

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK**

-----X

In the matter of : Index No. _____

YOAV GONEN and

THE CITY REPORT, INC.,

Petitioners, :

For a Judgment Pursuant to Article 78 :

of the Civil Practice Law and Rules :

-against- :

NEW YORK CITY POLICE DEPARMENT, :

,

Respondent. :

-----X

MEMORANDUM OF LAW IN SUPPORT OF VERIFIED PETITION

Heather E. Murray
 Cornell Law School
 First Amendment Clinic
 Myron Taylor Hall
 Ithaca, New York 14853
 (607) 255-8518

*Counsel for Yoav Gonen and The
 City Report, Inc.*

TABLE OF CONTENTS

PRELIMINARY STATEMENT..... 1

BACKGROUND AND PROCEDURAL HISTORY.....3

The Voided Arrest.....3

The City’s FOIL Request.....5

ARGUMENT.....6

I. CPL § 160.50 DOES NOT BAR RELEASE OF THESE RECORDS.....7

 A. CPL § 160.50 Does Not Extend To Investigative Records Concerning a Party That Was Not an Exonerated Defendant.....7

II. PERSONAL PRIVACY EXEMPTION DOES NOT APPLY TO BAR ACCESS TO THE RECORDS.....11

III. THE LAW ENFORCEMENT EXEMPTION DOES NOT APPLY TO SHIELD THE RECORDS13

 A. Respondents Fail To Establish That The Requested Records Relate to an Ongoing Investigation or Judicial Proceeding13

 B. Respondent Fails To Establish That Releasing Records Would Amount to Interference...14

IV. THE COURT SHOULD AWARD PETITIONERS ATTORNEY’S FEES AND LITIGATION COSTS.....17

CONCLUSION.....18

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Capital Newspapers, Div. of Hearst Corp. v. Burns</i> , 67 N.Y.2d 562 (1986)	6
<i>Capital Newspapers, Div. of Hearst Corp. v. Whalen</i> , 69 N.Y.2d 246 (1987)	6
<i>City of Elmira v. Doe</i> , 11 N.Y.3d 799 (2008)	8
<i>City of Elmira v. Doe</i> , 39 A.D.3d 942 (3d Dep't 2007), <i>aff'd</i> , 897 N.E.2d 1049 (2008).....	10
<i>Cobado v. Benziger</i> , 163 A.D.3d 1103 (3d Dep't 2018)	17
<i>Council of Regulated Adult Liquor Licensees v. City of New York Police Dep't</i> , 300 A.D.2d 17, (1st Dep't 2002).....	16
<i>Dioso Faustino Freedom of Info. L. Request v. New York City</i> , 142 N.Y.S.3d 502 (1st Dep't 2021).....	15
<i>Doe v. Dist. Att'y of Cnty. of Nassau</i> , 166 Misc. 2d 188 (Sup. Ct., Nassau Cty. 1995).....	9
<i>Fink v. Lefkowitz</i> , 476 N.Y.2d 567 (1979)	7, 15
<i>Friedman v. Rice</i> , 30 N.Y.3d 461 (2017)	7
<i>Hynes v. Karassik</i> , 405 N.Y.S.2d 242 (1st Dep't 1978).....	9
<i>Jewish Press, Inc. v. New York City Dep't of Investigation</i> , 193 A.D.3d 461 (1st Dep't 2021).....	14
<i>Lansner & Kubitschek v. New York State Office of Children & Family Servs.</i> , 64 Misc. 3d 438 (Sup. Ct., Albany Cty. 2019)	17
<i>Legal Aid Soc'y v. N.Y. State Dep't of Corr. and Cmty. Supervision</i> , 105 A.D.3d 1120 (3d Dep't 2013)	17
<i>Lesher v. Hynes</i> , 19 N.Y.3d 57 (2012)	13, 15
<i>Lockwood v. Nassau Cnty. Police Dep't</i> , 78 Misc. 3d 1219(A), 2023 N.Y. Slip Op. 50265(U) (Sup. Ct., Nassau Cty. 2023).....	12
<i>Lynch v. City of Troy</i> , 33 Misc. 3d 174 (Sup. Ct., Rensselaer Cty. 2011)	16
<i>Madeiras v. N.Y. State Educ. Dep't</i> , 30 N.Y.3d 67 (2017)	17
<i>Matter of Anonymous</i> , 464 N.Y.S.2d 194	9
<i>Matter of Dondi</i> , 63 N.Y.2d 331 (1984)	9
<i>Matter of Gould v. N.Y. City Police Dep't</i> , 89 N.Y.2d 267 (1996)	6, 14

Matter of Ragusa v. N.Y.S. Dep’t of L.,
 152 Misc.2d 602 (Sup. Ct., N.Y. Cty. 1991) 14

New York C.L. Union v. City of Rochester,
 210 A.D.3d 1400 (4th Dep’t 2022) 11

New York C.L. Union v. City of Syracuse,
 210 A.D.3d 1401 (4th Dep’t 2022) 11

New York C.L. Union v. New York City Dep’t of Correction,
 213 A.D.3d 530 (1st Dep’t 2023) 5, 11, 12

New York Times Co. v. City of New York Fire Dep’t,
 4 N.Y.3d 477 (2005) 15

North v. Walsh,
 881 F.2d 1088 (D.C. Cir. 1989) 15

NYP Holdings, Inc. v. New York City Police Dep’t,
 77 Misc. 3d 1211(A), 2022 N.Y. Slip Op. 51191(U) (Sup. Ct., N.Y. Cty. Dec. 6, 2022) 12

NYS Funeral Directors Assn. v. N.Y. State Dept of Health,
 67 Misc.3d 1243(A), 2020 NY Slip Op 50815(U) (Sup. Ct., Albany Cty. 2020) 14

