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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF NEW YORK CIVIL LIBERTIES
UNION,

Appellant,

-against-

NO. 133

NEW YORK CITY POLICE DEPARTMENT,

Respondent.

20 Eagle Street
Albany, New York
November 14, 2018

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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Official Court Transcriber



1 CHIEF JUDGE DIFIORE: Good afternoon, everyone.
2 The first appeal on this afternoon's calendar is appeal
3 number 133, the Matter of the New York Civil Liberties
4 Union v. New York City Police Department.

5 Counsel?

6 MR. DUNN: Good afternoon. I'm Christopher Dunn
7 with the New York Civil Liberties Union. With me is Robert
8 Hodgson also from the NYCLU. With the Court's permission,
9 I would like to reserve two minutes for rebuttal.

10 CHIEF JUDGE DIFIORE: Two minutes, sir?

11 MR. DUNN: Yes.

12 CHIEF JUDGE DIFIORE: You may.

13 MR. DUNN: At the outset, I want to highlight,
14 this is a case about judges, not about cops. This is a
15 case about the public's right to know about how the court
16 and the most influential police department in the country -
17 - -

18 CHIEF JUDGE DIFIORE: So counsel, how do we
19 reconcile those two statutes in favor of disclosure without
20 FOIL swallowing up the court's piece in the civil rights
21 law?

22 MR. DUNN: I think it's exactly what the Supreme
23 court did in this case and what every party before you
24 agrees should be done, which is to redact the identifying
25 information of the police officers.



1 CHIEF JUDGE DIFIORE: Redact it; is that what you
2 said?

3 MR. DUNN: Yes.

4 CHIEF JUDGE DIFIORE: Um-hum.

5 MR. DUNN: Yes. And so from the beginning, we
6 have never sought identifying information about the police
7 officers in these cases. Our request has been for the
8 judicial decisions with all officer identifying information
9 removed.

10 JUDGE STEIN: Well, what about the whole process
11 setup in - - - in 50-a? Giving notice, giving a right to
12 be heard. Are you saying that that process should be now
13 incorporated into FOIL when something is sought that would
14 be covered under 50-a?

15 MR. DUNN: We are not saying that, Your Honor. I
16 - - -

17 JUDGE STEIN: Okay. But then - - - then - - -
18 then how does that not obliterate 50-a and that whole
19 process that the legislature's set up?

20 MR. DUNN: Because I think that that process is
21 set up to deal with a situation, which is a common
22 situation, where the police officer's identity is going to
23 be revealed through the disclosure of the personnel record.
24 And in that case, 50-a provides - - -

25 JUDGE STEIN: But - - - but sometimes that's not



1 clear. I mean, in this very case there seems to be an
2 issue about whether redaction could sufficiently protect
3 the officer's identification.

4 MR. DUNN: Well, with all due respect, Judge
5 Stein, I don't think there - - - there is a serious
6 question about that. But I understand what you're saying.
7 And what I am suggesting is that the scheme that's set out
8 in 50-a, paragraphs 2, 3, and 4, deals with the situation
9 where a record is going to be produced in an ongoing
10 proceeding and the officer is going to be identified.
11 Here, the whole premise of this FOIL is all the officer
12 information comes out of the records. And it's our
13 position that in that situation, which is very unusual,
14 that those procedural safeguards just don't need to be
15 addressed because all of that information is coming out.
16 And therefore, there's no kind of process to be had with a
17 judge saying okay, is there enough of an interest to - - -

18 JUDGE FAHEY: Well, can't you just match the - -
19 - the event to the officer? As I understand it - - - and
20 I'm sure you know more about this than I do, but the
21 disciplinary hearings themselves are open to the public; is
22 that correct?

23 MR. DUNN: That's correct.

24 JUDGE FAHEY: And so observers can go and watch
25 and - - - and - - - and certainly, while maybe not be able



1 to identify all the participants, can identify the
2 particular events. That seems to be clear; couldn't they?

