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COURT OF APPEALS
STATE OF NEW YORK

MATTER OF NYCLU,

Respondent,

-against-

CITY OF ROCHESTER,

Appellant.

NO. 13

20 Eagle Street
Albany, New York
January 9, 2025

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUSTICE ANIL C. SINGH

Appearances:

PATRICK BEATH, ESQ.
CITY OF ROCHESTER
Attorney for Appellant
30 Church Street
Room 400A
Rochester, NY 14614

ROBERT HODGSON, ESQ.
NEW YORK CIVIL LIBERTIES UNION
Attorney for Respondent
125 Broad Street
19th Floor
New York, NY 10004

Sophia Long
Official Court Transcriber

1 CHIEF JUDGE WILSON: Last case on today's
2 calendar is matter of NYCLU v. City of Rochester. And for
3 it, we are delighted to be joined by our colleague from the
4 First Department Appellate Division, Justice Anil Singh.

5 Counsel?

6 MR. BEATH: Good afternoon, Your Honors. May it
7 please the court. Patrick Beath, corporation counsel for
8 the City of Rochester. I would ask to reserve three
9 minutes for rebuttal.

10 CHIEF JUDGE WILSON: Yes.

11 MR. BEATH: To be clear, the City of Rochester
12 releases, has released, continues to release through FOIL
13 and affirmatively law enforcement disciplinary records.
14 And when I say we release law enforcement disciplinary
15 records, I'm talking about records that involve the
16 commencement of an investigation and a hearing, or the
17 imposition of discipline where there's an actual
18 disciplinary finding or a hearing, regardless of outcome
19 over charges of misconduct.

20 The issue in this case, though, is not about
21 those disciplinary records. The issue here is about
22 unsubstantiated records and whether those are subject to
23 release through FOIL - - -

24 JUDGE SINGH: Would you agree that under FOIL,
25 that FOIL requires disclosure of quote/unquote all records

1 and that would necessarily include law enforcement
2 disciplinary records subject, of course, to statutory
3 redaction?

4 MR. BEATH: There is a presumption of access to
5 government records under the FOIL law of all sorts, be they
6 disciplinary records, be they records of allegations of
7 misconduct against law enforcement or other public
8 employees, or be they financial records of a city.

9 However, there are a number of exemptions to
10 those disclosure presumptions, one of which is where
11 disclosure would constitute an unwarranted invasion of the
12 individual personal privacy of the individual at stake.

13 JUDGE SINGAS: And haven't we said that we find
14 blanket exemptions inimical to our holdings, where we say,
15 look at each record and see if it's responsive, as opposed
16 to this blanket exemption that I think you're advocating
17 for.

18 MR. BEATH: In other contexts, yes, Your Honor.
19 That is what the courts have said.

20 JUDGE CANNATARO: So it doesn't apply here. Is
21 that what you're implying?

22 MR. BEATH: I think what we're talking whether it
23 be law enforcement misconduct, allegations of misconduct,
24 or general public employee records. We have a unique type
25 of record, and I think a blanket withholding does make

1 sense here - - -

2 CHIEF JUDGE WILSON: Well, except for this unique
3 type of record, the legislature simultaneously adopted a
4 redaction scheme, right?

5 MR. BEATH: Part of the argument we're making,
6 however - - -

7 CHIEF JUDGE WILSON: Yeah.

8 MR. BEATH: - - - is that unsubstantiated records
9 of allegations of misconduct are not law enforcement
10 disciplinary records as defined under the FOIL law.

11 CHIEF JUDGE WILSON: Well, if they're not, then
12 you have no basis to redact anything from them.

13 MR. BEATH: We do as we would any other record.

14 JUDGE CANNATARO: Wait a minute. They - - - the
15 law in question defines a law enforcement record as the
16 commencement of any investigation and any subsequent
17 hearing or disciplinary action.

18 MR. BEATH: I think the key there is the
19 conjunctive use of "and" and the disjunctive use of "or".

20 CHIEF JUDGE WILSON: But so if you're using - - -
21 if you're using this conjunctively, it restricts the
22 category of things that you can make redactions from. The
23 rest are just records that you have to produce. I think
24 you would want to read it disjunctively to make your
25 ability to redact greater. I think you've got this

1 backwards.

