB29. That standard is slightly less rigorous on the merits than the traditional "likelihood of success" standard, but requires the plaintiff to make a stronger showing on the balance of the hardships. *Trump v. Deutsche Bank AG*, 943 F.3d 627, 637 (2d Cir. 2019), *rev'd on other grounds sub nom. Trump v.*

Mazars USA, LLP, 140 S. Ct. 2019 (2020). As the Unions concede in a footnote (at 29 n.8), the district court explicitly found that "were I to use the serious-questions standard, the result would be the same." SPA11. So the Unions are just wrong—the court applied the standard in the alternative and the Unions lost under it.

In any event, the likelihood-of-success standard applies here. This Court has "repeatedly stated" that the serious-questions standard does not apply to "governmental action taken in the public interest pursuant to a statutory or regulatory scheme." *Trump,* 943 F.3d at 637-38 (internal quotation marks omitted). That is what this case is about. The legislature fully repealed § 50-a, rendering police misconduct and disciplinary records presumptively public under FOIL. Following repeal, the City has acted to discharge its obligation under FOIL to "make available for public inspection and copying all records." N.Y. Pub. Officers Law § 87(2). The Unions may not like how the City has chosen to do so—i.e., the City's use of a database for some records, responses to FOIL requests for others. But that it represents the City's attempt to effectuate its FOIL obligations following § 50-a's repeal, and

to do so in the public interest, is plain. The district court recognized as much. SPA11.

The Unions claim this was "wrong" as a "factual matter." UB31. This is apparently because different City agencies have different plans for what they will include in public databases or responses to FOIL requests, which, the Unions say, must mean that the City's decisions "are completely unmoored from any statutory or regulatory scheme." UB31-32. That does not follow. These are just differing exercises of statutory discretion under FOIL, based on particular agencies' circumstances and the public interest. This Court has applied the likelihood-of-success standard to such discretionary decisions. *E.g.*, *Plaza Health Labs., Inc. v. Perales*, 878 F.2d 577, 580-81 (2d Cir. 1989) (state officials' discretionary decision to suspend provider from Medicaid program was taken "pursuant to a statutory or regulatory scheme").

But this is all academic. The Unions' claims are wholly without merit, so they lose under any standard.

1. The Unions' due process claims are meritless.

The Unions' due process claims are based on a "stigma plus" theory. The "stigma plus" doctrine "provides a remedy for government

defamation under federal constitutional law" in cases involving loss of reputation (the stigma) in addition to some other state-imposed deprivation of status or rights (the plus). *Sadallah v. City of Utica*, 383 F.3d 34, 38 (2d Cir. 2004). The Unions cannot demonstrate stigma or plus.

Stigma. Establishing stigma requires a plaintiff to identify a "statement 'sufficiently derogatory to injure his or her reputation, that is capable of being proved false, and that he or she claims is false.'" *Id.* The Unions' ability to satisfy any of this, however, is hampered by the startling breadth of their claims. They seek to enjoin misconduct and disciplinary records across several broad categories on behalf of tens of thousands of officers. Yet they do not even allege that any particular record contains false information or that its release will harm any actual officer. There are no real claims here—just fuzzy sketches of hypothetical claims, and even the sketches are legally deficient.

The fatal defect in the Unions' claims is that none of the records at issue is false, "a necessary element of a defamation cause of action," *Greenberg v. Spitzer*, 62 N.Y.S.3d 377, 383 (2d Dep't 2017). As the district court held, "Plaintiffs have made no showing that any record

that would be released by the City would inaccurately reflect the disciplinary or investigative process." SPA30. "This is not a case … where the defendants are uncritically publishing the allegations of misconduct made against officers as if these allegations were true." SPA30. These records all contain "a true statement as to the outcome of an investigation of that allegation." SPA30. This cannot be defamation as a matter of law. *See* N.Y. Civil Rights Law § 74 (immunizing "any person" against liability "for the publication of a fair and true report of any … official proceeding"); *Cummings v. City of N.Y.*, No. 19-cv-7723 (CM)(OTW), 2020 WL 882335, *16 (S.D.N.Y. Feb. 24, 2020) (applying statute).

The Unions first feign surprise at this result, suggesting "[t]here seemed to be no dispute below" as to falsity. UB33. There was. CPR argued that "Plaintiffs do not even *allege* that any particular record contains false information, let alone that each is false." JA1004.

Next, the Unions try variations on the theme that an "accusation of misconduct" alone is defamatory, even if accompanied by a true statement as to the disposition of any investigation. UB34-35. They cite no support for this. Instead, they selectively quote the proposition

that a statement is defamatory if "a reasonable listener could have concluded that the statement was conveying a fact ... that was susceptible of a defamatory connotation." *Greenberg*, 62 N.Y.S.3d at 389. They then hypothesize that a listener could conclude that an accurate record as to the disposition of a complaint was nevertheless conveying the underlying accusation as fact.

The very case the Unions cite, *Greenberg*, destroys their argument. The court there distinguished between an assertion that an individual "was *charged* with fraud," which is not defamatory, and a statement that "reasonably implied that the fraud charges ... had already been established," which can be. *Id.* at 388. The district court correctly found that, on this record, the misconduct and disciplinary records at issue fall into the former, non-defamatory category.

Plus. The district court also correctly found that the Unions showed no plus. SPA33-35. "[D]eleterious effects flowing directly from a sullied reputation, standing alone, do not constitute a 'plus' under the 'stigma plus' doctrine." *Sadallah*, 383 F.3d at 38 (cleaned up). Rather, any "loss of reputation" must be "coupled with some other tangible element," such as termination of government employment or

deprivation of property. *Id.* Yet the Unions point only to the vague and unsubstantiated claim (at 38) that disclosure of misconduct records will "create lasting burdens for the identified officers when they seek new employment" in some hypothetical future.

The cases cited by the Unions do not help them. *Valmonte v. Bane* makes clear that "the impact that defamation might have on job prospects" is "not by itself a deprivation of a liberty interest." 18 F.3d 992, 1001 (2d Cir. 1994). The plus in that case was the plaintiff's inclusion on a child abuse registry, which prospective employers "w[ould] be informed" of "by *operation of law*." *Id.* If the employers wished to hire her, they were then "required by law to explain the reasons why in writing." *Id.* There is no such legal impediment here.