People v. McGurk,
 229 A.D.2d 895 (3d Dep’t 1996) 9

People v. Neuman,
 104 Misc. 2d 324 (Sup. Ct., Westchester Cty. 1980) 9

Reiburn v. N.Y. City Dep’t of Parks & Recreation,
 171 A.D.3d 670 (1st Dep’t 2019) 17

Vrooman v. Dentes,
 205 A.D.2d 235 (3d Dep’t 1994) 9

Westchester Rockland Newspapers, Inc. v. Kimball,
 50 N.Y.2d 575 (1980) 6

Statutes

N.Y. Pub. Off. Law § 84 6

N.Y. Pub. Off. Law § 87(2) 6

N.Y. Pub. Off. Law § 89(2-b) 13

N.Y. Pub. Off. Law § 89(4)(b) 7, 15

N.Y. Pub. Off. Law § 89(4)(c) 17

N.Y. Pub. Off. Law § 89 (2-b) 13

N.Y. Pub. Off. Law § 89(2-c) 13

New York Criminal Procedure Law §160.50 Passim

Other Authorities

120 Cong. Rec. S17,033 15

Comm. on Open Gov. Advisory Op., FOIL-AO-13469 (Jul. 17, 2002) 8

Comm. on Open Gov’t Advisory Op., FOIL-AO-17776 (Aug. 24, 2009) 16

Comm. on Open Gov’t Advisory Op., FOIL-AO-19095 (Dec. 20, 2013) 16

Mike Hayes, *NYPD ‘Friendly Fire’ Killed an Officer. Investigators Seemed to Ignore Video of Police Being Commanded to ‘Stop Shooting,’* ProPublica (Aug. 23, 2023) 1

Yoav Gonen and Katie Honan, *Adams Backs NYPD Chief's Intervention Before Retired Cop's Gun Arrest Was Voided*, The City (Mar. 10, 2023) 4, 13

Yoav Gonen, *Eric Adams Personally Asked Outgoing NYPD Commissioner Not to Discipline Top Chief, Source Tells The City*, The City (Jun. 29, 2023) 1, 11, 12

Yoav Gonen, *NYPD Brass Springs Ex-Cop After Arrest for Allegedly Chasing Brooklyn Kids With a Gun*, The City (Nov. 30, 2021) 4

Yoav Gonen, *NYPD Chief Ordered Ex-Cop's Arrest Voided After Gun Chase, Review Finds*, The City (Apr. 19, 2023) 5

Yoav Gonen, *Top Uniformed NYPD Officer Abused Authority in Brooklyn Gun Incident, Oversight Panel Finds*, The City (Apr. 14, 2023) 1, 4-5, 11

Yoav Gonen, *WATCH: Videos Show NYPD Chiefs Intervened Before Voiding of Ex-Cop's Gun Arrest*, The City (Mar. 9, 2023) 3, 4, 10

PRELIMINARY STATEMENT

This is a dispute about access to records that may shed light on an internal investigation concerning a top uniformed officer of the New York City Police Department (“NYPD”), who ordered that the arrest of a retired police officer be voided hours after the ex-cop was accused of brandishing a gun at three boys. While the Internal Affairs Bureau found no misconduct by Chief Jeffrey Maddrey, an agency charged with police oversight, the Civilian Complaint Review Board (“CCRB”), later determined that Maddrey abused his authority and recommended that he get docked up to 10 vacation days as punishment.¹ Shortly after the then-Police Commissioner proposed the same punishment for Maddrey despite a reportedly “intense campaign” not to, a source told news outlet *The City* that the Commissioner “realized that the end of her tenure at the top of the department was in sight.”² By unduly invoking the state statute sealing certain criminal records and inapplicable FOIL exemptions, the NYPD seeks to keep the public and the press from learning how the Internal Affairs Bureau could come to such a different conclusion than the CCRB. The public interest in the release of these documents is at its apex here, where in recent months questions have been raised not only about the quality of this investigation but also others “where the [Force Investigation Division] seemed to ignore evidence that was potentially damaging to officers who killed people in the line of duty.”³

Petitioners are constrained to file this lawsuit because their efforts to obtain relief through FOIL’s administrative review process have proven fruitless. This Court should order the NYPD to

¹ See Yoav Gonen, *Top Uniformed NYPD Officer Abused Authority in Brooklyn Gun Incident, Oversight Panel Finds*, THE CITY (Apr. 14, 2023), <https://www.thecity.nyc/2023/4/14/23684082/jeffrey-maddrey-nypd-ccrb-abuse-authority-brownsville-brooklyn>.

² Yoav Gonen, *Eric Adams Personally Asked Outgoing NYPD Commissioner Not to Discipline Top Chief, Source Tells The City*, THE CITY (Jun. 29, 2023), <https://www.thecity.nyc/2023/6/29/23779141/keechant-sewell-eric-adam-jeffrey-maddrey-nypd>.

³ See, e.g., Mike Hayes, *NYPD ‘Friendly Fire’ Killed an Officer. Investigators Seemed to Ignore Video of Police Being Commanded to ‘Stop Shooting,’* PROPUBLICA (Aug. 23, 2023), <https://www.propublica.org/article/nypd-mulkeen-friendly-fire-body-cam-footage>.

promptly grant Petitioners' FOIL request because the NYPD has utterly failed to demonstrate that releasing the investigative file is justified under any cited exemption. After the NYPD initially denied the request on the basis of an unwarranted invasion of privacy, Petitioners in their appeal demonstrated that no argument can be properly made that records related to a substantiated charge can be withheld in their entirety. And controlling case law has found that even for unsubstantiated allegations, the privacy exemption does not create a blanket exemption from disclosure.