2 MR. BEATH: No, I think in law enforcement
3 disciplinary records context, the ability to redact is
4 slimmer than other records of general application. We
5 always have the ability to redact to protect against
6 intrusions into personal privacy, which is what we've done
7 for years in the context of nonlaw enforcement public
8 employee records.

9 The Committee on Open Government in those
10 contexts has said for non-law enforcement public employee
11 records, you may withhold those where there's
12 unsubstantiated allegations of misconduct. Because to do
13 otherwise would be an invasion of personal privacy - - - an
14 unwarranted invasion of personal privacy.

15 Our argument is that the changes to the FOIL law
16 only concern records where there's sustained charges and a
17 hearing or discipline. Those, then, for instance, you're
18 not allowed to redact the subject officer's name. In the
19 context of unsubstantiated allegations, even for non-law
20 enforcement public employees, we've always been able to
21 withhold those records under Committee of Open Government
22 opinions. So at a minimum, we should be able to make
23 redactions.

24 JUDGE CANNATARO: How much - - - how much rooted
25 in the privacy interest of the subjects, or is it something

1 other than that? Is there some statutory source for that?
2 Right?

3 MR. BEATH: It's the privacy. The Committee on
4 Open Government opinions for the past number of decades
5 have been focused on the privacy interests.

6 JUDGE SINGH: How much - - - how much weight
7 should be given to those opinions?

8 MR. BEATH: I think you should give considerable
9 weight to those opinions for a number of reasons. One,
10 because this is the business, and has been the business, of
11 the Committee on Open Government. These are the issues
12 that they deal with on a regular basis.

13 Two, when the FOIL revisions were put in place
14 and when the disclosure of the documents at issue here were
15 tied to a disciplinary proceeding, that was all done in the
16 context of the legislature knowing that history of
17 Committee on Open Government decisions, which regularly
18 opined that where allegations were unsubstantiated and did
19 not lead to discipline in a nonlaw enforcement public
20 employee context, they could be withheld. If the
21 legislature wanted to deviate from that and make law
22 enforcement records that were not substantiated more
23 accessible than standard nonlaw enforcement public employee
24 records had been under Committee on Open Government
25 opinions, they should have said that in the FOIL revision.

1 JUDGE CANNATARO: But Counsel, assuming all of
2 that's true, if the right - - - if the source of the right
3 is the interest of privacy and the statute is now
4 configured, or the statutes, the FOIL law and the Public
5 Officers Law or wherever it comes from require a
6 particularized showing with respect to the privacy to be
7 protected, I don't understand how any of that gets you to a
8 blanket exemption.

9 MR. BEATH: Because every time we're dealing with
10 unsubstantiated allegations of misconduct, we're dealing
11 with potentially defamatory allegations that after an
12 investigation haven't been able to have been proved. So we
13 see analogs in other contexts.

14 JUDGE CANNATARO: So you show that. You
15 demonstrate that to a court. I mean, that could be true.
16 There could be a lot of reasons why you wouldn't want to
17 disclose it; that the damage to be done is far outweighs
18 any interest in looking at it. But you can't claim that
19 for - - - my reading of the statute is you can't claim that
20 categorically for the entire body of unsubstantiated
21 disciplinary records. So why is that wrong? How am I
22 misreading the statute?

23 MR. BEATH: Because I think of the - - - well, I
24 think the statute needs to be read in the context of years
25 of Committee on Open Government opinions, which said that

1 you may withhold those sorts of records. And I think the
2 reason for that - - -

3 JUDGE SINGH: Are the more current - - - the more
4 current decisions from the Committee on Open Government,
5 are they suggesting a different view at this point?

6 MR. BEATH: I think they're following the lead of
7 various courts that have decided the matter since the
8 revisions in 2020 to the FOIL law. But this court
9 obviously has the authority to say otherwise and opt for
10 the position of the Committee on Open Government that was
11 maintained for many years.

12 JUDGE SINGH: But your position is that that we
13 should follow what the Committee on Open Government is
14 saying and is it if they've now changed their view of it,
15 isn't that something we would look at?