The Unions also cite *Brandt v. Board of Cooperative Educational Services*, in which a teacher was fired for alleged sexual misconduct. 820 F.2d 41, 44 (2d Cir. 1987). The *firing* was the plus there. *Brandt* does reference a showing "that prospective employers are likely to gain access to [the plaintiff's] personnel file and decide not to hire him." *Id.* at 45. As *Valmonte* explains, however, that statement was about the "stigma requirement," not the plus. 18 F.3d at 1000 (quotation marks

omitted). And *Knox v. New York City Department of Education* involved both termination and an official recommendation that the plaintiff's inclusion on the New York City Board of Education's "Ineligible/Inquiry List" be considered for any future New York City public school position. 924 N.Y.S.2d 389, 389 (1st Dep't 2011).

2. The Unions' Article 78 claims are meritless.

Article 78 of New York's Civil Practice Law and Rules permits challenges to administrative agency action on the grounds that the action is "arbitrary and capricious" or "affected by an error of law." N.Y. C.P.L.R. § 7803(3). The Unions argue both, and on both they are wrong.

"Individualized review." The Unions first theory is that it was both an error of law and arbitrary and capricious for the City "to decide to release [records] without individualized and particularized review for safety and privacy concerns." UB44. There are at least three defects with this theory.

First, the Unions offer no support that this sort of claim exists. FOIL creates no individual private right to bar disclosure of records. And the Unions have not cited a single case in which a private party who opposes disclosure of records has secured that relief by challenging

an agency's *process* for applying FOIL. The Unions are thus asking this Court to recognize, for the first time, an entirely novel state-law right to line-edit an agency's FOIL procedures, while enjoining the operation of FOIL completely until the markup is complete.

Second, the Unions' argument is based largely on a disclosure that has already happened. The centerpiece of their claim is the CCRB's release of 81,000 "officer histories" to the New York Civil Liberties Union—in the form of a colorless spreadsheet, each line of which includes basic information like name, shield number, type of alleged misconduct, disposition, and so forth.[4] UB46. There is nothing irrational about treating the same types of information on consecutive lines of a spreadsheet in the same manner. But even if there were, the disclosure has already happened. There is nothing to enjoin. And as the Unions conceded to the district court, past "disclosures were

[4] This disclosure was the subject of a prior appeal to this Court concerning the Unions' attempt to enjoin NYCLU from further disclosure of records. This Court declined to issue an injunction pending appeal and the Unions withdrew the appeal. *See* Order and Opinion, *Uniformed Fire Officers Ass'n v. de Blasio*, No. 20-2400 (2d Cir. Aug. 20, 27, 2020), Dkts. 119, 148. NYCLU used the data to create a database and also makes the spreadsheet available. *See* New York Civil Liberties Union, NYPD Misconduct Complaint Database, https://tinyurl.com/y2z5t7zp (last visited Oct. 29, 2020).

immaterial to [the court's] analysis, except insofar as they were further indications of violations of [Plaintiffs'] rights." SPA12.

Third, the district court rejected the Unions' argument as a matter of fact. It found that the City "continue[s] to do a review of the records in response to FOIL requests to determine whether any of the other FOIL exemptions apply." SPA39-40. It went on to explain that "[i]n many cases that is done on an individualized basis; and with respect to certain officer reports, the protections are done at the outset with respect to the group of records that is produced." SPA40. So, far from some lawless "*carte blanch*," UB45, the City assesses particular types of records to determine the appropriate process for applying FOIL and its exemptions. The CCRB's Rule 30(b)(6) witness testified to just this. JA1643-46 ("[W]e do a case-by-case analysis of each FOIL request.").

The Unions invoke a snippet of deposition testimony from the same witness, which they argue supports the idea that the City in fact "ignore[s] … the specific exemptions in FOIL." UB45-46 (citing JA1654). All the witness said, though, was that the exemptions are "permissive"—meaning the government may, but need not assert them—while elsewhere explaining how and when the CCRB considers

and applies them. JA1654. The witness was correct on the law. *Cap. Newspapers Div. of Hearst Corp. v. Burns*, 496 N.E.2d 665, 668 (N.Y. 1986). And in any event, the district court did not clearly err by rejecting the Unions' tortured interpretation of an acontextual snippet of deposition testimony.

"Long-established position." The Unions' other argument is that it was "arbitrary and capricious for the City to change its long-established position of withholding unsubstantiated allegations on privacy grounds." UB48.

The Unions do not establish any "long-established" position. They glean from two cases, one in 2016 and one in 2017, in which the CCRB invoked FOIL's privacy exemption as to requests for records of unsubstantiated complaints, N.Y. Pub. Officers Law § 87(2)(b). At most, all that means is that the CCRB found that permissive exemption applicable in those cases and elected to exercise its discretion to deny access to records on that basis. These individual decisions do not somehow give rise to an Article 78 challenge in every case in which CCRB exercises its discretion differently. In any event, the district court found that "to the extent that other FOIL exemptions remain to

protect officers' privacy and safety rights, those rights still exist" and the City "continue[s] to do a review" for their application. SPA40.

Even if there had been a shift, moreover, it would simply "require explanation" for the different result. *In re Charles A. Field Delivery Serv., Inc.*, 488 N.E.2d 1223, 1228 (N.Y. 1985). The explanation here is obvious. The legislature's repeal of § 50-a signaled a policy shift toward more disclosure and transparency. Meanwhile, the legislature's enumeration of specific privacy-based redactions, *supra* 9, now further informs government agencies on what sorts of private information justifies nondisclosure. It is perfectly rational for the City to follow the legislature's lead.

3. The Unions' equal protection claims are meritless.

The Unions contend that release of misconduct records "violate[s] equal protection because it unreasonably treats law enforcement officers differently than similarly situated public employees." UB55. The Unions consume several pages discussing this claim, but at bottom they acknowledge that it is a rational basis claim, which means they have the burden "to negative every conceivable basis which might

support" the City's action. *Progressive Credit Union v. City of N.Y.*, 889 F.3d 40, 49 (2d Cir. 2018). They cannot come close.

The district court correctly concluded that law enforcement officers are not "similarly situated" to other public employees. SPA37. In so finding, the district echoed the findings of other courts that "[a] police officer occupies a unique position" for which "there must be in the eyes of … the public the greatest confidence in the integrity of the officer." *Baker v. Cawley*, 459 F. Supp. 1301, 1306 (S.D.N.Y. 1978), *aff'd*, 607 F.2d 994 (2d Cir. 1979). Given the "unique" position of police officers, they are not similarly situated to other public employees who do not "patrol the streets with firearms and are [not] authorized to use force under the aegis of state power." SPA37.

This and other rational bases for focusing on officer transparency abound in the record that was before both the district court and the legislature. It is not irrational to conclude that the officers who carry guns on public streets should be subject to the most transparency. The evidence shows, moreover, that police culture is so secretive that officers who witness misconduct rarely come forward. JA2084. So too it attests to the pressing need to rebuild trust between the NYPD and the

communities of New York City after years of secrecy. *Supra* 6-7. The City could rationally decide that its police department was more in need of reform than other departments. Or it could decide that, given the size of the NYPD, focusing attention on that agency first would yield the most rapid transparency gains overall. All of this is rational and the Unions negative none of it.

