

STATE OF NEW YORK
 SUPREME COURT: COUNTY OF ALBANY

In the Matter of the Application of
 NEW YORK CIVIL LIBERTIES UNION

Petitioner,

**DECISION, ORDER
 AND JUDGMENT**
 Index No. 905020-22

-against-

NEW YORK STATE POLICE,

Respondent.

(Supreme Court, Albany County, Special Term)

APPEARANCES:

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Savona, J.:

Enacted in 1976, New York State Civil Rights Law §50-a permitted law enforcement agencies to refuse to disclose “personnel records used to evaluate performance toward continued employment or promotion.” In September, 2020, following the repeal of Civil Rights Law §50-a, Petitioner New York Civil Liberties Union filed a request for documents with the New York State Police pursuant to the Freedom of Information Law (hereinafter “FOIL”). The request sought documents from January 1, 2000 through September 15, 2020, and consisted of eight categories of records: A) Disciplinary Records, B) Use of Force, C) Stops/Temporary Detentions/Field Interviews, D) Complaints About Misconduct, E) NYSP Immigration-Related Enforcement, F) NYSP Professional Standards Bureau Records, G) Diversity in the Ranks, and H) Additional Policies and Agreements. Each of these categories was broken down into subcategories, for a total of approximately fifty categories of inquiry.

According to the Petitioner, sixteen months after the filing of the FOIL request, the Respondent has responded to a portion of the demand but has refused to supply records responsive to the following categories:

Section A(1): “... copies of all law enforcement disciplinary records. For purposes of this request, ‘law enforcement disciplinary records’ means ‘any record created in furtherance of a law enforcement disciplinary proceeding’ as defined in Section 86, subdivision 6 of the Public Officers Law (the ‘Act’), including, but not limited to:

- a) The complaints, allegations, and charges against an employee;
- b) The name of the employee complained of or charged;
- c) The transcript of any disciplinary trial or hearing, including any exhibits introduced at such trial or hearing;
- d) The disposition of any disciplinary proceeding; and
- e) The final written opinion or memorandum supporting the disposition and, if applicable, the discipline imposed, including the agency's complete factual findings and analysis of the conduct, and if applicable, appropriate discipline of the covered employee."

Section D(7): "All investigative reports regarding each law enforcement officer cleared of, or found to have engaged in, wrongdoing in civilian complaints."

Section F: "We request copies of records regarding complaints filed with the NYSP Professional Standards Bureau ('PSB') formerly the Internal Affairs Bureau ('IAB'), including: Records kept in the PSB or IAB case tracking systems, including complete complaints and allegation histories of every active member of the NYSP, and every former member of the NYSP who left service for any reason since January 1, 2000."

The petition further asserts that, although a spreadsheet was provided in response to Section D(5) ("Documents sufficient to show the total number of complaints per calendar year within this request's time period, broken down by the subject of the complaint (categories used internally to categorize complaints are sufficient for the purposes of this request), including, but not limited to, complaints about racial profiling, the use of force, and stops or temporary detentions."), that certain officers' names were redacted. The Petitioner alleges that the Respondent wrongfully used the "personal privacy" exception in the redaction of these records.

The Petitioner seeks judgment: (1) Pursuant to C.P.L.R. § 7806, directing Respondent to comply with its duty under FOIL and disclose all the records sought by the NYCLU in the Request, redacted only as permitted by FOIL and on a reasonable rolling basis where appropriate; (2) Awarding reasonable attorneys' fees and litigation costs as allowed under New

York Public Officers Law § 89; and (3) Granting such other relief as the Court deems just and proper. The Respondent asserts that they have complied with the demand and that their refusal to respond to certain portions of the demand is justified due to the fact that the records sought are not reasonably described and that production of same would be unduly burdensome. The Respondent also asserts that the redaction of certain officers' names is appropriate for personal privacy reasons.

The Police Benevolent Association of the New York State Troopers, Inc., sought leave to intervene on the limited issue of whether the names of officers involved in unsubstantiated complaints were properly redacted from the Respondent's spreadsheet created in response to inquiry D(5). Said motion was granted and The Police Benevolent Association of the New York State Troopers, Inc. was given until March 6, 2023 to file a brief. However, nothing was ever received.

