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“Unsubstantiated” Complaints About Police Are Not Categorically Exempt from FOIL Disclosure

Court Also Rejects Police Department’s “Retroactivity” Argument

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New York’s Second Department, in [Newsday v. Nassau County Police Department](#), has held that police disciplinary records, formerly shielded from public disclosure under the now-repealed Civil Rights Law Section 50-a, are not categorically exempt from disclosure under the Freedom of Information Law’s (“FOIL”) privacy exemption. It joins the First and Fourth Departments in requiring police to make a particularized showing that a requested disciplinary record comes within the ambit of FOIL’s privacy exemption.

The Second Department has also rejected arguments by the police that records created before Section 50-a was repealed may still be kept secret because the repeal was not “retroactive,” writing that “the Legislature did not limit disclosure under FOIL to records generated after [the repeal], and we will not impose such a limitation ourselves.”

Background

In the summer of 2020, in the wake of the murder of George Floyd and the massive public protests calling for police reform and transparency, the New York Legislature repealed Section 50-a, a law that, in effect, precluded disclosure of virtually any record concerning complaints of police misconduct. It simultaneously amended FOIL to make clear that “complaints, allegations and charges” against police officers and the “disposition” of police disciplinary proceedings fall within FOIL’s disclosure mandate and would be subject only to the same exemptions as any other public record. As then-Governor Cuomo said when signing the repeal, the new access to “prior disciplinary records of law enforcement officers” would help “restore community confidence in law enforcement” and hold police “accountable for misconduct.”

After the repeal, news and public interest organizations across the state began making FOIL requests for police officer misconduct records that, until then, had been entirely shielded from public disclosure. Newsday, in particular, made requests to the Nassau County Police Department on Long Island for various records related to past highly publicized incidents of alleged police misconduct. For example, Newsday requested the Internal Affairs Unit (“IAU”) report into the [death of Jo’Anna Bird](#), who was murdered by her ex-boyfriend (a police informant) after certain NCPD officers failed to take seriously calls that he was violating restraining orders. Newsday requested the disciplinary records of a police sergeant who [allegedly made an unlawful arrest based on fabricated pretenses following a road rage incident](#). And Newsday requested the disciplinary records of various other officers involved in incidents ranging from [fatally shooting a student](#) to [allegedly falsifying paperwork](#).

NCPD effectively denied each of Newsday’s requests on the grounds that the records requested (1) were subject to FOIL’s “personal privacy” exemption, (FOIL § 87(2)(b)); (2) contained intra- or inter-agency deliberative materials (FOIL § 87(2)(g)); and/or (3) related to ongoing law enforcement proceedings or investigations (FOIL § 87(2)(e)). In response to the request for the Jo’Anna Bird records, NCPD also asserted that Section 50-a’s repeal should not apply “retroactively,” that is, that all records created before the repeal in June of 2020 should forever remain secret.

Trial Court Ruling

Newsday filed an Article 78 Petition against the NCPD on February 16, 2021, asserting that NCPD's position that police disciplinary records remained, essentially, *per se* exempt from disclosure even after the repeal of Section 50-a, was improper. That is, its categorical refusal to disclose disciplinary records contravened FOIL's requirement that agencies make "particularized" showings, and offer factual support, to invoke a FOIL exemption.

The trial court denied Newsday's Petition on November 4, 2021, holding, without explanation, that disclosure of records concerning "unsubstantiated" complaints against police officers would be an "unwarranted invasion of personal privacy" in every case. The trial court did not require any case-by-case weighing of privacy interests against the public interest in disclosure, as is normally required to invoke the privacy exemption. NCPD was permitted to withhold all records relating to any allegation of misconduct so long as NCPD itself considered the allegation "unsubstantiated."

Despite denying Newsday's Petition "in its entirety," the trial court did not address NCPD's refusal to disclose final IAU Reports and other records concerning *substantiated* cases of misconduct. Nor did it address the records NCPD refused to disclose on the grounds that they were subject to the "inter-/intra- agency" deliberative process exemption or the "law enforcement" exemption. (The court also did not address NCPD's assertion that documents concerning misconduct complaints, whether substantiated or not, created before June 2020 may be withheld under FOIL because the repeal of Section 50-a was not "retroactive.")

Newsday appealed to New York's Second Department.