4. The Unions' breach of contract claims are meritless.

The Unions final claim is that "[t]he City's release of negotiated settlement agreements between police officers and NYPD would breach the confidentiality protection expected by the parties and afforded to those contracts by §50-a." UB51.

They first argue that the district court abused its discretion "in declining to reach the merits of the Unions' breach of contract claim based on a purported lack of evidentiary support." UB53. This is incorrect. The district court noted that "the plaintiffs have only provided ... the most cursory explanations of these purported settlement agreements" and did not "provide[] … a single example of a settlement agreement with the NYPD." SPA26-27. But the district court said this

only *after* spending several pages explaining why the Unions' claims could never succeed on the merits. SPA24-26.

As to the merits, the Unions contend that because § 50-a barred disclosure at the time the settlements were negotiated, an "expectation of nondisclosure was incorporated by operation of law as a 'valid applicable law existing at the time' the agreements were executed." UB51 (quoting 11 Williston on Contracts § 30:19 (4th ed. 2020)). This is incorrect.

To begin with, for the reasons discussed in connection with the CBA-based claims, a private agreement that conflicts with the government's obligations under FOIL is void. *Supra* § I.A; *infra* § III.B; *see* SPA24-25.

The Unions' incorporation-of-existing-law argument, moreover, is inapplicable here as this is no ordinary contract between private parties. The Unions seek to convert a law regulating government activity into a contractual provision against the government, and thus an implied right of action. In such circumstances, "the presumption is that a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall

ordain otherwise." *Nat'l R.R. Passenger Corp. v. Atchison Topeka and Santa Fe Ry. Co.*, 470 U.S. 451, 466 (1985) (internal quotation marks omitted). That is because "[p]olicies, unlike contracts, are inherently subject to revision and repeal, and to construe laws as contracts … would be to limit drastically the essential powers of a legislative body." *Id.* The principle holds even when a private party is otherwise in a contractual relationship with the government on related matters. *Id.; see Doe v. Pataki*, 481 F.3d 69, 78-79 (2d Cir. 2007).

Section 50-a's now-repealed language contained nothing suggesting a "private contractual arrangement." *Nat'l R.R. Passenger*, 470 U.S. at 467. Nor did § 50-a create a private right of action against the government. *Simpson v. N.Y.C. Transit Auth.*, 112 A.D.2d 89, 90 (1st Dep't 1985). It therefore could not have created a contractual promise in perpetuity that restricted the government's ability to effectively repeal the law. *See Gen. Motors Corp. v. Romein*, 503 U.S. 181, 188-90 (1992) (rejecting incorporation argument because ruling that "all state regulations are implied terms of every contract" would "severely limit the ability of state legislatures to amend their regulatory legislation").

C. The public interest and balance of hardships weigh heavily against injunctive relief.

Even if the Unions could overcome the district court's rulings on irreparable harm and the merits, the district court still correctly denied a preliminary injunction because the public interest vastly outweighs any claimed harms, tipping the balance of equities decidedly in favor of immediate disclosure of misconduct and disciplinary records. *See Winter*, 555 U.S. at 27 (holding that "the public interest factor" warrants "serious consideration" and finding injunctive relief inappropriate where public interest outweighed any harm).

The decision to repeal § 50-a "was not made haphazardly." SPA42. It was a legislative accomplishment years in the making. *Supra* 7-9. The legislature debated the repeal extensively, considering all of the arguments the Unions present here, before coming down decisively in favor of public access. *Supra* 8-9. The public is "entitled to the prompt execution of orders that the legislature has made final." *Nken v. Holder*, 556 U.S. 418, 427 (2009).

In addition to the clear legislative mandate, there is ample evidence in the record of the urgent public interest in transparency.

Prompt and full access to all misconduct and disciplinary records promotes accountability to the public. Law enforcement officers are entrusted with tremendous authority to deprive citizens of their liberty, property, and even their lives. Given the extraordinary power wielded by officers, the public has a strong interest in knowing the full misconduct histories of the officers with whom they interact daily and to whose authority they must submit. JA2188; JA2074. The public also has a deep interest in holding the City and law enforcement agencies accountable for effective and thorough investigation of misconduct and disciplinary infractions, which they cannot do without access to records. JA2140; JA2180. Past and future victims of misconduct, moreover, have an interest in discovering the history of the officers who victimized them. JA2147, 2150-51; JA2170.

Accountability and transparency also promote public trust, which ultimately benefits both the public and officers. JA2067; JA2074; JA2083; JA2154-55; JA2171-72. To "prevent and solve crime, officers need the community members to come forward [to] provide information regarding crimes they have witnessed. The community will only do that when they have trust in the police department." JA2065.

Transparency surrounding misconduct—and effective resolution of complaints—is key to public trust. "If members of the community feel that the police are not being open and transparent, those citizens themselves are less likely to be open and transparent." JA2065. Transparency and public trust are also critical to officer safety. "[A]n officer is most at risk when the community believes that the police department is shrouded in secrecy and working to hide misconduct." JA2067.

Finally, accountability and transparency promote development of sound policy. Productive dialogue on police policy requires "full, real time facts concerning past and present NYPD conduct." JA2172; JA2075. Sensible policy helps keep both officers and the communities they serve safe.

The district court expressly credited all of this. The court held that if an injunction were issued, the City "would be stymied and improperly so, in their efforts to comply with" the repeal of § 50-a. SPA42. The repeal of § 50-a was "designed to promote transparency and accountability, to improve relations between New York's law enforcement communities and their first-responders and the actual

communities of people that they serve, to aid law makers in arriving at policy-making decisions, to aid underserved elements of New York's population and ultimately, to better protect the officers themselves." SPA42-43. "To grant the injunctive relief sought on this record," the court held, "would subvert the intent of both the legislature and the electorate it serves." SPA43.

The Unions' strategy for responding to all this, here as in the district court, is to just ignore it. Because the Unions do not even attempt to argue that the district court erred in crediting or weighing the evidence on the public interest or balance of the hardships, the district court should be affirmed.

CROSS-APPEAL

III. The District Court Erred In Granting Injunctive Relief On § 8 Of The CBAs.

We now turn to CPR's cross-appeal from the district court's "very limited injunction" based on § 8 of the CBAs. SPA24. That provision reads (in relevant part):

> Where an employee has been charged with a "Schedule A" violation as listed in Patrol Guide 118-2 and such case is heard in the Trial Room and disposition of the charge at trial or on review therefrom is other than "guilty," the employee concerned may, after 2 years from such disposition, petition

> the Police Commissioner for a review for the purpose of expunging the record of the case.