Response to Section D(5)

The issue of whether the names of officers involved in "unsubstantiated complaints" were properly redacted in the spreadsheet prepared by the Respondent in response to Petitioner's Request "D(5)" is not ripe for decision. This court agrees with the Respondent that the request did not ask for the names of officers. Rather, the request was for "Documents sufficient to show the total number of complaints per calendar year within this request's time period, broken down by the subject of the complaint (categories used internally to categorize complaints are sufficient for the purposes of this request), including, but not limited to, complaints about racial profiling, the use of force, and stops or temporary detentions." This Court notes that the creating of a spreadsheet is not equivalent to the disclosure of a document or documents maintained by an agency. The Respondent did not "redact" certain officers' names from records maintained by the

NYSP, but, instead, chose to omit those names from a spreadsheet which was created through the review of documents maintained by the NYSP.

It is clear that the mere fact that the complaint was determined to be unsubstantiated does not categorically exempt the records from disclosure. (*See, e.g., Matter of New York Civ. Liberties Union v. New York City Dept. of Corr.*, 2023 N.Y. App. Div. Lexis 896; *Matter of New York Civ. Liberties Union v. City of Syracuse*, 210 A.D.2d 1401[4th Dept., 2022]). If and when the Respondent turns over the disciplinary files pertaining to unsubstantiated complaints, the Respondent will be responsible for redacting said records so as to not create an unwarranted invasion of personal privacy through their disclosure. At that time the question of whether the redaction was appropriate will become an issue. Records pertaining to both unfounded and founded complaints may properly be redacted. The question of whether any prospective redactions were appropriate is a question for a later date, once the Petitioner is provided with documents containing redactions. Accordingly, the portion of the petition seeking an order compelling disclosure of an unredacted spreadsheet pursuant to section D(5) of the demand is denied.

Response to Section D(7)

Public Officers Law §89(3)(a) requires that records sought pursuant to FOIL requests must be “reasonably described.” “The requirement of Public Officers Law §89(3)(a) that requested documents be ‘reasonably described’ served to enable an agency to locate and identify the records in question.” *Matter of Reclaim the Records v. New York State Dept. of Health*, 185 A.D.3d 1268, 1269 (3rd Dept., 2020) (quoting *Matter of Konigsberg v. Coughlin*, 68 NY2d 245, 249 [1986]) (internal quotation marks and citations omitted). Section D(7) of the Petitioner’s

FOIL request sought “All investigative reports regarding each law enforcement officer cleared of, or found to have engaged in, wrongdoing in civilian complaints.”

The Respondent asserts that the records being sought are not reasonably described. (*See*, Exhibit R to the petition -letter dated January 20, 2021). The Petitioner does not provide a definition of “investigative reports” and has not established that the Respondent maintains a classification of documents known as “investigative reports”. The Respondent is not required to speculate about what exactly it is that the Petitioner is seeking, nor are they required to provide documents that may be perceived as “investigative reports” if they are not otherwise so named. Accordingly, the portion of the petition seeking an order compelling disclosure of documents responsive to section D(7) of the demand is denied.

Response to Section F

Section F of the Petitioner’s FOIL demand requested: “copies of records regarding complaints filed with the NYSP Professional Standards Bureau (‘PSB’) formerly the Internal Affairs Bureau (‘IAB’), including: Records kept in the PSB or IAB case tracking systems, including complete complaints and allegation histories of every active member of the NYSP, and every former member of the NYSP who left service for any reason since January 1, 2000.”

Although the Respondent was specifically asked, in the court’s February 14, 2023 “Decision of Motion” to provide information on “Whether the “PSB” or “IAB” “tracking systems” maintain “complete complaints and allegation histories of every active member of the NYSP, and every former member of the NYSP who left service for any reason since January 1, 2000”, the court did not receive any such information. “While Public Officers Law §89(3)(a) requires that the records sought be ‘reasonably described’, an agency denying a FOIL request for

lack of reasonable description ‘bears the burden to establish that the descriptions were insufficient for purposes of locating and identifying the documents sought.’” Matter of Puig v. New York State Police, 2023 N.Y. App. Div. LEXIS 255 (quoting *Matter of Jewish Press, Inc. v. New York State Police*, 207 AD3d 971, 974 [3rd Dept, 2022]).