16 MR. BEATH: I think the Committee of - - - on
17 Open Government was right at the time that the FOIL
18 revisions were put in place. And that was that the release
19 of unsubstantiated claims - - -

20 JUDGE TROUTMAN: Does not context matter? The
21 times changed and they changed. Does that not matter?

22 MR. BEATH: I think we're looking at the language
23 of the revisions of the FOIL law revisions. And so - - -

24 JUDGE TROUTMAN: Well, if you look at the
25 language and when it gives the definition, where do you - -

1 - where does it say unsubstantiated is not to be released?

2 MR. BEATH: Where does it say unsubstantiated is
3 to be released? And that's part of the problem. Part of
4 the problem is that when it defines law enforcement
5 disciplinary records.

6 JUDGE TROUTMAN: So they get to be excluded by
7 silence?

8 MR. BEATH: In light of the - - -

9 JUDGE TROUTMAN: Is that your suggestion here?

10 MR. BEATH: My suggestion is that in light of the
11 long history of the Committee on Open Government indicating
12 that withholding unsubstantiated records because they would
13 work an unwarranted invasion of personal privacy, that yes,
14 the legislature had to do more than just be silent about
15 unsubstantiated records.

16 JUDGE TROUTMAN: But do you still have the
17 protection of redactions?

18 MR. BEATH: Redactions are protective to a
19 certain extent but are not as productive as withholding
20 altogether. Redactions run a risk that if redactions are
21 missed, then private information goes out into the public.
22 Redaction presents a challenge where people can take a
23 redacted report that may - - -

24 JUDGE TROUTMAN: And does the - - -

25 MR. BEATH: - - - de-identify the subject

1 officers - - -

2 JUDGE TROUTMAN: - - - blanket prohibition create
3 a situation where people - - - although - - -
4 unsubstantiated does not necessarily mean innocent and the
5 decision making of those who may transfer them to a
6 different department or - - - the idea of FOIL is public
7 disclosure of information, correct? Isn't it a free
8 flowing idea as opposed to a holding back unless
9 specifically indicated otherwise?

10 MR. BEATH: That's correct. And the idea behind
11 holding back this type of record is that this type of
12 record is always an unwarranted invasion of personal
13 privacy.

14 JUDGE TROUTMAN: Always.

15 MR. BEATH: Because the allegations after
16 investigation are not sustained. And so it's - - -

17 JUDGE SINGH: But how does that analysis comport
18 with the statute? Because certainly the statute doesn't
19 say that. There's nothing in the statute about
20 unsubstantiated records. The statute, in fact, defines law
21 enforcement disciplinary records as records created in the
22 furtherance of a law enforcement disciplinary proceeding.

23 MR. BEATH: And - - -

24 JUDGE SINGH: So it's all those records, names,
25 complaints, allegations, correct?

1 MR. BEATH: Unsubstantiated records would never
2 be a record created in furtherance of a disciplinary
3 proceeding, because the proceeding only occurs once charges
4 are imposed. That's why the definition - - - if the
5 legislature wanted to include unsubstantiated records, they
6 could have defined law enforcement disciplinary records as
7 all records resulting from the commencement of an
8 investigation.

9 CHIEF JUDGE WILSON: But again, that definition
10 is for the purpose of determining what can be redacted.
11 It's not a carve-out of the general requirement that all
12 records be produced.

13 MR. BEATH: I agree with that, and that's why I
14 rely on the long-standing precedent of the Committee on
15 Open Government, which is the one that is very much - - -

16 CHIEF JUDGE WILSON: But most of that long-
17 standing precedent is before the law was changed.

18 MR. BEATH: But the changes to the law did
19 nothing to unsubstantiated records.

20 CHIEF JUDGE WILSON: Well, that seems, you know,
21 we're kind of spinning around in circles.

22 MR. BEATH: If anything, what the law did was
23 make clear that law enforcement records should be treated
24 just the same as the personnel records of any other public
25 employer.

1 CHIEF JUDGE WILSON: It clearly did the opposite
2 because it created specific exemptions for law enforcement
3 records and defined them. It clearly perceived a
4 difference between the two.

5 MR. BEATH: It perceived - - - it rectified the
6 fact that law enforcement is used to get special treatment
7 under Civil Rights Law 50-a. But ultimately, what it did -
8 - -

9 CHIEF JUDGE WILSON: Well, it still gets special
10 treatment because it's provisions for law enforcement
11 records that just apply to law enforcement records.
12 They're not treated the same as other records.