In denying Petitioners' appeal, the NYPD for the first time claimed that the records "have been SEALED pursuant to New York Criminal Procedure Law §160.50, which mandates that upon termination of a criminal action in favor of the accused, all official records and papers relating to the arrest or prosecution . . . shall be sealed and not made available to any person or public or private agency." *See* Ex. E.⁴ But this statute only applies in limited circumstances where an action terminates in favor of the accused that clearly do not apply here and only applies to "official records," a term that courts have generally found does not extend to investigative records. Moreover, the statute's purpose of ensuring confidentiality and protecting the accused from potential stigma is in no way fulfilled by sealing the records of this widely-reported voided arrest and the subsequent investigation into Maddrey's actions.

Significantly, this is not the first time that the NYPD has improperly claimed that CPL §160.50 shields records related to this incident. In January 2023, the NYPD claimed that body worn camera footage of the arrest of the retired officer had been sealed under CPL §160.50. *See* Ex. F. But the Brooklyn District Attorney's Office shortly thereafter released "an enormous trove of footage" under FOIL "consisting of 36 videos culled from police body-worn cameras, and neighborhood and precinct

⁴ All "Ex." Nos. refer to Exhibits to the accompanying Petition.

house surveillance cameras[.]”⁵ The public release of the footage regarding the underlying arrest by the DA’s office conclusively demonstrates that there is no basis for the NYPD continuing to argue that CPL §160.50 shields records related to Maddrey’s role in voiding the arrest.

The NYPD also claimed in its denial of Petitioners’ appeal that both an unwarranted invasion of personal privacy exempted the records and that they could be withheld because “disclosure would interfere with law enforcement investigations or judicial proceedings [§87(2)(e)(i)]; specifically, the internal investigation related to the matter.” Ex. E. Given the legislature’s clear intent in amending FOIL in 2020 to make disciplinary records public and binding precedent rejecting a blanket application of the privacy exemption to shield police disciplinary records, the Court should order the NYPD to release these records subject to the limited redactions provided for in Section 89(2)(b) of FOIL. The law enforcement exemption likewise is inapplicable because there is no ongoing investigation or judicial proceeding and, even if this Court finds to the contrary, the NYPD has utterly failed to demonstrate any interference with a proceeding from the release of these records. Because no exemption applies to shield these records, the Court should thus order their release and an award of attorney’s fees and costs.

BACKGROUND AND PROCEDURAL HISTORY

The Voided Arrest

On Nov. 30, 2021, Petitioner Yoav Gonen, a Senior Reporter for nonprofit accountability news outlet *The City*, broke the story that then-Community Affairs Bureau Chief Maddrey “ordered cops in a Brooklyn precinct to release a retired officer they had arrested only hours earlier for allegedly

⁵ See Yoav Gonen, *WATCH: Videos Show NYPD Chiefs Intervened Before Voiding of Ex-Cop’s Gun Arrest*, THE CITY (Mar. 9, 2023), <https://www.thecity.nyc/2023/3/9/23632499/nypd-police-jeffrey-maddrey-video>.

menacing three kids with a gun” on Thanksgiving eve.⁶ An Internal Affairs Bureau investigation later found that Maddrey hadn’t “behaved inappropriately.”⁷ In March 2023, *The City* published a trove of videos obtained via a FOIL request to the Brooklyn District Attorney’s Office that allowed the public for the first time to see the evidence the arresting officer had before concluding an arrest was warranted.⁸ The publicly-released footage showed that the officer “found the kids’ independent and matching descriptions of what [the retired officer’s] gun looked like, as well as of which side of his body he drew it from, convincing enough to warrant the arrest.”⁹ The videos also demonstrated that the retired officer repeatedly asked for Maddrey shortly after being arrested and that he was “release[d] less than 90 minutes after” Maddrey’s arrival.¹⁰ The videos allowed *The City* to publish a detailed account of what transpired the night of the arrest, which raised significant questions about the NYPD’s internal investigation that found no wrongdoing.¹¹

A month after the video footage was widely reported on, the CCRB found Maddrey had abused his authority when he intervened in the arrest of the retired police officer, and the CCRB recommended a maximum penalty of the loss of 10 vacation days.¹² The CCRB’s report revealed that

⁶ Yoav Gonen, *NYPD Brass Springs Ex-Cop After Arrest for Allegedly Chasing Brooklyn Kids With a Gun*, THE CITY (Nov. 30, 2021), <https://www.thecity.nyc/2021/11/30/22810682/nypd-brass-springs-ex-cop-after-arrest-allegedly-chasing-kids-gun>.

⁷ Yoav Gonen and Katie Honan, *Adams Backs NYPD Chief’s Intervention Before Retired Cop’s Gun Arrest Was Voided*, THE CITY (Mar. 10, 2023), <https://www.thecity.nyc/2023/3/10/23634388/eric-adams-jeffrey-maddrey-nypd-gun-arrest-brooklyn>.

⁸ Yoav Gonen, *WATCH: Videos Show NYPD Chiefs Intervened Before Voiding of Ex-Cop’s Gun Arrest*, THE CITY (Mar. 9, 2023), <https://www.thecity.nyc/2023/3/9/23632499/nypd-police-jeffrey-maddrey-video>.

⁹ Yoav Gonen and Katie Honan, *Adams Backs NYPD Chief’s Intervention Before Retired Cop’s Gun Arrest Was Voided*, THE CITY (Mar. 10, 2023), <https://www.thecity.nyc/2023/3/10/23634388/eric-adams-jeffrey-maddrey-nypd-gun-arrest-brooklyn>.