While Exhibit R to the petition (letter dated January 20, 2021) makes the blanket assertion that the records sought in connection with Section F of the FOIL request are not “reasonably described”, no justification for this assertion is provided and the court disagrees with the assertion. The Petitioner is seeking “Records kept in the PSB or IAB case tracking systems, including complete complaints and allegation histories of every active member of the NYSP, and every former member of the NYSP who left service for any reason since January 1, 2000”. As a result of the Respondent’s failure to respond to the court’s specific inquiry, the court has no idea whether such records exist or where they might be maintained, but the court feels that the request contains a description that will reasonably allow the Respondent to identify the records, if they do exist. Accordingly, this portion of the petition is granted, and the Respondent is directed to provide documents responsive to this portion of the demand on a rolling basis, commencing thirty days from the entry of this order and continuing until all such documents have been provided. The Respondent shall of course be permitted to make any redactions it feels are statutorily appropriate.

Response to Section A(1)

Section A(1) of the FOIL request sought “... copies of all law enforcement disciplinary records. For purposes of this request, ‘law enforcement disciplinary records’ means ‘any record created in furtherance of a law enforcement disciplinary proceeding’ as defined in Section 86, subdivision 6 of the Public Officers Law (the ‘Act’), including, but not limited to:

- f) The complaints, allegations, and charges against an employee;
- g) The name of the employee complained of or charged;
- h) The transcript of any disciplinary trial or hearing, including any exhibits introduced at such trial or hearing;
- i) The disposition of any disciplinary proceeding; and
- j) The final written opinion or memorandum supporting the disposition and, if applicable, the discipline imposed, including the agency's complete factual findings and analysis of the conduct, and if applicable, appropriate discipline of the covered employee."

As justification for their failure to provide responsive documents, the Respondent asserts both

that the documents are not reasonably described *and* that compliance with the demand would be unduly burdensome. "However, the question of whether a request contains a reasonable description is separate from consideration as to whether the request is unduly burdensome."

Matter of Puig v. New York State Police, 2023 N.Y. App. Div. LEXIS 255.

When an agency concedes that it is able to locate the requested records, said agency may not deny the request on the grounds that the request was overly broad and that the description of the requested items was insufficient to permit the location and identification of the requested documents. (See Matter of Jewish Press, Inc. v. New York City Dept. of Educ., 183 A.D.3d 731 (2nd Dept., 2020); See, also Konigsberg v. Coughlin, 68 N.Y. 2d 245 [1986]). Here, the Respondent has outlined in painstaking detail the steps that will need to be taken in order to locate and identify the requested records. Accordingly, the defense of overbreadth is unavailable to the Respondent. As the Petitioner states in its Reply, "Respondent claims it would be an unreasonable burden to disclose the requested records, but Respondent already has conceded it knows where to locate responsive documents." (Reply at Page 1). The Respondent is therefore estopped from using the "overly broad" defense and the Court must turn to the question of whether compliance with the FOIL demand would be unduly burdensome.

The Third Department recently remitted a matter “for a determination as to whether it would be unduly burdensome for respondent to comply with petitioner’s modified request [seeking records “confined to two identifiable troops”] because “the record concerning this issue is not sufficiently developed, in that it does not demonstrate how many troopers’ files would need to be searched or the particular manner in which such a search would be conducted.” Matter of Puig v. New York State Police, 2023 N.Y. App. Div. LEXIS 255 at *5 (3rd Dept, 2023). Guided by the Puig decision, this Court, in its February 14, 2023 denial of the Respondent’s Motion to Dismiss, requested the following information from the parties:

“The Respondent is directed to focus on: 1. Why the redaction of officers’ names in the response to Section D(5) is appropriate; 2. How the NYSP maintains “complaints, allegations, and charges” against “employees” and whether these are maintained in individual personnel folders in different places for different Troops; 3. How many “employees” the NYSP has employed from January 1, 2000 through September 15, 2020; 4. Whether transcripts of “disciplinary trial[s] or hearing[s]” are generated and maintained and, if so, where they are maintained; 5. In what way “dispositions” of “disciplinary proceedings” are memorialized and maintained; 6. Whether “final written opinion[s] or memorandum[s]” are generated following every “disciplinary proceeding” and, if so, where they are maintained; 7) Whether the “PSB” or “IAB” “tracking systems” maintain “complete complaints and allegation histories of every active member of the NYSP, and every former member of the NYSP who left service for any reason since January 1, 2000.”; 8) The approximate number of personnel hours it would take to search all personnel files covering the period of January 1, 2000 to September 15, 2020, and to assess, extract and copy responsive documents.

Finally, the Respondent is directed to succinctly identify which items or category of items it feels are not reasonably or sufficiently described to permit the location and identification of same.