13 MR. BEATH: They make - - -

14 CHIEF JUDGE WILSON: On the face of the statute,
15 they're not.

16 MR. BEATH: Arguably, they are consistent with
17 prior Committee on Open Government rulings concerning
18 general employee records, because they tie disclosure to a
19 disciplinary proceeding, which is consistent with the
20 Committee on Open Government, opining - - -

21 CHIEF JUDGE WILSON: But then - - - but you're
22 essentially saying they didn't need to put in the whole
23 business about the police disciplinary proceedings, because
24 that would have been the law anyway. It's all superfluous.

25 MR. BEATH: I think they could have,

1 alternatively, just simply said, records of law enforcement
2 entities shall be treated the same as general municipal
3 employees - - -

4 JUDGE CANNATARO: Counsel, can I just ask you - -
5 -

6 MR. BEATH: - - - and it would be the same end
7 result.

8 JUDGE CANNATARO: - - - very quickly?

9 MR. BEATH: Yes.

10 JUDGE CANNATARO: With respect to this
11 distinction between investigations and proceedings, drawing
12 that line. 86-6 says that disciplinary records are any
13 records created in - - - as you pointed out - - - created
14 in the furtherance of a law enforcement disciplinary
15 proceeding.

16 MR. BEATH: Right.

17 JUDGE CANNATARO: Then goes on to say, including
18 but not limited to, complaints, allegations, and charges
19 made against it. To me, those three things - - -
20 complaints, allegations, charges - - - or maybe the first
21 two, at - - - at the very least, are things that you would
22 expect to happen before there is a proceeding. So could we
23 not read the language of the statute as being much broader
24 than you're representing it to be here?

25 MR. BEATH: But I think that - - -

1 JUDGE RIVERA: And if I may add to that before
2 you answer that. 86-7 defines enforcement disciplinary
3 proceeding as the commencement of any investigation. So
4 why is not an allegation that has to be considered,
5 reviewed part of the commencement of any investigation?

6 MR. BEATH: So if we look at the definition 86-7
7 of a law enforcement disciplinary proceeding in its
8 totality, it's the commencement of any investigation and
9 any subsequent hearing or discipline.

10 JUDGE RIVERA: Um-hum.

11 MR. BEATH: The argument that we're making is
12 that that's a two-part test - - -

13 JUDGE RIVERA: And if - - - and if we - - -

14 MR. BEATH: - - - commencement of investigation -
15 - -

16 JUDGE RIVERA: - - - don't agree with you - - -

17 MR. BEATH: - - - and hearing.

18 JUDGE RIVERA: - - - do you lose?

19 MR. BEATH: Do - - -

20 JUDGE RIVERA: Does it turn on this?

21 MR. BEATH: I'm sorry?

22 JUDGE RIVERA: Does it turn on this? Does your
23 argument turn on this?

24 MR. BEATH: The argument turns on this and the
25 past treatment of disciplinary records in the context of

1 nonlaw enforcement public service.

2 JUDGE RIVERA: Thank you.

3 MR. BEATH: To your question, law enforcement
4 disciplinary records. If the 86-6 definition had said law
5 enforcement disciplinary records consist of the following
6 and gave that list, then I would agree with your argument.
7 But that's not what it says. It says they - - - law
8 enforcement disciplinary records are those created in
9 furtherance of a disciplinary proceeding and include the
10 following. The disciplinary proceeding is the gateway.

11 JUDGE CANNATARO: So the triggering event is the
12 proceeding as you define proceeding?

13 MR. BEATH: It's the proceeding as proceeding is
14 defined in the Civil Service Law and the FOIL law. In the
15 Civil Service Law Section 75, a proceeding commences with
16 charges. There's an eighteen-month statute of limitations
17 to bring a disciplinary proceeding; that eighteen months is
18 measured from the service of charges.

19 JUDGE RIVERA: Well, why should we look to that
20 when the FOIL law describes it - - - when 86-7 describes it
21 for purposes of the public officers law?