¹⁰ *Id.*

¹¹ *Id.*

¹² Yoav Gonen, *Top Uniformed NYPD Officer Abused Authority in Brooklyn Gun Incident*, THE CITY (Apr. 14, 2023), <https://www.thecity.nyc/2023/4/14/23684082/jeffrey-maddrey-nypd-ccrb-abuse-authority-brownsville-brooklyn>.

Maddrey confirmed he had ordered a sergeant to void the retired officer's arrest, which contradicts an earlier police department statement around the time of the incident that denied Maddrey had done so.¹³ The then-police commissioner resigned shortly after likewise determining that Maddrey be docked vacation days and, according to news reports, Maddrey decided to fight the penalty by taking his case to an administrative trial.¹⁴

The City's FOIL Request

On Sept. 14, 2022, Mr. Gonen made a request to the NYPD for "a copy of the investigative file for IAB case 2021-26524. This should include but not be limited to a closing memo, which the NYPD might use a different term for, but it's essentially a document that describes the findings of the case and explains the reason that IAB arrived at the disposition it reached." Ex. A. On May 5, 2023, the NYPD denied the request and claimed disclosure "would constitute an unwarranted invasion of personal privacy." Ex. C.

On May 22, 2023, Petitioners appealed the denial of the request, *see* Ex. D, and cited binding precedent finding that the personal privacy exemption "does not create a categorical or blanket exemption from disclosure for unsubstantiated complaints or allegations of uniformed officers' misconduct." *New York C.L. Union v. New York City Dep't of Correction*, 213 A.D.3d 530, 530–31 (1st Dep't 2023). On June 5, 2023, the NYPD for the first time claimed that the records "have been SEALED pursuant to New York Criminal Procedure Law §160.50, which mandates that upon termination of a criminal action in favor of the accused, all official records and papers relating to the arrest or prosecution . . . shall be sealed and not made available to any person or public or private agency." Ex. E. The NYPD also claimed in its denial of Petitioners' appeal that both an unwarranted

¹³ Yoav Gonen, *NYPD Chief Ordered Ex-Cop's Arrest Voided After Gun Chase, Review Finds*, THE CITY (Apr. 19, 2023), <https://www.thecity.nyc/2023/4/19/23689930/jeffrey-maddrey-ccrb-police-abuse>.

¹⁴ Yoav Gonen, *Top Uniformed NYPD Cop's Misconduct Case Headed for Internal Trial*, THE CITY (May 24, 2023), <https://www.thecity.nyc/2023/5/24/23736017/jeffrey-maddrey-nypd-police-oversight>.

invasion of personal privacy exempted the records and that they could be withheld because “disclosure would interfere with law enforcement investigations or judicial proceedings [§87(2)(e)(i)]; specifically, the internal investigation related to the matter.” *Id.* Petitioners sent a follow-up letter on Sept. 29, 2023 notifying the NYPD that it planned to file suit if the records were not released by Oct. 3, 2023. *See* Ex. G. The NYPD failed to respond to the demand letter.

Petitioners have thus exhausted their administrative remedies and commence this Article 78 Proceeding to challenge the NYPD’s blanket denial of their FOIL request.

ARGUMENT

FOIL was enacted “[t]o promote open government and public accountability,” and the law “imposes a broad duty on government to make its records available to the public.” *Matter of Gould v. N.Y. City Police Dep’t*, 89 N.Y.2d 267, 274 (1996) (citing N.Y. Pub. Off. Law § 84). The express policy underlying FOIL is “[t]he people’s right to know the process of governmental decision making and to review the documents and statistics leading to determinations” because “government is the public’s business[.]” N.Y. Pub. Off. Law § 84; *see also Westchester Rockland Newspapers, Inc. v. Kimball*, 50 N.Y.2d 575, 579 (1980) (“[I]t is incumbent upon the state and its localities to extend public accountability *wherever and whenever* feasible.”) (quoting N.Y. Pub. Off. Law § 84) (emphasis in original). The NYPD’s continued refusal to release the investigative file frustrates these fundamental statutory goals.

“FOIL is to be liberally construed and its exemptions narrowly interpreted so that the public is granted maximum access to the records of government.” *Capital Newspapers, Div. of Hearst Corp. v. Whalen*, 69 N.Y.2d 246, 252 (1987). FOIL’s disclosure provisions are not complicated. Under FOIL, all public agency records are “presumptively open to public inspection and copying unless otherwise specifically exempted.” *Capital Newspapers, Div. of Hearst Corp. v. Burns*, 67 N.Y.2d 562, 566–67 (1986); N.Y. Pub. Off. Law § 87(2). FOIL exemptions are to be construed narrowly—an agency seeking an

exemption bears the burden of “articulat[ing] particularized and specific justification” that the withheld material “falls squarely within a FOIL exemption.” *Friedman v. Rice*, 30 N.Y.3d 461, 475 (2017) (quoting *Fink v. Lejkowitz*, 476 N.Y.2d 567, 571 (1979)) (quotation marks omitted); *see also* N.Y. Pub. Off. Law § 89(4)(b).

The NYPD cannot satisfy this burden of providing particularized and specific justification that its blanket withholding of the investigative file falls squarely within CPL § 160.50 or any FOIL exemption. The records must thus be released.

I. CPL § 160.50 DOES NOT BAR RELEASE OF THESE RECORDS

While CPL § 160.50 indisputably requires the sealing of official records following the exoneration of a defendant, the NYPD errs in holding the statute allows it to withhold the investigative file of a non-defendant’s alleged wrongdoing in his capacity as a high-ranking public official. And even if the Court were to find that the statute permits limited records to be withheld, the NYPD cannot credibly claim that the entirety of the file of this widely-reported matter should be kept secret. The DA’s Office has already released extensive video footage of the incident that the NYPD previously improperly claimed was likewise shielded by CPL § 160.50, and the CCRB has also released its report substantiating a charge of abuse of authority against Maddrey. The public deserves to know what basis the Internal Affairs Bureau had for its determination that no wrongdoing had been committed.