The Petitioner is directed, in addition to replying to the Answer, to: 1) indicate whether it would be appropriate to “engage an outside professional service” to conduct a review of

thousands of individuals' personnel folders and an assessment of the relative responsiveness to the FOIL demand of the respective documents contained in each folder; 2) Expound on the assertion that the NYSP could simply look in the folders of the names listed in the spreadsheet prepared in response to Section D(5) and indicate whether it is possible that personnel folders may contain "disciplinary records" that are not the result of a "complaint about misconduct"; and 3) indicate why the redaction of officers' names in the response to Section D(5) is inappropriate."

Pursuant to Public Officers Law §89(3)(a), "An 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 because the agency lacks sufficient staffing or on any other basis *if the agency may engage an outside professional service* to provide copying, programming or other services required to provide the copy, the costs of which the agency may recover pursuant to paragraph (c) of subdivision one of section eighty-seven of this article." (Emphasis added). "The statutes and case law...require an agency relying on the volume of a request to, first establish that the request is unduly burdensome and, second, establish that an outside service cannot be utilized to comply with the request." Matter of Time Warner Cable News NY1 v. New York City Police Dept., 53 Misc. 3d 657, 670 (Sup. Ct., NY Cty., 2016). It is the court's opinion that the Respondent has met this burden.

In support of their Answer, the Respondent submitted an Affidavit from Shannon M. Brundige, who has been Assistant Counsel in the New York State Police Office of Counsel since July 2014. Attorney Brundige explains that the NYSP currently employs over 5,700 employees and that an additional 6,047 individuals were employed by the NYSP from the period of time from January 1, 2000 to September 15, 2020 (Brundige Aff. at paragraph 16).

According to Attorney Brundige, “records associated with NYSP employee disciplinary actions are primarily indexed within individual employee files. These employee files are predominantly maintained as paper files... Therefore a search for responsive records would require an individualized review of every current and past employee’s personnel files, to include sworn members and non-sworn personnel.” (Brundige Aff. at paragraph 18). Active employee files, as well as three years’ worth of former employee files are maintained at Division Headquarters. Older files are maintained “offsite” at a “warehouse maintained by New York State Office of General Services (“OGS”). Offsite files “would need to be requested in waves of a few boxes at a time, scanned and made electronic to be reviewed.” (Brundige Aff. at paragraph 20).

According to the Respondent, the records being sought are “maintained primarily in individual employee files which also contain confidential information, gathered during normal employment processing including, but not limited to, health insurance transaction forms, personally identifiable information such as social security numbers, dates of birth, and home addresses, the names of employees’ spouses, children and other family members, and protected medical information.” (Brundige Aff. at paragraph 20).

Additionally, “[p]ersonnel investigations often pertain to a NYSP member’s conduct in relation to a criminal investigation or arrest of an individual. In these instances, a copy of the underlying investigative report and arrest report (if applicable), along with details thereof, are made a part of the personnel investigation report.” (Brundige Aff. at paragraph 21). “Criminal investigation incident and arrest reports often contain highly sensitive and confidential law enforcement information such as victims’ names, addresses, narratives surrounding alleged criminal activities including non-routine law-enforcement techniques, and procedures used in the

course of investigating a crime.” (Brundige Aff. at paragraph 22). The Respondent asserts that certain information maintained in connection with disciplinary investigations is only viewable, pursuant to the United States Department of Justice, CJIS Security Policy, by personnel who have the appropriate security clearance. (*see* Brundige Aff. at paragraphs 21-26).

Petitioner offers several cases as bases for why the Respondent should be prevented from claiming that production of the requested records would be unduly burdensome. Those cases are distinguishable from the instant matter. One case cited concerned 144 separate FOIL requests, each pertaining to a specific, named officer. Under that set of circumstances, the NYPD’s unduly burdensome defense was rejected. (See NYP Holdings, Inc. v. N.Y. City Police Dep’t, [Sup.Ct., NY Cty., 2022]). Here, individual officers’ names were not provided. Rather, the demand was made for records pertaining to all employees (not limited to officers) over a twenty year period. This court has no reason to believe that the Respondent has misstated the number of “all employees” who fall under this umbrella as close to twelve thousand individuals.