JA2327.[5] The district court granted an injunction over any records that "have been, are currently, or could be" the subject of such an expungement request. SPA24.

This was error. As a threshold matter, CPR, as intervenor, has standing to bring this cross-appeal. *Infra* § A. On the merits, the § 8 injunction should be reversed because, as explained with respect to § 7(c), any agreement between the City and the Unions to circumvent FOIL is per se ineffective, leaving the Unions unlikely to succeed in arbitration. *Infra* § B.

A. CPR has standing to appeal the district court's grant of preliminary relief on § 8.

Because CPR is an intervenor-defendant in this case, and because the City has opted not to appeal the § 8 injunction, CPR must have standing under Article III to pursue an appeal. *See Schulz v. Williams*, 44 F.3d 48, 52 (2d Cir. 1994). "To maintain standing, the intervenor

[5] Although there is no record on the contents of Schedule A, a recently released document from NYPD, entitled "Disciplinary System Penalty Guidelines," includes Command Discipline schedules listing Schedule A violations. *See* https://tinyurl.com/y6jeygjt.

must satisfy the well-established requisites of Article III." *Id.* at 52. This requires a showing of (1) injury-in-fact; (2) that is fairly traceable to the challenged action; and (3) that is redressable by the relief requested. *Id.*

In the case of an intervenor-defendant, claimed injury typically flows from the relief the plaintiff seeks from the litigation. *E.g.*, *id.*; *Military Toxics Project v. E.P.A.*, 146 F.3d 948, 954 (D.C. Cir. 1998) (noting intervenor "would suffer concrete injury if the Court grants the relief"). As a result, the analysis tends to turn on the injury-in-fact requirement; if the relief requested by the plaintiff constitutes injury-in-fact, that injury will of course be "traceable" to the plaintiff who brought the case, and defeating the plaintiff will "redress" the injury. *Crossroads Grassroots Pol'y Strategies v. Fed. Elec. Comm'n*, 788 F.3d 312, 316 (D.C. Cir. 2015) (explaining that if the intervenor-defendant "can prove injury, then it can establish causation and redressability").

The relief the Unions seek injures CPR in at least two basic ways, as established by declarations submitted before the district court in support of CPR's motion to intervene, JA930-61, and the declaration

appended to this brief supporting standing for purposes of this appeal, Add.1-8.[6]

First, the relief the Unions have sought and—when it comes to § 8—obtained has resulted in the improper withholding of records CPR has a legal right to access under FOIL. As indicated in CPR's notice of cross-appeal, JA2490, CPR has currently pending requests under FOIL for records that the Unions are seeking to enjoin from release. JA935-36; Add.5-6. Two such requests seek disclosure from the NYPD and CCRB for, among other things, records pertaining to complaints categorized under Schedule A command discipline. Add.6. These records are covered by the § 8 injunction.

In response to CPR's request, the NYPD has indicated that it is "prohibit[ed]" from release of any records until the "resolution of" this case. Add.7. The Unions' case has therefore resulted in the improper

[6] In evaluating Article III standing for a defendant-intervenor, this Court has previously looked to the full record before the district court. *Schulz*, 44 F.3d at 53 n.4. And where, as here, Article III standing is not required until appeal, parties may "supplement the record," "establish[ing] standing by the submission of [their] arguments and any affidavits or other evidence appurtenant thereto at the first appropriate point"—which, in the absence of a motion to dismiss the appeal, is the "opening brief." *Sierra Club v. E.P.A.*, 292 F.3d 895, 900 (D.C. Cir. 2002).

withholding of documents to which CPR is legally entitled. It also threatens to interfere with CPR's future intended exercise of FOIL rights. JA935-36. This injury is the basis for most any ordinary FOIA case in federal court. *E.g.*, *Hajro v. U.S. Citizenship and Immigr. Servs.*, 811 F.3d 1086, 1103 (9th Cir. 2016).

Second, and independently, the relief the Unions seek will directly injure CPR's pursuit of its organizational mission by imposing barriers to ready, inexpensive public access to police disciplinary and misconduct records. CPR's mission is "to end discriminatory and abusive policing, and … to build a lasting movement that advances community safety and reduces reliance on policing in New York." JA931. It seeks transparency as an end in itself and also depends on ready public access to records in order to pursue reform. JA931, JA935. The Unions' lawsuit would thwart such access, interfering with CPR's goals and raising the costs of CPR's operations. JA934-35. Such injuries are a settled basis for standing. *E.g.*, *Centro de la Comunidad Hispana de Locust Valley v. Town of Oyster Bay*, 868 F.3d 104, 110 (2d Cir. 2017) ("diver[sion]" of resources and harm to ability to organize); *cf. Bryant v.*

Yellen, 447 U.S. 352, 367-68 (1980) (harm to market flowing from improper interpretation of law).

Each of the above injuries is traceable to the Unions and their requested relief. Each will be redressed by a favorable outcome in the appeal, cross-appeal, and the lawsuit generally. CPR's appeal is therefore properly before the Court.

B. As with the § 7(c) claim, the § 8 claim is unlikely to succeed because government agencies and private parties cannot contract around FOIL.

For reasons explained in connection with § 7(c), this Court should reverse the grant of injunctive relief on the § 8 claim. As with § 7(c), the Unions argue that § 8 is a bar to disclosure of any records covered by that provision. As with § 7(c), they have asked the arbitrator to bar "release[e] [of] any information to the public" of any records under § 8, JA2350, including by "production in response to a Freedom of Information Demand," JA2340. And so as with § 7(c), even if § 8 were susceptible of the Unions' desired interpretation, it would be a legally ineffective attempt to contract around the City's duties and the public's

rights under FOIL.[7] The relief the Unions request is therefore legally impermissible and beyond the power of an arbitrator to grant. *See supra* § I.A.

The district court's contrary decision was error. The court "considered arguments … that [it] would be contrary to public policy to permit the CBAs—to permit plaintiffs through the CBAs—to block public access to certain records." SPA23. But it misunderstood the meaning of "contrary to public policy" in this legal context. The court thought its task was to conduct a balancing between "the public interest" in disclosure of the records described in § 8 and "the union's contractual rights." SPA23. In other words, it treated the analysis like the "balance of the hardships" and "public interest" components of the preliminary injunction standard—which were, naturally, top-of-mind for the district court in otherwise assessing the appropriateness of preliminary relief.

[7] In light of the highly deferential standard of review in an appeal from a preliminary injunction, CPR does not challenge the district court's analysis of the language of § 8 or its factual suppositions concerning its coverage. CPR reserves the right to raise any defenses or arguments in due course.