A. CPL § 160.50 Does Not Extend To Investigative Records Concerning a Party That Was Not an Exonerated Defendant

CPL § 160.50 requires the sealing of “all official records and papers, including judgments and orders of a court but not including published court decisions or opinions or records and briefs on appeal, relating to the arrest or prosecution” where a “criminal action or proceeding” terminates in favor of the accused. CPL § 160.50(1), (1)(c). Because the statute only applies in limited circumstances where an action terminates in favor of the accused that are not applicable here and only applies to

“official records,” a term that courts have generally found does not even extend to investigative records, the records should be released.

The subject of the internal affairs investigative file at issue here was not even arrested. While a retired police officer was arrested in connection with the incident and that arrest was voided shortly thereafter, a voided arrest by itself would only trigger sealing of certain records generated at that time under the statute if “a copy of the fingerprints of such person” had been forwarded to the Division of Criminal Justice Services. CPL § 160.50(3)(j). The NYPD has not demonstrated that this in fact happened. And even it did, the DA’s Office’s actions in already releasing under FOIL video surveillance concerning the voided arrest itself and the incident leading up to the arrest calls into serious question this belated attempt to claim that CPL § 160.50 somehow applies here. The NYPD has additionally made no attempt to credibly argue that this limited sealing provision would somehow apply to internal investigation records created after the voided arrest concerning a non-defendant high-ranking official accused of misconduct.

The Court of Appeals has made unmistakably clear that not every record generated in the course of an arrest and prosecution constitutes an “official record[] and paper[]” subject to sealing under the statute. *City of Elmira v. Doe*, 11 N.Y.3d 799, 800 (2008) (finding sealed investigative records, including “property tags, bags and logs . . . and other records generated in the investigations of those arrests” were “not official records subject to a CPL 160.50 seal”). The Committee on Open Government (“COOG”) and several New York courts have specifically made a distinction between investigative records, which they generally have found are not subject to sealing, and “official records and papers.” *See* Comm. on Open Gov. Advisory Op., FOIL-AO-13469 (Jul. 17, 2002), *available at* <https://docsopengovernment.dos.ny.gov/coog/ftext/13469.htm> (“Generally investigative and audit reports are not records required to be sealed . . . [I]t appears that ‘official records’ and the capacity to seal involve those records ‘relating to the arrest or prosecution,’ and do not necessarily include

investigative materials.”) (collecting cases) (internal citations omitted); *see also Matter of Anonymous*, 464 N.Y.S.2d 194, 197 (2d Dep’t (1983) (finding tape recording “does not constitute part of the official records and papers in the criminal proceeding involving the respondent and therefore is not subject to the protections afforded by CPL 160.50”); *Hynes v. Karassik*, 405 N.Y.S.2d 242, 243 (1st Dep’t 1978), *aff’d*, 47 N.Y.2d 659, 393 (1979) (“[A] tape recording made in the course of an investigation does not become an official record required to be sealed under the section simply because it is marked in evidence as an exhibit in the course of a criminal trial. On the other hand, it would seem clear that the indictment itself is such an official record.”); *People v. Neuman*, 104 Misc. 2d 324, 326 (Sup. Ct., Westchester Cty. 1980) (finding “investigative and audit reports prepared by” special prosecutor “do not constitute ‘official records and papers’ within the meaning of CPL Sec. 160.50(1)(c)”).

An investigative record generally should only be subject to sealing where it was “integral to both appellant’s arrest and his prosecution[.]” *Matter of Dondi*, 63 N.Y.2d 331, 338 (1984). Where, as here, the investigative records center on the mere target of an investigation who was not arrested or prosecuted, a New York court rejected an application to seal investigative records precisely because “[t]he dispositive factor . . . is the relationship between the investigative record and the resulting arrest and/or prosecution. The court’s research has not disclosed a single reported case where investigative records were sealed pursuant to CPL 160.50 in the absence of either an arrest or a prosecution.” *Doe v. Dist. Att’y of Cnty. of Nassau*, 166 Misc. 2d 188, 192 (Sup. Ct., Nassau Cty. 1995).

In reviewing whether documents sufficiently “relat[e] to the arrest or prosecution” to come within the ambit of CPL § 160.50, courts conduct an inquiry that turns on “a proper recognition of the purpose underlying the legislation[.]” *Vrooman v. Dentes*, 205 A.D.2d 235, 237–38 (3d Dep’t 1994). The “well-established purpose of” CPL § 160.50 “for persons acquitted of criminal charges is to ensure confidentiality and to protect the individual from criminal prosecution.” *People v. McGurk*, 229 A.D.2d 895, 895–96 (3d Dep’t 1996). Records that are “innocuous on their face with respect to” the

person acquitted plainly do not fall within the ambit of CPL 160.50. *City of Elmira v. Doe*, 39 A.D.3d 942, 945 (3d Dep't 2007), *aff'd*, 897 N.E.2d 1049 (2008). “[A]lthough the records may implicate other defendants, their release does not offend the well-established purposes of CPL 160.50 of ensuring confidentiality and protection from the potential public stigma associated with a criminal prosecution.” *Id.*

No showing can be made here that the investigative file sought here is either “integral” to the retired police officer’s arrest nor potentially stigmatizing to him. The investigative file centers on an investigation of high-ranking police officers’ conduct not the accused’s. And the voided arrest of the accused and subsequent internal and independent investigations of current police officers’ conduct in connection with that arrest have been widely reported on by Petitioners and other New York media outlets. Indeed, Petitioners publicly posted video surveillance of the chase of the three boys and subsequent arrest obtained from the DA’s Office.¹⁵ It is hard to imagine how the release of this internal investigative file could possibly result in the type of stigma that the statute was designed to prevent.