3 MR. DUNN: Well, they could in theory. But - - -

4 JUDGE FAHEY: All right. So if they can identify
5 the particular events, then simply releasing the records,
6 you can coordinate the event with the records and identify
7 the officer.

8 MR. DUNN: Yeah. And to be clear, Judge Fahey,
9 what we are saying is the sort of facts that would allow
10 somebody to do that, can be taken out of the decision.

11 JUDGE FAHEY: Well, if you take those facts out,
12 along with everything else, what's the point, I guess?

13 MR. DUNN: Well, there are lots of points. The
14 facts that might identify an officer, are not all the facts
15 that are in an opinion, one. Secondly, let's be very
16 clear. You and I do this all the time. We read decisions
17 that have pages and pages and pages of legal analysis in
18 it. They say nothing about facts. These are judicial
19 decisions. Some of these things are fifty pages long, as
20 the City points out. There is a lot of law in there. And
21 our primary interest here is in how judges in the NYPD are
22 interpreting law that governs police officers. So for
23 instance, if judges in the NYPD think there's a fourth
24 amendment exception to the probable cause requirement, I
25 want to know about that. I cannot - - - I cannot know



1 about that now because these decisions and their discussion
2 of the law, as well as the facts, are entirely secret. I
3 would submit - - -

4 JUDGE FAHEY: I can see that. I think that - - -
5 I think that's an interesting argument, a valid argument.
6 But I'm still struggling with overcoming a number of
7 hurdles before you get there. And I'm wondering if
8 redaction is - - - is really the - - - the way you should
9 be doing this. And if we actually have the authority to do
10 that, particularly in light of 50-a's requirement that
11 there be consent by the officer. Some of the objections
12 that were raised by the PBA in their amicus brief seem to
13 be also compelling on the other side.

14 MR. DUNN: Well, let me address a couple things
15 here if I could.

16 JUDGE FAHEY: Sure. Go ahead.

17 MR. DUNN: This court has never suggested, and no
18 court has suggested, that redaction is only available if it
19 renders impossible the ability to identify the redacted
20 information. It's a commonsense approach. We are talking
21 about trials that took place ten, twelve years ago. Our
22 request is from 2001 to 2011. The - - - the order that was
23 issued by the supreme court justice here was to redact
24 factual details sufficient to conceal the identity of the
25 officer.



1 JUDGE STEIN: But - - - but under FOIL, it's the
2 agency that makes the determination as to what's sufficient
3 and what's not. Under 50-a, it's the court that makes that
4 determination. And that's - - - that's one of the things
5 that troubles me here.

6 MR. DUNN: Well - - - well, fair enough. But
7 Judge Stein, keep in mind here that we went through a court
8 process in this case. The court ordered - - -

9 JUDGE STEIN: Yes. But you're not saying it's
10 required in every case.

11 MR. DUNN: Well, I - - - I - - -

12 JUDGE STEIN: You - - - as a matter of fact, I
13 think when I asked you the question, you said that the
14 process set forth in 50-a is not necessary.

15 MR. DUNN: I - - - I think that fairly read - - -
16 and this court has never addressed the issue. But fairly
17 read, when you're dealing with documents that are redacted
18 of the officer identifying information, that when those are
19 sought under FOIL, that it is sufficient to have the agency
20 make the redactions. On top of that though here, we did
21 have a process - - - and this is unusual about this case -
22 - - where the judge looked at five sample decisions that
23 were directed to the City to produce with the redactions,
24 and he determined that the redactions in fact were
25 sufficient for purposes of concealing the identity of the



1 officer. So here we have a situation where while I don't
2 think 50-a required it, that we actually have judicial
3 review of these documents.

4 JUDGE RIVERA: Counsel, can I ask a question? I
5 just want to clarify your position and your interpretation
6 of FOIL. As I understand 87(2), it leaves to the agency
7 complete discretion whether or not to invoke the exemption.
8 So the reality is that the City could have chosen to turn
9 it over anyway.