That is not the nature of the "public policy" doctrine at issue here. In this context, "public policy" refers to a legal prohibition separate from the parties' (alleged) bargain and the contract law that otherwise governs it. *See 159 MP Corp. v. Redbridge Bedford, LLC*, 128 N.E.3d 128, 133 n.4 (N.Y. 2019) (public policy means "the law of the State, whether found in the Constitution, statutes or decisions of the courts"). Public policy prohibitions can emanate from different sources. *Id.* at 133-35. But where the source of the public policy prohibition is a conflict between the agreement and positive law—like an agreement that conflicts with statutory FOIL obligations—there is no need to conduct "a search for the equitable outcomes of a particular case." *Id.* at 135 n.5. An agreement that transgresses that sort of public policy is simply void.[8]

[8] In comparison, an equitable balancing *is* appropriate when evaluating contractual provisions that are arguably in tension with public policies located in *non*-mandatory statutory commands—for example, a sophisticated commercial tenant's agreement to waive its right to bring a declaratory judgment action. *159 MP Corp.*, 128 N.E.3d at 133. An agreement that abdicates a government entity's mandatory statutory duty while selling out the public's unqualified rights under FOIL is different in kind. *Id.* at 135 (distinguishing agreements that "involve illegal activity").

Simply put, any agreement that has the effect of undermining the government's FOIL obligations and the public's FOIL rights is categorically unenforceable. To hold otherwise is to permit the government and private parties to negotiate ad hoc, non-statutory FOIL exemptions. Because settled law holds this impermissible, the district court erred in finding that the Unions have some chance of success in "the arbitration process." SPA23; *In re Sprinzen*, 389 N.E.2d at 459 ("[A]n [arbitral] award which is violative of public policy will not be permitted to stand.").

Although the district court seemed to think the records covered by § 8 were relatively unimportant, there is no question that they are covered by FOIL. The City is therefore no less required to grant public access to these records than to any others. And more fundamentally, the larger question of whether unions can wield their immense power to extract promises of secrecy in their CBAs is just as salient with respect to these records as it is for any others. In repealing § 50-a, the legislature elected to make all police disciplinary and misconduct records presumptively public. If the Unions dislike that result, their appeal must be to the legislature.

CONCLUSION

The district court's decision should be affirmed insofar as the district court denied injunctive relief. The district court's decision should be reversed insofar as it granted injunctive relief as to § 8 of the CBAs.

October 29, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Second Circuit Local Rule 28.1.1(b) because this brief contains 14080 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in Century Schoolbook 14-point font.

Dated: October 29, 2020

ORRICK, HERRINGTON & SUTCLIFFE LLP

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DECLARATION OF JOO-HYUN KANG IN SUPPORT OF APPELLEE-CROSS-APPELLANT COMMUNITIES UNITED FOR POLICE REFORM'S CROSS APPEAL

I, Joo-Hyun Kang, declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the following is true and correct:

1. I submit this sworn declaration in support of Communities United for Police Reform's (CPR's) cross-appeal. I have personal knowledge of the facts contained in this declaration, and, if called as a witness, I am competent to testify to those facts, except as to matters expressly stated upon opinion and belief. As to those, I believe them to be true.

2. I am CPR's Director, a position that I have held since 2012.

3. CPR is a non-partisan, multi-strategy organization and campaign to end discriminatory and abusive policing and build a lasting movement that advances community safety and reduces reliance on policing in New York. CPR's work includes stakeholders from all five New York City boroughs and all walks of life, with particular focus on low-income communities of color, who are most impacted by abusive policing policies.

4. In my role as Director, I oversee the coordination of the planning and implementation of CPR's strategies (including community organizing, policy advocacy, legal, public education, civic engagement, strategic communications, and research) to advance CPR's mission; represent CPR in meetings with elected officials; serve as one of CPR's media spokespeople; and meet with members of communities impacted by discriminatory and abusive police practices.

5. CPR's principal goals include police transparency and accountability and it has consistently sought to ensure that itself, its stakeholders, and the community members it serves have meaningful access to information and records relating to NYPD's policing practices.

6. CPR sought (and was granted) intervenor status in this case before the district court in order to protect its interests. As explained in my declaration in support of CPR's motion to intervene as well as the brief in support of intervention, JA930-39, JA861-891, the relief sought by the Unions directly threatens CPR's exercise of its rights to access records under New York's Freedom of Information Law (FOIL), hampers CPR's ability to accomplish its organizational mission, and

seeks to undermine legislative accomplishments towards which CPR's advocacy was vital.

7. On August 21, 2020, the district court granted injunctive relief over disclosure of "records of 'Schedule A' command discipline violations, for cases heard in the Trial Room, and for which the disposition of the charge at trial or on review or appeal therefrom is other than 'guilty,' which records have been, are currently, or could in the future be the subject of a request to expunge the record of the case pursuant to §8, for those officers covered by the Police Benevolent Association, Sergeants Benevolent Association, and Lieutenants Benevolent Association collective bargaining agreements." SPA24. For reasons explained in both CPR's motion and declarations in support of intervention in the district court and additional reasons explained below, this injunctive relief as well as the broader injunctive relief the Unions continue to seek through their own appeal directly injures CPR.

8. CPR regularly exercises its legal rights, including rights under FOIL, to obtain access to information and records necessary for the fulfillment of CPR's mission, including police misconduct and disciplinary records and related information.

9. The relief requested and obtained by the Unions has resulted in and continues to result in the improper denial of access to records that CPR has a legal right to under FOIL. The injunctive relief granted by the district court, which is the subject of CPR's cross-appeal, has directly interfered with two of CPR's currently pending FOIL requests.

10. On June 18, 2020, the New York City Council passed Int. 1309-B, which the Mayor signed as Local Law 69 on July 15, 2020. Local Law 69 requires the NYPD to develop and publicly post an internal disciplinary matrix that would set forth a schedule of violations and penalties to be imposed in response to violations of NYPD rules of conduct committed by members of NYPD. The law also requires the NYPD to report the number of times the NYPD Commissioner deviates from the matrix.

11. On August 31, 2020, pursuant to Local Law 69, NYPD released for public comment a "Discipline Matrix," which purports to "give[] an overview of the goals of internal discipline, define[] the presumptive penalties for specific acts of substantiated misconduct by officers, and outline[] potential aggravating and mitigating factors that

may be considered when assessing a disciplinary penalty." *See* https://on.nyc.gov/2HlE2rb. The Discipline Matrix, in part, references "technical violations," which under the Matrix can be address by "instruction" or "through discipline imposed at the command level, called 'Command Discipline.'" The Matrix also references "Schedule A," "Schedule B," and "Schedule C" violations, ostensibly categorizing violations that are subject to Command Discipline. Among the types of violations listed in Schedules A and B are indefinite categories for "minor" violations that "in the opinion of" NYPD, CCRB, or a commanding/executive officer are "appropriate" for treatment under those schedules.