Developments in Other Cases

In the first two years after Section 50-a's repeal, numerous trial courts around the state weighed in on how disciplinary records should now be treated. The most common issues (though there were others) were (1) whether records reflecting "unsubstantiated" complaints were categorically exempt under FOIL's privacy exemption without any "particularized" showing necessary, and (2) whether the repeal was "retroactive" such that records from before June 2022 would be subject to disclosure. The trial courts came to various, and inconsistent, conclusions.

While Newsday's appeal was pending in the Second Department, other appellate divisions began to address the issues. The Fourth Department in [NYCLU v. Syracuse](#) and [NYCLU v. Rochester](#), held, on November 10, 2022, that "the personal privacy exemption does not categorically exempt" law enforcement disciplinary records, even when they concern "unsubstantiated allegations or complaints of professional misconduct." Rather, "to invoke the personal privacy exemption," a police department "must review each record responsive to petitioner's FOIL request," and then "demonstrate that [it] falls squarely within the ambit" of the privacy exemption. The First Department followed suit on February 16, 2023, in [NYCLU v. NYC Department of Corrections](#), also holding that there was no categorical exemption for "unsubstantiated" complaints against officers.

The First Department addressed the issue of retroactivity on October 12, 2023, in [NYP Holdings, Inc. v. NYPD](#). It held that although the "legislature made no express statement" on retroactivity, the legislative history nevertheless made clear that the repeal "applies to records then existing and not simply to records created at a time subsequent to the enactment of the legislation."

The Second Department's Ruling

More than two years after the trial court's decision in Newsday's case, the Second Department issued its decision, unanimously reversing the trial court and granting Newsday's Petition. With respect to NCPD's invocation of FOIL's privacy exemption, the Second Department "agree[d] with the Appellate Division, First and Fourth Departments, that there is no categorical exemption from disclosure for unsubstantiated allegations." It wrote:

Upon repealing Civil Rights Law § 50-a, the Legislature amended [FOIL] to specifically contemplate the disclosure of "law enforcement disciplinary records," which it defines to include "complaints, allegations, and charges against an employee." If the Legislature had intended to exclude from disclosure complaints and allegations that were not substantiated, "it would simply have stated as much."

The Second Department went on to hold that the "NCPD failed to meet its burden of demonstrating that the requested material fell squarely within the personal privacy exemption." Its "conclusory" statements that *all* the requested records were exempt "based on considerations of privacy' ... were not supported by any facts and were insufficient."

The Court also rejected NCPD's other bases for withholding. It held that NCPD was not entitled to invoke a "retroactivity" argument with respect to any of the requests except the one regarding the Jo'Anna Bird murder, since NCPD had failed to raise the issue in administrative proceedings. And, the retroactivity argument did not apply to the Bird request either because Newsday was not seeking a retroactive application of the appeal at all, the Court held. That is, Newsday was not seeking to apply the repeal of Section 50-a to a FOIL request that was made before the repeal was enacted. As the Court explained:

[Newsday] made the subject FOIL requests in July 2020, after the legislative amendments were enacted, and, thus, [Newsday] is not seeking retroactive application of the statutory amendments to a pending FOIL request. To the extent that the NCPD contends that the Legislature intended to exclude from disclosure any law enforcement disciplinary records that were created prior to June 12, 2020, it has offered no support for this proposition. By their nature, FOIL requests seek records that were generated prior to the request date.

As for the claim of the “intra/inter-agency” exemption, the Court found that NCPD failed to offer any “factual support” and thus did not “meet [its] burden of demonstrating that the exemption applied to any of the requested material.” And the Court held that NCPD had abandoned its claim of the “law enforcement” exemption on appeal.

Motion for Rehearing and/or Leave to Appeal

Shortly after the Second Department rendered its decision, the NCPD [moved for rehearing](#) and/or leave to appeal to New York’s Court of Appeals. Its motion is focused almost entirely on “retroactivity,” arguing that disclosing records that were created prior to the repeal of Section 50-a would be “fundamental[ly] unfair[.]” and that the Court was wrong to focus on the date that the requests were made rather than on the date the records were created. A response to this motion is due in January.

Meanwhile, the New York Court of Appeals will adjudicate an appeal in *NYCLU v. Rochester* next year, focused primarily on the issue of whether “unsubstantiated” complaints may be treated as categorically exempt from disclosure.

Alia L. Smith and David A. Schulz of Ballard Spahr LLP represent Newsday. The NCPD is represented by the Nassau County Attorneys’ Office.

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