10 MR. DUNN: That's correct, Your Honor.

11 JUDGE RIVERA: Without any redactions.

12 MR. DUNN: You're absolutely right.

13 JUDGE RIVERA: It doesn't matter what 50 says.

14 MR. DUNN: That - - - that - - - FOIL allows - -

15 -

16 JUDGE RIVERA: Correct.

17 MR. DUNN: - - - production.

18 JUDGE RIVERA: Correct.

19 MR. DUNN: That's exactly right.

20 JUDGE RIVERA: But they've decided to invoke the
21 exemption. And so now this is where we are.

22 MR. DUNN: That's correct.

23 JUDGE RIVERA: But I just wanted to clarify if
24 that was your interpretation also of the statute.

25 MR. DUNN: Yes. I mean, that - - - that's a



1 little bit of an odd thing about the FOIL statute. It
2 allows agencies to withhold documents. It doesn't require
3 - - -

4 JUDGE GARCIA: Doesn't that go to Judge Stein's
5 point then as to what protection would 50-a afford if all
6 we look to was FOILs permissive release provision? Then
7 what civil rights protection is 50-a or 50-b for that
8 matter, giving to anyone? If an agency has these records,
9 how about the, you know, documents that tend to identify
10 victims of a sex offense, the agency could then make a
11 decision, you know, we don't even need to redact this,
12 we'll give them to you.

13 MR. DUNN: Well, Your Honor - - -

14 JUDGE GARCIA: Only applying FOIL.

15 MR. DUNN: - - - happily, I'm not the agency.
16 I'm not in that position. What we are dealing with here is
17 a situation in which the agency did move to redact.

18 JUDGE GARCIA: Right. But under your rule, the
19 only issue is - - - putting aside 50-a, the only issue is
20 whether the agency is going to make a determination that
21 they'll give them to you, they'll give them to you
22 redacted, they may not redact them. And doesn't that gut
23 the civil rights law?

24 MR. DUNN: Your Honor, I don't think it does. I
25 - - - I think the agency has an obligation under 50-a



1 perhaps to redact - - - to respect the officer information.

2 JUDGE GARCIA: So the officer could bring a civil
3 action against the NYPD?

4 MR. DUNN: Well, they can and they have. I mean,
5 we have a dispute right now where the PBA has sued over the
6 release of bodycam footage claiming that those are 50-a
7 protected records.

8 JUDGE RIVERA: But 50-a's coverage is not
9 absolute even on its own terms.

10 MR. DUNN: That's exactly right. And that's an
11 important point.

12 JUDGE RIVERA: So - - - so if the legislature
13 really wanted to make these documents absolutely
14 confidential, no one can ever get to it, that's what they
15 would've said. They didn't do that. And it does have a
16 particular purpose. Could you address the question of the
17 purpose and whether or not that's implicated at all in your
18 FOIL request?

19 MR. DUNN: Well, I think it's definitely
20 implicated in the sense that you're absolutely right, that
21 50-a does not create an absolute bar to production of
22 personnel records. In fact, it creates a disclosure
23 regime. And it allows for them to be disclosed if there's
24 a process in place. And that's a situation as I - - -

25 JUDGE FAHEY: But isn't that limited by a lawful



1 court order in the context of litigation? In other words,
2 it's not a FOIL request just to an agency, but instead,
3 50-a says these kind of records can only be released
4 subject to a lawful court order, usually after in camera
5 review, et cetera, and then in the context of pending
6 litigation, not just through a request to an agency. This
7 would be - - - this would subvert that process.

8 MR. DUNN: I don't think it subverts it at all,
9 Judge Fahey. I think it complements it.

10 JUDGE FAHEY: Okay. Explain to me how it
11 doesn't, because you're taking an individual's records,
12 redacting them, and releasing them. So go ahead.