22 MR. BEATH: The 86 law - - -

23 JUDGE RIVERA: Why are we looking anywhere else?

24 MR. BEATH: And that is consistent if you read
25 the "and" and the "or", as they should be read,

1 conjunctively and disjunctively. That is consistent with
2 disciplinary proceeding under the Civil Service Law,
3 because it is the commencement of an investigation and a
4 subsequent hearing or discipline. Civil Service Law, the
5 proceeding is the service of charges, which is sustained -
6 - - a sustained allegation, and then a hearing or
7 discipline. So those two things are the - - - in my
8 opinion, the legislature was very careful in crafting - - -

9 JUDGE RIVERA: Why isn't it - - -

10 MR. BEATH: - - - this language.

11 JUDGE RIVERA: - - - the commencement of any
12 investigation, as well as a subsequent hearing or
13 disciplinary action conducted by the agency?

14 MR. BEATH: I think if it had been written the
15 commencement of any disciplinary proceeding and any hearing
16 and any discipline, then that would be a wash. Same thing
17 if it were all disjunctive, but it's not. And so - - -

18 JUDGE RIVERA: Do you mean it's the use of the
19 "or" between hearing and disciplinary? Hearing or
20 disciplinary? Excuse me.

21 MR. BEATH: Combination of the use of "and" after
22 commencement and "or" between disciplinary and hearing.
23 Yes.

24 JUDGE RIVERA: All right.

25 CHIEF JUDGE WILSON: Thank you.

1 MR. BEATH: Thank you.

2 MR. HODGSON: Thank you and - - - thank you. And
3 may it please the court. Bobby Hodgson from the New York
4 Civil Liberties Union Foundation.

5 CHIEF JUDGE WILSON: How do you respond to your
6 adversary's - - - this precise point that he's making?

7 MR. HODGSON: I think this is that - - - what
8 they propose is not a plausible or even a possible
9 interpretation of the words "and any subsequent". I think
10 as Judge Rivera points out, the definition is expansive and
11 inclusive. And I could give an example.

12 If my employer were to say you have to submit
13 receipts for any business meal, and we're defining a
14 business meal to include the first course you order and any
15 subsequent dessert or drinks. If I don't have dessert or
16 drinks, I've still had a business meal and I still have to
17 submit the receipt. The words "and any subsequent",
18 they're asking you to read those to mean only if there is a
19 subsequent. And that's simply not the meaning.

20 CHIEF JUDGE WILSON: My problem is - - - which I
21 guess I've asked about - - - is that I read those words as
22 coming to define the scope of things that can be redacted
23 pursuant to the provisions allowing for redaction, not a
24 definition of what - - - in the first instance, what FOIL
25 applies to.

1 MR. HODGSON: Well - - -

2 CHIEF JUDGE WILSON: And for that reason, I think
3 they can - - - they - - - they should want them to be read
4 expansively because it allows them in more types of records
5 to redact things. And if they read this narrowly to have
6 to require a - - - that there be a hearing, they may be
7 required to produce things that they can't redact.

8 MR. HODGSON: Well, I think the narrow reading is
9 conflicting with the rest of the language of the statute
10 for many reasons, and that's one of them. But I would
11 submit that it does more. I mean, so by defining something
12 as a law enforcement disciplinary record that includes
13 affirmatively allegations, complaints, the name of the
14 officer complained of or charged, and then there is a
15 specific set of mandatory and permissive redactions that,
16 as you point out, the legislature has created.

17 They considered what should mandatorily be
18 redacted from all those records. It's information like
19 officer's addresses, phone numbers, medical histories. And
20 then there's a permissive set of redactions for things
21 called technical infractions, which is a very limited term
22 of art.

23 JUDGE SINGH: Is that an exclusive or
24 nonexclusive group of exceptions with respect - - -

25 MR. HODGSON: It's not exclusive to the extent



1 that civil rights laws - - - or sorry - - - that the public
2 officer's laws general invasion of - - -

3 JUDGE SINGH: So then - - -

4 MR. HODGSON: - - - privacy exemption - - -

5 JUDGE SINGH: So then next, what? If it's not
6 within the - - - these exceptions, what do the courts
7 require at that point? Don't they require a balancing of
8 the privacy interests versus the right to know?

9 MR. HODGSON: They do. But we submit that the
10 fact that the legislature created such a detailed scheme
11 and considered what should mandatorily be redacted from
12 these records, what should permissively be redacted, and
13 that they did not include unsubstantiated complaints. They
14 did not include the names of officers complained of or
15 charged. You cannot read the statute consistent to say
16 then that the general invasion of privacy exemption can
17 somehow apply to all that material.