Given that the CCRB recently substantiated a charge of abuse of authority against Chief Maddrey, allowing CPL § 160.50 to shield the internal investigation file of an incident that sheds light on alleged police misconduct detaches the statute entirely from its logical underpinnings. The Court should thus decline to extend CPL § 160.50 to these internal investigative records.¹⁶

¹⁵ See Yoav Gonen, *WATCH: Videos Show NYPD Chiefs Intervened Before Voiding of Ex-Cop’s Gun Arrest*, THE CITY (Mar. 9, 2023), <https://www.thecity.nyc/2023/3/9/23632499/nypd-police-jeffrey-maddrey-video>.

¹⁶ While the NYPD claims in its appeal denial that it has no obligation to redact the investigative records because they fall under CPL § 160.50 and the statutory authority to redact under FOIL does not extend to records exempted by state statute, *see* Ex. E, this interpretation improperly suggests that the sealing provision can be applied in a blanket fashion to any or all investigative records. Instead, the Court must independently evaluate whether the investigative file records are indeed official records that are somehow stigmatizing to the retired officer or integral to the arrest before any withholding here.

II. PERSONAL PRIVACY EXEMPTION DOES NOT APPLY TO BAR ACCESS TO THE RECORDS

FOIL's personal privacy exemption allows an agency to deny access to records or portions of records that "if disclosed would constitute an unwarranted invasion of personal privacy." N.Y. Pub. Off. Law § 87(2)(b). To withhold any portion of a record under this exemption, an agency "must articulate 'particularized and specific justification' for not disclosing requested documents." *New York C.L. Union v. City of Syracuse*, 210 A.D.3d 1401, 1403 (4th Dep't 2022).

Courts across the state have rejected the NYPD's argument that the personal privacy exemption allows for blanket withholding here following the repeal of Civil Rights Law § 50-a, which previously shielded police disciplinary records from disclosure. In the past several months, both the First and Fourth Departments ruled that the personal privacy exemption "does not create a categorical or blanket exemption from disclosure for unsubstantiated complaints or allegations of uniformed officers' misconduct." *New York City Dep't of Correction*, 213 A.D.3d at 530–31; *see also New York C.L. Union*, 210 A.D.3d at 1403; *New York C.L. Union v. City of Rochester*, 210 A.D.3d 1400, 1401 (4th Dep't 2022).

Those rulings apply with even greater force to the investigative file sought here, since the CCRB recently "substantiated a single charge of abuse of authority" against Chief Maddrey and the then-Police Commissioner shortly thereafter agreed that Maddrey should be docked vacation days as recommended by the CCRB as punishment.¹⁷ Petitioners reported that Maddrey since then "signaled

¹⁷ *See* Yoav Gonen, *Top Uniformed NYPD Officer Abused Authority in Brooklyn Gun Incident, Oversight Panel Finds*, THE CITY (Apr. 14, 2023), <https://www.thecity.nyc/2023/4/14/23684082/jeffrey-maddrey-nypd-ccrb-abuse-authority-brownsville-brooklyn>; Yoav Gonen, *Eric Adams Personally Asked Outgoing NYPD Commissioner Not to Discipline Top Chief, Source Says*, THE CITY (Jun. 29, 2023), <https://www.thecity.nyc/2023/6/29/23779141/keechant-sewell-eric-adam-jeffrey-maddrey-nypd>.

that he intended to take his case before an NYPD administrative judge rather than accept the relatively light punishment – a highly unusual move.”¹⁸

No argument has been or can be made that disciplinary records related to a substantiated charge like the one at issue here can be withheld in their entirety. Indeed, a New York court interpreting the “clear definitions” added to FOIL by the legislature in repealing Civil Rights Law § 50-a recently opined in a case against the NYPD “[t]hat all disciplinary records, whether they are substantiated or unsubstantiated, are subject to disclosure under FOIL and respondents cannot categorically withhold these records.” *NYP Holdings, Inc. v. New York City Police Dep’t*, 77 Misc. 3d 1211(A), 2022 N.Y. Slip Op. 51191(U), at *4 (Sup. Ct., N.Y. Cty. Dec. 6, 2022). In that case, the NYPD had already agreed to produce records pertaining to substantiated complaints.

Where an agency “fail[s] to establish that identifying details in the records or data requested could not be redacted to prevent an unwarranted invasion of privacy[,]” as is the case here, the agency must “disclose the requested records, subject to redactions with specific justification under Public Officers Law § 87(2).” *New York C.L. Union*, 213 A.D.3d at 531. Indeed, “[t]o hold otherwise — that is, to allow agencies to withhold documents based upon their own determination that their release would constitute an unwarranted invasion of privacy — threatens to subvert the goals of the legislation repealing Civil Rights Law § 50-a, particularly in view of the facility with which an agency could simply theorize that any record is, in its opinion, private.” *Lockwood v. Nassau Cnty. Police Dep’t*, 78 Misc. 3d 1219(A), 2023 N.Y. Slip Op. 50265(U), at *8 (Sup. Ct., Nassau Cty. 2023).