13 MR. DUNN: Well, I think I start with FOIL, which
14 in its present form was enacted after 50-a was enacted.

15 JUDGE FAHEY: Right.

16 MR. DUNN: 50-a deals with the situation, as I
17 said before, as I understand it, where the production of
18 the record will result in the identification of the
19 officer. Okay. And in that situation, 50-a speaks to how
20 to deal with that. In the FOIL context - - -

21 JUDGE FAHEY: So - - - so let me stop you.

22 MR. DUNN: Sure.

23 JUDGE FAHEY: So you have to - - - the record
24 itself, if it - - - you're - - - you're saying if - - - we
25 both know the record can't guarantee that you won't be able



1 to identify the officer. But in a commonsense reading of
2 it, if the agency determines that this record could not
3 identify the officer, then it could be releasable if
4 redacted?

5 MR. DUNN: Under FOIL, absolutely, without
6 creating any 50-a problem.

7 JUDGE FAHEY: I see.

8 MR. DUNN: And that's the whole premise of our
9 position here, that we are looking for documents that can
10 and have been shown to be redacted in a way that the
11 officers are not going to be identified. We don't care
12 about the officer identifications. What this is about is
13 getting at the judicial decisions that the NYPD is issuing
14 about police misconduct. And so what I am saying to you in
15 terms of the interest in FOIL, and the interest in 50-a,
16 the redaction of the officer identification balances both
17 of those interests, which is exactly what this court said
18 in Daily Gazette.

19 JUDGE RIVERA: But - - - but they argue that it -
20 - - but they argue to - - - to really have the kind of
21 redaction that would ensure that one could never identify
22 the officer. That that would either be totally useless to
23 you because everything's redacted, you get nothing from it,
24 or it would indeed not be representative of the actual
25 determination, which then goes to how it's helpful to you.



1 Could you address the latter, not the former; I get where
2 you are on the former.

3 MR. DUNN: Okay. Well, so these documents, based
4 on what I know about them - - - and I've seen examples of
5 these and you've been given examples of these - - - they
6 have lots of information there that is valuable to me and
7 to the public about the way NYPD judges operate. And even
8 if one were to take out all the facts, and I do not think
9 that's necessary to - - - to anonymize them for police
10 officer identity, there's plenty of information there that
11 is valuable. And the fact that it's incomplete, that's
12 what redaction does in every single situation. And the
13 City wants to describe that as distortion. It's just an
14 incomplete document. And again, I just want to reiterate,
15 there are all kinds of useful, valuable information. And
16 again, going back in terms of the actual redaction, so this
17 court doesn't want to get in the business, I understand, of
18 going through documents and redacting. Judges do this all
19 the time at the trial court level.

20 CHIEF JUDGE DIFIORE: Thank you, Mr. Bloom.

21 MR. DUNN: All right. Thank you, Your Honor.

22 CHIEF JUDGE DIFIORE: Counsel?

23 I meant Mr. Dunn. Excuse me.

24 MR. DUNN: Very well. I knew what you meant.

25 MR. BLOOM: Good afternoon, Your Honors. My name



1 is Aaron Bloom and I represent the respondents, the New
2 York City Police Department. Your Honors, this appeal
3 presents the court with an opportunity to both harmonize
4 three prior decisions that are intention and provide
5 guidance to a government agency, and to government agencies
6 generally trying to faithfully walk the line between two
7 competing legislative - - -

8 JUDGE RIVERA: So - - - so let me ask you - - -

9 MR. BLOOM: - - - policies.

10 JUDGE RIVERA: - - - also the question I asked
11 your adversary. Is it - - - is it the NYPD's position that
12 87(2) allows the agency to determine for itself whether or
13 not it will invoke the exclusion, but it does not mandate
14 the exclusion; do you agree with that or do you have a
15 different reading?

