



**State of New York
Department of State
Committee on Open Government**

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By Electronic Mail Only

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The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence, except as otherwise indicated.

Dear Mr. :

You have asked whether the Committee has changed its [opinion](#) on the legal standard now applicable to records of unsubstantiated or pending complaints of misconduct made against law enforcement officers in light of three recent court decisions finding on the facts presented to those courts that Freedom of Information Law ("FOIL") disclosure was permitted or required. The short answer is no; all three of the court decisions you mention are consistent with our [opinion](#) issued in 2020 concerning the release by law enforcement agencies of unsubstantiated or pending complaints of misconduct by law enforcement agency employees.

The Supreme Court decisions each reiterate that, in light of the repeal of Section 50-a of the Civil Rights Law and the provisions added to FOIL to address law enforcement agency disciplinary records, FOIL now requires that upon a request therefor, a law enforcement agency must review all records of complaints, whether or not substantiated, to determine rights of access. Moreover, in the decisions you reference, each court makes findings of fact that are specific to the records before it and is careful to identify that each such determination of FOIL accessibility by other agencies looking at other records will be similarly fact-specific. *See, e.g., Buffalo Police Benevolent Association v. Brown*, 134 N.Y.S.3d 150, 155-56 (Supr. Ct. Erie Co. 2020) ("Finally, it should be noted that the court's rulings do not mean that police disciplinary records . . . shall be released or must be released. The court is not mandating or otherwise authorizing the public release of any particular records. That decision will presumably be made by the Respondents in accordance with the provisions and exemptions set forth in the Public Officers Law, including § 87(2)(b)."); *Schenectady Police Benevolent Association v. City of Schenectady*, 2020 N.Y. Slip Op. 34346(U) (Supr. Ct. Schenectady Co. Dec. 29, 2020) ("Finally, notwithstanding any greater societal significance which any actual or interested party, or the media, may seek to ascribe to the instant ruling, it is, in actuality, narrowly confined to the particular FOIL requests outstanding as to Patrolman Pommer and the members of the Schenectady Police Department. Any broader applicability as to other locales or other FOIL requests will necessarily have to be determined on their own specific merits."). This is precisely what we advised in 2020 before courts had opined.

With respect to the Second Circuit decision, we do not read it as a mandate to agencies to release all unsubstantiated complaints without a review for rights of access under FOIL. Rather, it is a ruling, on a union request to enjoin an agency from proactive disclosure of an entire category of records, that an agency, such as the New York City Police Department, *may affirmatively determine to release and cannot be enjoined from releasing* such records if it concludes either that no FOIL exemptions apply to them or that it will waive such exemptions now that the legal restriction preventing their release has been repealed. *See Uniformed Fire Officers Association v. DeBlasio*, 2021 WL 561505 (2d Cir. Jan. 21, 2021). Specifically, the ruling of the court related to an injunction that it ultimately denied: the court was asked to enjoin the NYPD

from releasing such records in its portal and found that the petitioner unions failed to establish success on merits of several arguments in favor of withholding them as a category of records. The Court did not make a ruling on a specific record or make a ruling that no law enforcement agency could make a different determination on its own records. The basic FOIL principles continue to apply to these records, and therefore an agency that does not wish to proactively disclose the entire category of records (or waive exemptions that may apply) may still review such records and make determinations as to rights of access. *See, e.g., id.* at *3 (the court continues to “recognize those specific FOIL exemptions that are designed to protect against unwarranted invasions of personal privacy or endangering a person’s safety”). Again, this is precisely what we advised in 2020 before courts had opined.

Please do not hesitate to contact us if you have further questions. Thank you.

Very truly yours,

/s/ Shoshanah Bewlay

Shoshanah Bewlay