18 And we would say that even more than that, it is
19 affirmatively included in the definition the name of the
20 officer complained of or charged. They cannot then turn
21 around and interpret the general provision to say, well,
22 the name of every officer complained of is material that is
23 an invasion of privacy.

24 CHIEF JUDGE WILSON: Well, could they make - - -
25 could they make under sort of general FOIL provisions a

1 specific application? In this particular case, this would
2 work some undue harm.

3 MR. HODGSON: Absolutely. We would submit that
4 those invocations of the privacy exemption would be subject
5 to the same test that there has always been, which is they
6 have to come up with a particularized and specific
7 justification for it. We would also submit, though, that
8 it is a narrow universe of records, particularly when
9 you're talking about the items affirmatively named in the
10 definition of a law enforcement disciplinary record.
11 Allegations, complaints, the name of the officer complained
12 of or charged. It would be - - -

13 JUDGE SINGAS: What about the argument that other
14 government employees unsubstantiated records are exempted,
15 but not police officers?

16 MR. HODGSON: I think that's not true for a few
17 reasons, and I'm glad for the opportunity to clarify. It
18 has never been the case that every public employee has a
19 blanket exemption for unsubstantiated complaints. We cite
20 to the Thomas v. New York City Department of Education case
21 from 2013 in the First Department, where the First
22 Department said exactly that. And that wasn't to do with
23 police records, that was to do with educators. It said
24 there is no blanket exemption for quote/unquote
25 unsubstantiated complaints, because, of course, you are

1 always balancing the public's interest in a particular
2 record with the privacy implications of it.

3 We would also point out that, you know, those are
4 decisions from a pre-2020 world. Post-2020, the FOIL has
5 been amended. It now says affirmatively allegations,
6 complaints, the name of the officer complained of or
7 charged is - - - is an affirmative part of the records that
8 must presumptively be produced. And it's not listed
9 anywhere in the mandatory or permissive redactions.

10 And the Committee on Open Government in 2022
11 issued a very specific and very strongly worded rejection
12 of Rochester's proposed interpretation here. It said that
13 it would undermine the public trust in police
14 accountability to create this broad secrecy. It would go
15 against the legislative intent and the plain language of
16 the statute to create an exemption for materials that are
17 related to unsubstantiated complaints and - - -

18 JUDGE CANNATARO: And does that operate as a
19 repudiation of their prior position on the disclosability
20 of these documents?

21 MR. HODGSON: Let me start by saying that their
22 prior position is not that categorically all
23 unsubstantiated complaints are always subject. They have
24 always said they may constitute an unwarranted invasion of
25 privacy.

1 JUDGE SINGH: And in any event, with respect to
2 their prior positions, was there any appellate case law
3 that supported those positions? I know they went to the
4 trial court. And they had - - - there was a trial court
5 order that purportedly supported that position, correct?

6 MR. HODGSON: No, Your Honor. And the answer is
7 no, there was not appellate support for that position. In
8 fact, the Thomas case I mentioned from the First Department
9 rejected it explicitly. And there were other cases where
10 individual records of educators, for example, were found to
11 be redactable because they were constantly - - - they were
12 related to an unsubstantiated complaint. That's the
13 LaRocca case mentioned in the briefing. But in that
14 context, they pointed specifically to the fact that there
15 was a standalone, separate statute, Education Law 3020-a
16 that rendered educators records confidential in that
17 context. Of course, the analog to that is Civil Rights Law
18 section 50-a, which no longer exists for police.

19 I do want to speak a bit about the legislative
20 intent here, because I think it could not be clearer that
21 legislators who were voting both for and against this law
22 knew exactly what it do - - - what it would do, and that it
23 would reveal and force agencies to produce records related
24 to unsubstantiated complaints. We point in our briefing to
25 statements by legislators who are saying I'm voting for



1 this because it will reveal how police accountability works
2 and why it is that, for example, 4,000 complaints of racial
3 profiling in New York City resulted in zero
4 substantiations. It talked about how that - - -

5 JUDGE CANNATARO: And are you referring to
6 legislative intent because you think it's possible that
7 there may be some ambiguity in that?