16 MR. BLOOM: With - - - I have a different view
17 with - - -

18 JUDGE RIVERA: Okay.

19 MR. BLOOM: - - - respect to - - -

20 JUDGE RIVERA: Yes.

21 MR. BLOOM: - - - 87(2) (a).

22 JUDGE RIVERA: Okay.

23 MR. BLOOM: So when there is a - - - when there
24 is another state or federal statute that mandates
25 confidentiality, I don't believe that anything in FOIL



1 authorizes the government to ignore that other law that
2 mandates confidentiality. So - - -

3 JUDGE RIVERA: Well, then what does may deny?
4 Because that applies to all of the categories including A.

5 MR. BLOOM: That - - - that's correct. But I
6 believe that nothing in may deny implies that - - - that
7 another command that exists that says must keep
8 confidential, doesn't apply.

9 JUDGE RIVERA: But then that doesn't make sense
10 with respect to what A says; are specifically exempted,
11 right? May deny what is already specifically exempted.

12 MR. BLOOM: Well, I think that that's just - - -

13 JUDGE RIVERA: I mean, that this is the
14 superseding statute.

15 MR. BLOOM: Well, I don't - - - respectfully,
16 Your Honor, I don't believe that - - - that that's what
17 that means. Otherwise, as I think Judge Garcia pointed
18 out, many of the confidentiality statutes that exist would
19 simply be discretionary. And - - - and I don't believe
20 that that has ever been the opinion of the courts that - -
21 - that those statutes are discretionary. I believe that
22 the may deny applies to all of the - - - the - - - the
23 exemptions. And certainly, where there are exemptions that
24 are created by FOIL, those are ones that can be asserted in
25 discretion.

1 JUDGE RIVERA: What if the officer is deceased?

2 MR. BLOOM: What is - - - what - --

3 JUDGE RIVERA: What if the officer's deceased?

4 Does 50-a - - - I'm not sure even I know the answer to
5 that. Does 50-a apply to those kinds of records where the
6 officer's deceased?

7 MR. BLOOM: I - - - I don't - - - I believe so.

8 JUDGE RIVERA: Okay. So that might - - -

9 MR. BLOOM: But I don't believe we've - - -

10 JUDGE RIVERA: - - - that might be a case, right,
11 where you could see that 2(a) would allow for the
12 discretion?

13 MR. BLOOM: I - - - I'm not sure. But I - - -
14 but I - - - I'm not sure. But I don't think it - - - it
15 pertains to this - - -

16 JUDGE RIVERA: To this issue. Fair enough.

17 MR. BLOOM: - - - this case in particular.

18 JUDGE RIVERA: Fair enough.

19 JUDGE STEIN: Could you explain, as I understand
20 your argument however, you think that there's a distinction
21 in 87(2)(a) between the civil - - - civil rights law 50-a
22 and other statutes that fall within that exemption.

23 MR. BLOOM: Yes.

24 JUDGE STEIN: How - - - how do you - - - how do
25 we find a basis to - - -



1 MR. BLOOM: Sure.

2 JUDGE STEIN: - - - judicially make such a
3 distinction?

4 MR. BLOOM: Well - - -

5 JUDGE STEIN: Where in the statute do you find
6 that?

7 MR. BLOOM: I - - - I think you find it in A, the
8 very structure of the statute; B, the legislative history;
9 and C, this court's prior holdings - - - all of this
10 court's prior holdings about 50-a. All of those holding -
11 - - all of this court's prior decisions say that the
12 structure and the legislative purpose of 50-a is very
13 specific. It is about - - - and the touchstone is whether
14 the records could potentially be used to embarrass an
15 officer in litigation.

16 That's the touchstone that's been constant
17 throughout all of this court's decisions. And it comes
18 from the structure of the statute, which is - - - is
19 tailored to a litigation context, and from the legislative
20 history. All - - - this statute is unique. Unlike many
21 confidentiality statutes, it is about a specific use of
22 documents. It comes from the - - - the - - - the - - - to
23 prevent the use of records to embarrass an officer in
24 litigation, also outside of litigation. But this court has
25 always said the context is litigation. So to determine



1 whether the records - - -

2 JUDGE RIVERA: So then that helps to explain the
3 process, right? Isn't your adversary then correct, the
4 process that's set out in 50-a is focused on that very
5 purpose?