12. The Discipline Matrix provides no data, guidance, or information concerning how Schedules A, B, or C are applied in practice. This information is essential to understanding how the misconduct and disciplinary system operates, providing meaningful public comment, and advocating for any reform needed.

13. On September 18, 2020, CPR, through counsel, submitted two FOIL requests, one to the Civilian Complaint Review Board (CCRB) and an identical request to the NYPD. CPR requested:

> Law enforcement misconduct or disciplinary records, as defined in N.Y. Pub. Officers Law § 86(6), in your possession ... without regard to whether any underlying proceeding is pending or final, pertaining to
>
> (a) Any incident, allegation, or complaint for which any part of the misconduct is or has been categorized, adjudicated, disciplined, or otherwise treated at any time and for any purpose as falling within Schedule A Command Discipline;
>
> (b) Any incident, allegation, or complaint for which any part of the misconduct is or has been categorized, adjudicated, disciplined, or otherwise treated at any time and for any purpose as falling within Schedule B Command Discipline; and
>
> (c) Any incident, allegation, or complaint for which any part of the misconduct is or has been categorized, adjudicated, disciplined, or otherwise treated at any time and for any purpose as falling within Schedule C Command Discipline."

See **Exhibit A** (CPR's FOIL request).

14. This request seeks access to records falling into categories over which the Unions seek injunctive relief, including both the categories as to which the district court denied injunctive relief (at issue in the Unions' appeal) and the narrow category as to which the district court granted relief (at issue in CPR's cross-appeal).

15. On September 28, 2020, CCRB acknowledged receipt of CPR's requested and stated that CPR could expect a response on or about February 9, 2021.

16. On September 22, 2020, NYPD denied CPR's request on the basis that the request was "too broad in nature." On October 22, 2020, CPR, through counsel, appealed the denial. *See* **Exhibit B** (CPR's FOIL appeal).

17. On October 23, 2020, NYPD granted CPR's appeal and remanded its request to the Records Access Officer for further searching for the requested records. In NYPD's appeal determination, it stated that "as it pertains to the release of disciplinary records maintained by this agency, a stay has been ordered by the 2nd Circuit, pending an appeal, which prohibits the release of any such records." *See* **Exhibit** C (CPR's FOIL appeal determination). NYPD's Records Access Appeal Officer indicated "that a determination will be issued by the RAO following resolution of the pending matter." *Id.*

18. Thus, as a direct result of the Unions' lawsuit and the relief they seek and have obtained, CPR has been denied access to records responsive to its pending FOIL requests—records to which it is legally entitled. And if the Unions are able to secure the broad permanent injunction they are seeking, that relief will inevitably result in future

similar injury to CPR's rights and its ability to pursue its organizational mission.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 28th day of October, 2020 in New York, New York.

Respectfully Submitted,

Joo-Hyun Kang

EXHIBIT A

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September 18, 2020

Records Access Officer ("RAO")
NYPD FOIL Unit
1 Police Plaza, Room 110 C
New York, New York 10038

Records Access Officer ("RAO")
Civilian Complaint Review Board
100 Church Street, 10th Floor
New York, NY 10007

Re: *Freedom of Information Law Request*

Dear Records Access Officer:

I make this request pursuant to the New York State Freedom of Information Law ("FOIL"), Article 6, Sections 84-90 of the Public Officers Law, and its implementing regulations, Chapter 21 of the New York Code of Rules and Regulations ("NYCRR") Part 1401, as well as the Uniform Rules and Regulations for All City Agencies Pertaining to the Administration of the Freedom of Information Law, Title 43, Rules of the City of New York ("RCNY"), Chapter 1 (the "Uniform Rules") on behalf of Communities United or Police Reform ("CPR") (hereinafter the "Requester").

BACKGROUND

On June 12, 2020, New York repealed in its entirety N.Y. C.R.L. § 50-a, a provision that blocked public access to officer misconduct and disciplinary records. The law that repealed § 50-a also amended FOIL to include certain narrow bases for permissive or mandatory exemption from disclosure. One such amendment permits redaction of "records pertaining to 'technical infractions'" *id.* § 89(2-c), defined as "a minor rule violation by a person employed by a law enforcement agency … solely related to the enforcement of administrative departmental rules that (a) do not involve interactions with members of the public, (b) are not of public concern, and (c) are not otherwise connected to such person's investigative, enforcement, training, supervision, or reporting responsibilities," *id.* § 86(9).

On August 31, 2020, the NYPD released for public comment a "Discipline Matrix," which purports to "give[] an overview of the goals of internal discipline, define[] the

presumptive penalties for specific acts of substantiated misconduct by officers, and outline[] potential aggravating and mitigating factors that may be considered when assessing a disciplinary penalty." *See* https://on.nyc.gov/2ZPHLDe. Among other things, the Discipline Matrix references "technical violations" and states that they can be addressed by "instruction" or "through discipline imposed at the command level, called 'Command Discipline.'" *Id.* In turn, the Discipline Matrix refers to Patrol Guide procedure 206-03, which lists the violations ostensibly subject to Command Discipline in three "Schedules" labeled A, B, and C. Among the types of violations listed in Schedules A and B are indefinite categories for "minor" violations that "in the opinion of" NYPD, CCRB, or a commanding/executive officer (as relevant) are "appropriate" for treatment under those schedules.

The Discipline Matrix provides no data, guidance, or information concerning how these Schedules have been or will be applied in practice. Nor is it presently clear whether and to what extent NYPD or CCRB regard misconduct subject to Command Discipline as falling within any exemption under FOIL—for example, whether such infractions could ever fall within the definition in N.Y. Pub. Officers Law § 86(9), reprinted above.

Reform organizations, elected officials, and members of the public (including those who have been harmed or affected by police misconduct) have a deep interest in transparency into the above topics, as specifically recognized by Local Law 69 of 2020,[1] which required the NYPD to release a draft Discipline Matrix for public comment, and ultimately to publish a final Discipline Matrix. Such transparency is essential to accountability in department and officer performance, the functioning of the oversight, misconduct, and disciplinary systems, and the safety and security of the community.

RECORDS SOUGHT

The Requesters hereby seek access to the following records for the time period beginning on January 1, 2014 (or the earliest possible date after that for which records are available) up to the date on which the request is fulfilled.