8 MR. HODGSON: Absolutely not. I'm saying that it
9 is very clear they looked and they said, look, this is the
10 kind of thing that will address - - - what the public is
11 calling for, will build trust between departments and the
12 public by saying, you know, let's show our work. Let's
13 take away this veil of secrecy so you can see what happens
14 when someone makes a complaint of police misconduct.

15 And you have departments since 2020 that have
16 fully embraced that. Hundreds of thousands of these
17 records have been made public since 2020, with only good
18 results. A better understanding of what police
19 accountability looks like in - - - in people's communities.
20 Every appellate court to have considered this precise
21 question has come out the same way. You have places like
22 New York City, but also like Utica saying we're going to
23 affirmatively put up all of our disciplinary records
24 alongside things like commendations and honors, because
25 that's how we show this is what accountability looks like

1 in our community. This is transparency. That should be
2 good for everyone. And legislators recognize that.

3 They did also say, though, that, you know, in the
4 legislative history, the repeal of Section 50-a and the
5 amendment of FOIL would allow, for example, Ramarley Graham
6 - - - Ramarley Graham's family, someone who had died prior
7 to 2020, to finally see the police records that had been
8 kept secret since his death. Eric Garner's family, who
9 died prior to 2020 - - - they said that - - - that this
10 repeal would allow his family to finally see those records.
11 They talk in the sponsors memo about how the initial
12 purpose of Section 50-a was very narrow and was to address
13 a specific issue, but that over the course of time, it had
14 been expanded in the courts to be so sweeping as to create
15 this veil of secrecy, and that this enactment was intended
16 to correct that. And to - - -

17 JUDGE SINGH: You argue in your briefing that the
18 names of police officers should always be provided
19 unredacted.

20 MR. HODGSON: Not always, but the presumption has
21 to be that those names should be provided and there has to
22 be clarity on that, because - - -

23 JUDGE SINGH: But shouldn't - - - couldn't there
24 be a balancing on that where courts or agencies would, in
25 the first instance, decide whether or not that should be

1 released, because there may be a privacy interest or reason
2 why it shouldn't be?

3 MR. HODGSON: I think there are examples where
4 that may be the case, but I think it's really important
5 that there be clarity that there can't be a categorical
6 withholding of all officer names - - -

7 JUDGE CANNATARO: So it comes up at times - - -

8 MR. HODGSON: - - - where there would be a
9 presumption that there would be anonymity.

10 JUDGE CANNATARO: You would raise it in a
11 particularized - - -

12 MR. HODGSON: Yes.

13 JUDGE CANNATARO: - - - objection to that - - -
14 that record.

15 MR. HODGSON: That particular record. And we - -
16 - and obviously, many FOIL requests are such that there's a
17 request for you know, hundreds of records and you have
18 agencies saying well, we're going to categorically redact
19 every officer's name. Or if we can't anonymize these
20 records, we're not going to turn them over. And that is
21 clearly inappropriate because the statutory text includes
22 affirmatively the name of the officer complained of or
23 charged. It would be a rare case, but one that may exist
24 where an agency could say, oh, this particular officer
25 changed their name legally in the past because of a

1 particularly personal reason, and it's not relevant to the
2 public. And maybe we can redact it there.

3 But there has to be clarity on this issue,
4 because, you know, four and a half years after the repeal
5 of 50-a, many agencies around the state unfortunately
6 continue to categorically withhold things like officer
7 names on a broad blanket basis, or continue to insist that
8 they'll only turn over records if they're anonymized, and -
9 - - and that's not consistent with the text of FOIL or the
10 legislators intent when they passed it.

11 If Your Honors don't have any further questions,
12 I think I would go back to the final thing I said, which is
13 that this case presents an opportunity for the court to
14 give much needed guidance, not just in this case, but to
15 agencies around the state who are engaging in these - - -
16 responding to these FOIL requests at a time when
17 categorical invocations of the privacy exemption or other
18 exemptions to blanket withhold officer names or allegations
19 or complaints are something that's happening repeatedly.

20 So to provide the specific guidance to agencies
21 to say it is not just a universal blanket unreasoned denial
22 that is inappropriate, but instead when materials are
23 affirmatively included in the statute, the name of the
24 officer complained of or charged, the allegations, the
25 complaints, those are materials that presumptively have to



1 be turned over. Thank you, Your Honors.