6 MR. BLOOM: Exactly. Yes, Your Honor. And so
7 what I would say about the process is that that process
8 only pertains to the litigation context. And you know that
9 from the text of the statute itself, because what the
10 process says is the - - - after making a showing that
11 warrants the records to be given to a court for in camera
12 review, the judge must decide whether those - - - whether
13 those records are material and relevant to the action
14 before that judge. So the standards set out in 50-a really
15 only make sense when you have - - - when it's in a
16 litigation context.

17 JUDGE FAHEY: Let me ask this question. The
18 position that you're taking before us today, is it
19 different than the position that you took in the Appellate
20 Division?

21 MR. BLOOM: Yes.

22 JUDGE FAHEY: Okay. How? In a one-sentence
23 explanation, how is it different?

24 MR. BLOOM: Well, we had a two-part - - - we - -
25 - we had two parts to our argument in the Appellate



1 Division. One, that this court's holding in Short and
2 Karlin controlled. And two, that effective redaction
3 wasn't feasible.

4 JUDGE FAHEY: Right.

5 MR. BLOOM: Now we argue that this court should
6 harmonize Short and Karlin with Daily Gazette.

7 JUDGE FAHEY: So basically, you want us to do
8 what you didn't want us to do in the Appellate Division?

9 MR. BLOOM: Well, I wasn't before you in the
10 Appellate Division. And I think that's the key thing.

11 JUDGE FAHEY: And I wasn't there either. So - -
12 - so we're - - - we're clear on that. But - - -

13 MR. BLOOM: But I mean, the point is that there
14 was - - - from - - - from the perspective of a governing
15 agency, there was controlling Court of Appeals case law
16 Short and Karlin, which at least on its face of the
17 decision, appeared to control that the - - - the decision.

18 JUDGE FAHEY: I'm familiar with the cases and the
19 Daily - - - Daily Gazette case also.

20 MR. BLOOM: Yes.

21 JUDGE FAHEY: I - - - I understand the interplay
22 between them. And it - - - it's a close question. I'm
23 just wondering why the flip?

24 MR. BLOOM: Well, again, because as a government
25 agency, we're trying to do our best to - - - to comply with



1 two competing legislative policies and the controlling case
2 law. So when we're before an Appellate Division - - -

3 JUDGE STEIN: Can't - - - can't you - - - can't
4 you harmonize Short and Karlin with Daily Gazette by
5 reading Daily Gazette as - - - as focusing on whether the -
6 - - the documents themselves fall within the - - - what 50-
7 a describes as personnel records? So they're either
8 exempt, or they're not exempt. And - - - and if they're
9 really - - - if they're really not exempt documents, but
10 there happen to be references within them to maybe some
11 personnel issues, then it's appropriate to redact in those
12 situations. But not if the documents themselves are the
13 personnel records again that - - - that 50-a is - - - is
14 addressed to. You don't redact in those situations.

15 MR. BLOOM: Your Honor - - -

16 JUDGE STEIN: Can't you read - - - can't you read
17 Daily Gazette that way?

18 MR. BLOOM: Your Honor, I believe you can. And
19 I'm not here to tell you that the only way to harmonize
20 decision is the way that we are proposing. What I'm here
21 to say is that we believe that there are two competing
22 legislative policies here. There are - - - there is a way
23 to harmonize them that maximizes the - - - the - - - the
24 open government principles that are embodied in FOIL. And
25 that - - - we believe that - - - that one can fully respect



1 the legislative policy embodied in 50-a, if we harmonize
2 the two decisions by allowing redacted disclosure, but only
3 when effective redaction can be done that to a reasonable
4 degree of certainty would preclude identifying the officer.

5 JUDGE GARCIA: Why isn't that your - - - if you
6 just look at FOIL and put aside 50-a and the entire issue
7 with whether 50-a would ever allow this. But if we just
8 read FOIL in Short, in Karlin, you can do that. It's your
9 call. I'm having some trouble understanding why you are
10 asking us to overrule Short and Karlin, which in this case
11 would allow you to do whatever you want.