Law enforcement misconduct or disciplinary records, as defined in N.Y. Pub. Officers Law § 86(6), in your possession—including, but not limited to, complaints, allegations, and charges against an officer; Supervisor Complaint Reports; Command Discipline Reports; Command Discipline Election Reports; Charges and Specifications; written

[1] Int 1309-B was passed by the New York City Council on June 18, 2020 and signed as Local Law 69 by the Mayor on July 15, 2020. Text of the law can be found at https://on.nyc.gov/33EyLC6.

opinions or other documents, final or otherwise, concerning the disposition of any agency misconduct or discipline review process, disciplinary decision, or other aspect of any investigation or disciplinary proceeding, including NYPD requests for CCRB reconsideration or dismissal of allegations; and a report from the Citywide Command Discipline System (or equivalent database), containing data on complaints, allegations, charges, officer name, officer rank, and officer command, investigation disposition or reason for termination of the investigation, and result of any disciplinary proceedings, or equivalents of any such record or report enumerated—without regard to whether any underlying proceeding is pending or final, pertaining to:

a. Any incident, allegation, or complaint for which any part of the misconduct is or has been categorized, adjudicated, disciplined, or otherwise treated at any time and for any purpose as falling within Schedule A Command Discipline;

b. Any incident, allegation, or complaint for which any part of the misconduct is or has been categorized, adjudicated, disciplined, or otherwise treated at any time and for any purpose as falling within Schedule B Command Discipline; and

c. Any incident, allegation, or complaint for which any part of the misconduct is or has been categorized, adjudicated, disciplined, or otherwise treated at any time and for any purpose as falling within Schedule C Command Discipline.

For the avoidance of doubt, the request above is inclusive of requested records pertaining to any incident in which any part of the incident relates to Command Discipline, including records concerning incident allegations (regardless of allegation finding) that involve or were alleged to involve misconduct not subjected to Command Discipline (for example, "FADO" complaints, sexual misconduct complaints, alleged violations of the 2017 Right to Know Laws, or other alleged misconduct).

CONCLUSION

The records sought are reasonably described above. If you disagree and find that the records requested are not reasonably described, please contact me as soon as possible to begin the process of assisting me in identifying the requested records and, if necessary, in re-formulating the request "in a manner that will enable the agency to identify the records sought", including by identifying to me "the manner in which the records" sought "are filed, retrieved or generated." *See, e.g.*, 21 NYCRR 1401.2(b)(2); 43 RCNY 1-03(b); and 43 RCNY 1-05(c)(3).

Please respond to this request by e-mail to rkathawala@orrick.com.

Please provide digital/electronic versions of responsive documents, preferably in .PDF format.

Please treat each individual request contained herein as severable from the others and provide responsive records on a rolling basis.

Please notify me in advance if any associated fees are expected to exceed $100.

I look forward to your first response to this request within five business days.

Should you deny any portion of this request based on a determination that you are legally exempt from the disclosure requirement with respect to a particular document, please provide me with a written explanation specifically citing the category in Public Officers Law § 87(2) or § 89(2-b), (2-c) into which you allege that each document allegedly exempt from disclosure falls.

Please articulate particularized and specific justifications for withholding any documents from disclosure.

Additionally, please provide me with the name, e-mail address, mailing address, and facsimile number of the person or body to whom I should direct an administrative appeal of any such potential denial.

Thank you for your prompt attention to this matter.

Very truly yours,

/s/ Rene Kathawala

Rene Kathawala

EXHIBIT B

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October 22, 2020

FOIL Appeals Officer
NYPD FOIL Unit
1 Police Plaza, Room 110 C
New York, New York 10038
foilappeals@nypd.org

By email

Re: Administrative Appeal – FOIL Request No. 2020-056-13891

Dear FOIL Appeals Officer:

I represent Communities United for Police Reform (the "Requester").

On September 18, 2020, the Requester filed the above-captioned request pursuant to the Freedom of Information Law (FOIL) sent electronically to the New York City Police Department (NYPD) through the OpenRecords portal. The Requester sought access to the following records for the time period beginning on January 1, 2014 (or the earliest possible date after that for which records are available) up to the date on which the request is fulfilled:

> Law enforcement misconduct or disciplinary records, as defined in N.Y. Pub. Officers Law § 86(6), in your possession—including, but not limited to, complaints, allegations, and charges against an officer; Supervisor Complaint Reports; Command Discipline Reports; Command Discipline Election Reports; Charges and Specifications; written opinions or other documents, final or otherwise, concerning the disposition of any agency misconduct or discipline review process, disciplinary decision, or other aspect of any investigation or disciplinary proceeding, including NYPD requests for CCRB reconsideration or dismissal of allegations; and a report from the Citywide Command Discipline System (or equivalent database), containing data on complaints, allegations, charges, officer name, officer rank, and officer command, investigation disposition or reason for termination of the investigation, and result of any disciplinary proceedings, or equivalents of any such record or report enumerated—without regard to whether any underlying proceeding is pending or final, pertaining to:
>
> a. Any incident, allegation, or complaint for which any part of the misconduct is or has been categorized, adjudicated, disciplined, or otherwise treated at any time and for any purpose as falling within Schedule A Command Discipline;

b. Any incident, allegation, or complaint for which any part of the misconduct is or has been categorized, adjudicated, disciplined, or otherwise treated at any time and for any purpose as falling within Schedule B Command Discipline; and

c. Any incident, allegation, or complaint for which any part of the misconduct is or has been categorized, adjudicated, disciplined, or otherwise treated at any time and for any purpose as falling within Schedule C Command Discipline.

For the avoidance of doubt, the request above is inclusive of requested records pertaining to any incident in which any part of the incident relates to Command Discipline, including records concerning incident allegations (regardless of allegation finding) that involve or were alleged to involve misconduct not subjected to Command Discipline (for example, "FADO" complaints, sexual misconduct complaints, alleged violations of the 2017 Right to Know Laws, or other alleged misconduct).

On September 22, 2020, the Records Request Officer denied the Request by e-mail stating in full:

> In regard to the document(s) which you requested, I must deny access to the records on the basis that your request is too broad in nature and does not describe a specific document.

I now submit this appeal of the NYPD's denial of the Request.

GROUNDS FOR APPEAL

The Requester appeals from the blanket denial of the request because the basis for the denial is contrary to established law; violates applicable regulations concerning an agency's obligations in responding to FOIL requests; and is arbitrary and capricious.

To begin with, the Records Request Officer's one-sentence denial is improper because it fails even to state any legitimate basis for denying the request. Although it calls the request "too broad in nature," it cites no requirement in statute, regulation, rule, or other source of law concerning the appropriate breadth of the "nature" of a request. It then claims that the request—although purportedly asking for a set of records "too broad in nature"—somehow simultaneously does not identify any "specific document." Again, there is no indication of any statute, regulation, rule, or otherwise relied upon for this "specific document" requirement, nor any guidance as to what it may require. The denial thus fails to satisfy the statutory requirement that an agency "fully explain in writing … the reason for the denial of access." Pub. Officers Law § 89(4)(c).