2 CHIEF JUDGE WILSON: Thank you.

3 MR. BEATH: Just briefly, Your Honors, to the
4 point of redaction of particularly in the case of
5 unsubstantiated records. I think the revisions to the FOIL
6 law creates specific things that may or may not be redacted
7 as far as law enforcement disciplinary records go.

8 Again, we would argue that unsubstantiated
9 complaint records fall outside of that definition. And
10 even if this court were to find that those are subject to
11 disclosure, subject to redaction, we would want to make
12 sure we have the ability to still redact individual names
13 and facts - - -

14 JUDGE SINGH: But - - - but - - -

15 MR. BEATH: - - - in the interest of personal
16 privacy.

17 JUDGE SINGH: But isn't that inconsistent with
18 the statute? The statute says specifically complaints,
19 allegations, charges, names of employees complained of or
20 charged. So isn't your friend's point strong that there
21 needs to be essentially a balancing - - - it's the names
22 may not, under certain circumstances, be turned over for
23 whatever reasons because - - - because of the balancing.
24 Isn't that how it should be handled?

25 MR. BEATH: And this goes back to the argument

1 that I made previously that unsubstantiated records, by
2 definition, cannot be disciplinary records. They cannot
3 result in discipline. They can never result in charges.
4 And so they should be treated differently.

5 So even if this court finds that a blanket
6 withholding, as we would argue the Committee on Open
7 Government used to support, is not appropriate going
8 forward, we would still want to make sure we have the
9 latitude to make redactions as appropriate to protect
10 personal privacy - - -

11 JUDGE SINGAS: So is your point that - - -

12 MR. BEATH: - - - particularly where allegations
13 are not sustained.

14 JUDGE SINGAS: Are you trying to make the point
15 that a disciplinary proceeding is a term of art and - - -
16 and we're to take your word for what it means and ignore
17 the context and the other examples in the statute? I mean,
18 you're basically telling us that's not what a disciplinary
19 proceeding is.

20 MR. BEATH: I'm saying that what a disciplinary
21 proceeding is, if we read the definition as conjunctive,
22 having two pieces, that it's consistent with the definition
23 of a disciplinary proceeding in the Civil Service Law,
24 which is a close analog, because that's always been applied
25 to civilian public employees. So I'm not asking you to

1 ignore the language of the current statute. I am
2 suggesting that it should be read in a very specific way.

3 JUDGE SINGH: But you're suggesting that names
4 should always be withheld.

5 MR. BEATH: Not where we have sustained
6 discipline.

7 JUDGE CANNATARO: Unsubstantiated complaint
8 names. I - - - correct me if I'm wrong. You just asked
9 that they be subject to categorical redaction. If we find
10 that they're nonetheless disclosable, right?

11 MR. BEATH: No. That the municipality have the
12 discretion to be able to redact those.

13 JUDGE CANNATARO: Meaning that we should leave it
14 to the municipality to decide when to redact and when not
15 to redact?

16 MR. BEATH: For unsubstantiated records, yes.

17 JUDGE CANNATARO: And would it be cynical to say
18 that then they're always going to be redacted?

19 MR. BEATH: I don't know whether or not it would
20 be cynical, but time would tell, and those would still be
21 able to be subject to challenge, right? They could only be
22 redacted if the municipality could show that it wouldn't
23 work in unwarranted invasion of personal privacy. But - -
24 -

25 JUDGE SINGH: So in other words, the balancing.

1 MR. BEATH: Right.

2 JUDGE SINGH: The - - - the - - - that the
3 balancing favors the police officer in that instance with
4 respect to that unsubstantiated claim, correct?

5 MR. BEATH: It would more often - - -

6 JUDGE SINGH: Not all claims.

7 MR. BEATH: Yes. It would more often favor the
8 police officer because of the nature of the unsubstantiated
9 allegations. Yes. Thank you, all.

10 CHIEF JUDGE WILSON: Thank you.

11 (Court is adjourned)

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C E R T I F I C A T I O N

I, Sophia Long, certify that the foregoing transcript of proceedings in the Court of Appeals of New York Civil Liberties Union v. City of Rochester, No. 13 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Signature: Sophia Long

Agency Name: eScribers

Address of Agency: 7227 North 16th Street
Suite 207
Phoenix, AZ 85020

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