The Rochester case cited by the Petitioner held simply “that the court erred in concluding that the personal privacy exemption under Public Officers Law § 87(2)(b) creates a blanket exemption allowing respondents to categorically withhold the law enforcement disciplinary records at issue.” Matter of New York Civ. Liberties Union v. City of Rochester, 210 A.D.3d 1400, 1401 (4th Dept., 2022). The court in *Rochester, id.*, did not specifically address the issue of whether the burden of producing the requested records would be prohibitive, nor did the decision provide information about the number of records at issue.

The Syracuse court similarly considered solely the issue of personal privacy when it held that “the [lower] court erred in determining that the personal privacy exemption under Public Officers Law §87(2)(b) allows respondents to categorically withhold the law enforcement

disciplinary records at issue.” Matter of New York Civ. Liberties Union v. City of Syracuse, 210 A.D.2d 1401, 1403 (4th Dept., 2022). The question of whether responding to the request would be unduly burdensome was not raised and there was no discussion in the decision about the number of records being sought.

The Department of Corrections case cited by the Petitioner is distinguishable from the instant proceeding in that the issues therein were “(1) whether the limited privacy exemption of FOIL shields unsubstantiated claims; [and] (2) whether the repeal of 50-a applies to information contained in databases that existed prior to the appeal...” New York Civil Liberties Union v. New York City Department of Correction, 2022 WL 1156208 at *1. Those are not the issues being considered here.

This Court has no reason to believe that the Respondent is misrepresenting the volume of the records that would need to be searched, or the nature of the materials contained within employee personnel files. It is clear to this Court that it would be unduly burdensome to search through approximately 12,000 files and redact all protected information. It is equally clear that the option of hiring a third party to conduct such an exercise is wholly inappropriate in this situation.

The Court is cognizant of the Petitioner’s claim that “[i]ndeed, Respondent has a list of those employees whose files it must search, and Respondent produced a redacted version of this list in response to Request D(5).” The spreadsheet that was created in response to Request D(5), however, was driven by a request for information concerning “the total number of *complaints* per calendar year....broken down by the subject (with “subject” being defined as a *category* rather than an individual) (emphasis added). Section A(1) seeks “all law enforcement disciplinary records...” While surely there may be some crossover, not all complaints resulted in disciplinary

records and not all disciplinary actions or investigations into same were prompted by a “complaint.”

The spreadsheet provided in response to Section D(5) is hundreds and hundreds of pages long. Because the 12,000 employees covered by the time frame contained in the FOIL demand has presumably been narrowed in the creation of the D(5) spreadsheet, the Respondent is hereby ordered to conduct, on a rolling basis, a review of the personnel files of those officers against whom “complaints” were made, as they have been identified by the Respondent. Upon review and appropriate redaction of each of those files, the Respondent shall provide to the Petitioner, documents that are responsive to Request A(1) with the understanding that this does not mean that the Petitioner will receive “disciplinary records” from all incidents which gave rise to a “complaint”, as the two terms are independent of each other. Respondent is directed to provide documents responsive to this portion of the demand on a rolling basis, commencing thirty days from the entry of this order and continuing until all such documents have been provided. The Respondent shall of course be permitted to make any redactions it feels are statutorily appropriate.

Attorney’s Fees

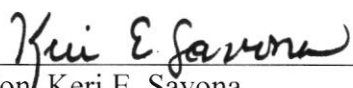
The 2020 amendment to the law has created a flurry of legal activity, leaving many questions to be answered and many interpretations to be provided. Many of the issues being raised in this proceeding and similar proceedings are novel issues. This Court believes that the Respondent has shown a good faith basis for its failure to respond to certain portions of the FOIL demand and, in fact, the court agrees with some of the Respondent’s denials. Accordingly, the request for legal fees is denied. (*See, e.g.,* New York Civil Liberties Union v. New York City

Department of Correction, 2022 WL 1156208 at *4; Matter of New York Civ. Liberties Union v. New York City Dept. of Corr., 2023 N.Y. App. Div. Lexis 896 at *1 [1st Dept. 2023])

This Memorandum constitutes the Decision and Order of the Court. This original Decision and Order is being returned to the attorney for the respondent. The other papers referenced below are being transferred to the Albany County Clerk's Office. **The signing of this Decision and Order shall not constitute entry or filing, under CPLR 2220. Counsel is not relieved from the provision of that rule regarding filing, entry, or notice of entry.**

SO ORDERED AND ADJUDGED
ENTER.

Dated: April 14, 2023
Albany, New York



Hon. Keri E. Savona
Acting Supreme Court Justice