The legislature’s actions in repealing Section 50-a and simultaneously amending FOIL specifically to address concerns of officer privacy also indisputably support the conclusion that the

¹⁸ Yoav Gonen, *Eric Adams Personally Asked Outgoing NYPD Commissioner Not to Discipline Top Chief, Source Says*, THE CITY (Jun. 29, 2023), <https://www.thecity.nyc/2023/6/29/23779141/keechant-sewell-eric-adam-jeffrey-maddrey-nypd>.

privacy exemption cannot be wielded as a blanket shield here. The legislature added two new provisions to FOIL in 2020 that govern when a law enforcement agency responds to a request for law enforcement disciplinary records. The first provision requires the agency to redact: (i) the officer's medical history information; (ii) the officer's home addresses, personal telephone numbers, personal cell phone numbers, personal e-mail addresses, and those of their family members; (iii) social security numbers; and (iv) the officer's use of an employee assistance program, mental health service, or substance abuse assistance service. *See* N.Y. Pub. Off. Law § 89(2-b). The second provision permits redaction of any portion of a law enforcement disciplinary record that pertains only to “technical infractions” that are not applicable to this great matter of public concern regarding official misconduct. *See id.* § 89(2-c).

Given the clear legislative intent and binding precedent rejecting a blanket application of the privacy exemption to shield police disciplinary records, the Court should order the NYPD to release these records subject to the limited redactions provided for in Section 89(2-b).

III. THE LAW ENFORCEMENT EXEMPTION DOES NOT APPLY TO SHIELD THE RECORDS

A. Respondents Fail To Establish That The Requested Records Relate to an Ongoing Investigation or Judicial Proceeding

The law enforcement exemption “ceases to apply after enforcement investigations and any ensuing judicial proceedings have run their course.” *Lesber v. Hynes*, 19 N.Y.3d 57, 68 (2012). The NYPD in its denial of Petitioners' appeal makes the conclusory claim that the exemption applies because “disclosure would interfere with . . . specifically, the internal investigation related to the matter.” Ex. E. But according to media reports, the internal investigation concluded prior to the NYPD denying Petitioners' appeal.¹⁹ To assess whether an investigation is, in fact, ongoing, courts

¹⁹ *See, e.g.*, Yoav Gonen and Katie Honan, *Adams Backs NYPD Chief's Intervention Before Retired Cop's Gun Arrest Was Voided*, THE CITY (Mar. 10, 2023),

make their own determination and need not defer to an agency's assessment of an action's status. *See Matter of Ragusa v. N.Y.S. Dep't of L.*, 152 Misc.2d 602, 607 (Sup. Ct., N.Y. Cty. 1991) (declining to accept an agency's assessment that an investigation is ongoing).

To the extent that the NYPD now claims that the administrative trial Maddrey has requested counts as an ongoing proceeding, the Court should rule that the exemption does not apply unless the NYPD demonstrates that evidence is still being gathered when the Court rules on this matter. This is because records must be released “[o]nce the evidentiary phase of its administrative proceedings [is] closed.” *NYS Funeral Directors Assn. v. N.Y. State Dept of Health*, 67 Misc.3d 1243(A), 2020 NY Slip Op 50815(U), *5 (Sup. Ct., Albany Cty. 2020).

B. Respondent Fails To Establish That Releasing Records Would Amount to Interference

Even if an investigation or a judicial proceeding were deemed to be ongoing, binding First Department precedent has rejected “broad arguments for withholding all” investigative “records, which, if accepted, would amount to a blanket exemption that would seemingly apply to virtually any records of any investigation conducted by” the NYPD. *Jewish Press, Inc. v. New York City Dep't of Investigation*, 193 A.D.3d 461, 462 (1st Dep't 2021) (emphasizing that “blanket exemptions for particular types of documents are inimical to FOIL's policy of open government”) (citing *Matter of Gould*, 89 N.Y.2d at 275). Petitioners are entitled to the requested investigative file because the NYPD has not met its burden to show that releasing the records would interfere with the investigation or a pending judicial proceeding. For the law enforcement exemption to apply, “[t]he agency must identify the generic kinds of documents for which the exemption is claimed, and the generic risks posed by disclosure of these categories of documents. Put slightly differently, the agency must still fulfill its

<https://www.thecity.nyc/2023/3/10/23634388/eric-adams-jeffrey-maddrey-nypd-gun-arrest-brooklyn>.

burden under Public Officers Law §89(4)(b) to articulate a factual basis for the exemption,” which the NYPD has failed to do. *Lesher*, 19 N.Y.3d at 67. “[C]onclusory” assertions “in the absence of any factual showing as to how disclosure would have interfered with that investigation” are plainly insufficient to withhold records. *Dioso Faustino Freedom of Info. L. Request v. New York City*, 142 N.Y.S.3d 502, 504 (1st Dep’t 2021) (finding agency’s mere assertion that disclosure would interfere with ongoing investigation provided no reasonable basis for denying access to body camera footage).

As the Court of Appeals has recognized, the law enforcement exemption was enacted to avoid FOIL potentially “furnish[ing] the safecracker with the combination to the safe.” *Fink*, 47 N.Y.2d at 573. Courts have credited claims of interference where an agency’s “hand would be prematurely tipped by the release of” evidence “replete with information about the crimes committed.” *Lesher*, 19 N.Y.3d at 58; see also *Fink*, 47 N.Y.2d at 572 (“The purpose of this exemption is obvious. Effective law enforcement demands that violators of the law not be apprised of the nonroutine procedures by which an agency obtains its information.”). No such argument can be made here, where presumably the target of the investigation already possesses the entire contents of the safe in preparation for the administrative trial and due to his high-ranking position within the NYPD is apprised of any non-routine procedures. “[I]t is hard to see how” releasing records like those requested here could possibly interfere with an investigation. *New York Times Co. v. City of New York Fire Dep’t*, 4 N.Y.3d 477, 490-91 (2005); see also *North v. Walsh*, 881 F.2d 1088, 1098 (D.C. Cir. 1989) (quoting 120 Cong. Rec. S17,033 (May 30, 1974)) (noting legislative history of federal FOIA’s analogous provision demonstrates that it was intended to apply only where a law enforcement proceeding “would be harmed by the premature release of evidence *not* in the possession of known or potential defendants.”).