Not only does the denial of the FOIL request fail to articulate any recognized basis for denying the request, the bases listed are flatly contrary to established law and plainly wrong from the face of the Request. As to the "too broad in nature" rationale, FOIL flatly states that "[a]n agency shall not deny a request on the basis that the request is voluminous or that locating or reviewing the requested records or providing the requested copies is burdensome." Public Officers Law § 89(3)(a). FOIL thus plainly contemplates that requesters will seek access to many records in a single request, and plainly forecloses a blanket denial bases solely on the size, breadth, or volume of that request.

Relatedly, FOIL does not require each request to be limited to a single topic or subject, let alone "a specific document." Again, it contemplates requests for numerous documents, so long as the request is "reasonably described," *id.* § 89(3)—a requirement that the Records Request Officer does not even invoke. The Court of Appeals, moreover, has made clear that a requester may "reasonably describe" groups of documents in a categorical way—for example, by requesting "any and all" records on a particular subject or subjects. *Konigsberg v. Coughlin*, 68 N.Y.2d 245, 247 (1986). The request at issue here does just that, while also detailing specific types of documents on specific topics. For example, while it seeks all "[l]aw enforcement and disciplinary records" on the three Command Discipline schedules, it also specifically enumerates (among other things) "Command Discipline Reports," "Command Discipline Election Reports," "Charges and Specifications," and "a report from the Citywide Command Discipline System (or equivalent database)." Those are all "specific documents." The Records Request Officer does not suggest that responsive documents do not exist. And as explained, the fact that the request seeks access to many specific documents is not a legal basis for denying a request.

Even if the Records Request Officer had believed that the records were not "reasonably described" under § 89(3)(a)—which it did not do—that decision would be arbitrary and capricious. It is the agency's burden to establish that the description of records is "insufficient for purposes of enabling it to locate and identify the documents sought." *Konigsberg*, 68 N.Y.2d at 247. That the set of documents requested is "broad in nature" does not mean that the documents cannot be located and identified. And there is nothing vague about a reticulated request for particular types of records, during a particular time period, on a set of defined subjects.

Finally, in all events, if the Records Request Officer believed that the records sought were not "reasonably described," it had a mandatory obligation to inform the Requester and provide assistance in reformulating the request. The City of New York's own regulations require just that. An agency must provide "direction, to the extent possible, that would enable [a requester] to request records reasonably described[,]" 21 NYCRR § 1401.5(c)(1), and must "assist" them in "identify[ing] the records sought, if necessary, and when appropriate, indicate the manner in

which the records are filed, retrieved or generated to assist persons in reasonably describing records[,]" 21 NYCRR § 1401.2(b)(2); *see also* 43 RCNY § 1-03(b) (requiring an agency to "assist members of the public in identifying requested records"). If the agency believes that a request does not reasonably describe records, the Records Request Officer "shall notify the requesting party in writing . . . stating the reasons why the request does not meet the requirement of this section and *extending to the requesting party an opportunity to confer with the records access officer* in order to attempt to reformulate the request in a manner that will enable the agency to identify the records sought" 43 RCNY § 1-05(c)(3) (emphasis added). It must also "[c]ontact persons seeking records when a request is voluminous or when locating the records sought involves substantial effort, so that agency personnel may ascertain the nature of records of primary interest and attempt to reasonably reduce the volume of the records requested." 21 NYCRR § 1401.2(b)(3).

In its request, the Requester specifically cited the above regulations and requested the assistance guaranteed by law in the event the Records Request Officer believed that the records were not "reasonably described." The Requester can only assume that the Records Request Officer did not so find, because it did not say so, did not cite § 89(3)(a), and did not follow mandatory regulations for use when a request is denied on this ground. But in the event this was (or will be) the intended basis for the denial, an agency's failure to follow its own regulations is contrary to law, arbitrary and capricious, and therefore unreasonable—yet another reason the denial is flatly improper.

CONCLUSION

Because the Records Request Officer stated no legitimate grounds for denying the request, the records requested should be produced.

At a minimum, if the agency maintains that the records requested are not reasonably described, it must contact counsel as soon as possible to begin the process of assisting the requester in identifying the requested records and, if necessary, in re-formulating the request "in a manner that will enable the agency to identify the records sought," including by identifying to "the manner in which the records" sought "are filed, retrieved or generated." *See, e.g.*, 21 NYCRR § 1401.2(b)(2); 43 RCNY § 1-03(b); 43 RCNY § 1-05(c)(3).

I look forward to NYPD's prompt and complete response to this appeal within ten business days as is required by FOIL § 89(4)(a). Please respond to this request by e-mail to rkathawala@orrick.com.

Please note that failure to determine this appeal by then "by granting access to the records sought or fully explaining the reasons for further denial in writing shall constitute a denial of the appeal" under 21 NYCRR § 1401.7(f); *see also* 21 NYCRR § 1401.5(e).

Thank you for your attention to this matter.

Very truly yours,

/s/Rene A. Kathawala

Rene A. Kathawala

cc: Committee on Open Government
New York State Department of State
41 State Street
Albany, New York 12231

EXHIBIT C

POLICE DEPARTMENT
Office of Deputy Commissioner,
Legal Matters
One Police Plaza, Room 1406A
New York, New York 10038
FOILAppeals@NYPD.org

October 23, 2020

Rene A. Kathawala
Orrick, Herrington & Sutcliffe, LLP
rkathawala@orrick.com

RE: FREEDOM OF INFORMATION LAW
REQUEST: FOIL-2020-056-13891
Re: Disciplinary Records

Dear Sir or Madam:

This letter is in response to your email dated October 22, 2020, appealing the determination of the Records Access Officer made on September 22, 2020 regarding records requested from the New York City Police Department. Your request, pursuant to the Freedom of Information Law, was originally received by the FOIL unit on September 18, 2020 and subsequently denied by the RAO.

This letter is meant to inform you that the appeal has been granted to the extent that it has been remanded back to the Records Access Officer for a further search to be conducted for the requested records. Furthermore, please note that as it pertains to the release of disciplinary records maintained by this agency, a stay has been ordered by the 2nd Circuit, pending an appeal, which prohibits the release of any such records. Accordingly, I estimate that a determination will be issued by the RAO following the resolution of the pending matter.

Respectfully,

Jordan S. Mazur
Sergeant
Records Access Appeals Officer

c: Committee on Open Government