Even if the records aren’t already in Maddrey’s possession, the NYPD still cannot demonstrate that releasing the records would somehow interfere with an ongoing proceeding here because the file only “provide[s] historical context” regarding an already concluded internal investigation that by its

very nature cannot interfere with a proceeding. *Council of Regulated Adult Liquor Licensees v. City of New York Police Dep't*, 300 A.D.2d 17, 18, (1st Dep't 2002). As the First Department has explained in distinguishing between records that “provide historical context” and those that “refer to prospective police activity,” only the latter actually enables a target to “frustrate” a pending investigation and thus should be redacted from records to be released. *Id.*; see also *Lynch v. City of Troy*, 33 Misc. 3d 174, 179 (Sup. Ct., Rensselaer Cty. 2011) (ordering documents submitted for *in camera* review to determine “whether each and every record within the . . . investigation file will interfere with or compromise a ‘continuing investigative or judicial process’ and noting “documents that simply provide the historical context of an investigation should be disclosed”).

As the COOG has recognized, the very public nature of what happened here also strongly counsels against withholding. See Comm. on Open Gov't Advisory Op., FOIL-AO-19095 (Dec. 20, 2013), available at <https://docs.dos.ny.gov/coog/ftext/f19095.html>. In a case where the very “fact and focus of the investigation” has “become widely reported and well-known” because a high-ranking official was charged with crimes, the COOG opined “that the ability to justify a denial of access is limited and questionable” “in consideration of the disclosure already made and known to the public, particularly the nature of the state and federal charges.” *Id.* Indeed, even if this internal investigation were ongoing, which it indisputably is not, “[i]nformation regarding ongoing investigations is routinely disclosed.” Comm. on Open Gov't Advisory Op., FOIL-AO-17776 (Aug. 24, 2009), available at <https://docs.dos.ny.gov/coog/ftext/f17776.html>. “In short, in most instances, there are *some* elements within records that relate to an ongoing investigation that would not, if disclosed, ‘interfere’ with an investigation or judicial proceeding.” *Id.* (emphasis in original).

Because the NYPD has not demonstrated that the records relate to an ongoing investigation or judicial proceeding or that releasing the records would interfere with such a proceeding, the Court should grant the Petition and release the records.

IV. THE COURT SHOULD AWARD PETITIONERS ATTORNEY'S FEES AND LITIGATION COSTS

Should Petitioners substantially prevail in this proceeding, this Court should award attorney's fees and other litigation costs. FOIL provides, in pertinent part, that where (1) a petitioner has "substantially prevailed" in an Article 78 proceeding to obtain the information sought; and (2) "the court finds that the agency had no reasonable basis for denying access," the court "*shall* assess, against such agency involved, reasonable attorney's fees and other litigation costs reasonably incurred by [the petitioner.]" N.Y. Pub. Off. Law § 89(4)(c) (emphasis added). The legislature amended FOIL in 2017 to provide for mandatory attorney's fees in certain instances to "encourage compliance with FOIL and to minimize the burdens of cost and time from bringing a judicial proceeding" because "[o]ften, people simply cannot afford to take a government agency to trial to exercise their right to access public information." *Reiburn v. N.Y. City Dep't of Parks & Recreation*, 171 A.D.3d 670, 671 (1st Dep't 2019) (quoting 2017 NY Assembly Bill A2750). For all the reasons described above, the NYPD had no reasonable basis for denying access to the requested license plate numbers.

A petitioner "substantially prevails" in a FOIL proceeding when the petitioner receives all the information that he requested and to which it is entitled in response to the underlying FOIL litigation. *See Cobado v. Benziger*, 163 A.D.3d 1103, 1106 (3d Dep't 2018). "This does not mean that petitioner received every page of every document sought in [his] request, but that [he] obtained the 'full and only response available pursuant to the statute under the circumstances.'" *Lansner & Kubitschek v. New York State Office of Children & Family Servs.*, 64 Misc. 3d 438, 454 (Sup. Ct., Albany Cty. 2019) (quoting *Legal Aid Soc'y v. N.Y. State Dep't of Corr. and Cmty. Supervision*, 105 A.D.3d 1120, 1122 (3d Dep't 2013)); *see also Madeiros v. N.Y. State Educ. Dep't*, 30 N.Y.3d 67, 79 (2017) (awarding fees despite agency's redactions being upheld because "petitioner's legal action ultimately succeeded in obtaining substantial unredacted post-commencement disclosure responsive to her FOIL request"). Because the NYPD

has no reasonable basis for denying access to the investigative file here, Petitioners request that the Court award them attorney's fees and litigation costs.

CONCLUSION

For all of the foregoing reasons, Petitioners respectfully request that this Court grant their petition seeking that this Court: (1) declare that the NYPD's denial of access to the requested records violates FOIL; (2) direct the NYPD to comply with its duty under FOIL and produce the requested records within twenty (20) days; (3) award Petitioners the attorney's fees and litigation costs incurred in obtaining the NYPD's belated compliance with this request for public records; and (4) grant Petitioners such further relief as the Court deems just and proper.

Dated: October 5, 2023
Ithaca, NY

Respectfully submitted,

CORNELL LAW SCHOOL

FIRST AMENDMENT CLINIC

by: /s/ Heather E. Murray

Heather E. Murray

Myron Taylor Hall

Ithaca, New York 14853

Tel.: (607) 255-8518

hem58@cornell.edu

Counsel for Yoav Gonen and The City Report, Inc.