12 So in this case, if you think the records could
13 not be properly redacted, you don't have to turn them over
14 and it's your call. In the next case, if you do believe
15 that, you could turn them over. So I don't understand why
16 you're asking us to overrule Short.

17 MR. BLOOM: Well, I'm not - - - I'm not sure how
18 in light - - - if - - - if Short is deemed applicable to 50
19 - - - if 50-a falls under the rule of Short - - -

20 JUDGE GARCIA: Right.

21 MR. BLOOM: - - - then Short says that redaction
22 is not available.

23 JUDGE GARCIA: Short says you can't force an
24 agency to redact. Short in fact says, the agency can
25 redact.



1 MR. BLOOM: Well, I guess what - - - I guess what
2 - - -

3 JUDGE GARCIA: So no one's forcing you to do
4 that.

5 MR. BLOOM: - - - that - - - that turns to my
6 response to - - - to - - - to Judge Rivera's question,
7 which is that we - - - at least we interpret the Short
8 doctrine as saying - - - the - - - the opinion in Short as
9 not giving agencies free reign to do what they want, but
10 that 50-a controls. And unless redaction is specifically
11 authorized or unless this court says that - - - that FOIL -
12 - - that - - - that - - - that use - - - the use of
13 redaction is authorized through FOIL to - - - to allow for
14 disclosure, then we would not be able to do - - - to do
15 that.

16 JUDGE STEIN: Do you agree that - - - that the
17 process set forth in 50-a is not necessary or is
18 irrelevant? In other words, notice, the right to be heard,
19 and so forth?

20 MR. BLOOM: Well - - -

21 JUDGE STEIN: And a decision made by a court as
22 opposed to an agency.

23 MR. BLOOM: I - - - I think that going forward,
24 assuming - - - if - - - if the court were to agree with our
25 position that redacted disclosure where effective should be



1 allowed, then in the normal course either of a FOIL request
 2 or an agency that wishes to affirmatively disclose redacted
 3 documents, a - - - a lawsuit - - - some type of standalone
 4 lawsuit to - - - to seek judicial permission to do so would
 5 not be necessary and is not in keeping with how FOIL or - -
 6 - or general other principles work. That would be sort of
 7 creating a new sort of standalone cause of action. So we
 8 don't believe that that's the case. We believe that in
 9 this - - -

10 JUDGE STEIN: You agree with your adversary on
 11 that point?

12 MR. BLOOM: Yes, on that point we do. Although
 13 in this case - - -

14 JUDGE RIVERA: I'm sorry, your position is you
 15 don't have to notify the officers and they don't get
 16 entitled to - - -

17 MR. BLOOM: Not if - - - if the agency has made a
 18 determination that the - - - that redaction is possible and
 19 sufficiently prevents the identification of the officers.
 20 And I just want to - - -

21 CHIEF JUDGE DIFIORE: Do the officers get to
 22 weigh in on that decision?

23 MR. BLOOM: Again, this is like many other
 24 instances under FOIL, where potential disclosure of records
 25 - - - of government records could impact third-parties'



1 privacy. And generally speaking, under FOIL, government
2 agencies are entrusted to make appropriate redactions and
3 disclose the documents without first having to go to a
4 court.

5 JUDGE FAHEY: So what would the implications of -
6 - - of this policy be say for victims of sex offenses?

7 MR. BLOOM: Well, again, we don't believe that -
8 - - that this exemption applies to 50-b. So for instance,
9 there - - -

10 JUDGE FAHEY: Wouldn't the logic though apply?

11 MR. BLOOM: No. And I - - - the - - - the reason
12 is what - - - how I responded previously to a question.
13 I'm sorry, I forget which - - - which of you asked, which
14 is how do we explain why this particular statute should be
15 carved out of the Short and Karlin rule. As we argue in
16 the brief, Short and Karlin serves an important - - - I
17 mean, the Short and Karlin rule serves an important
18 purpose, which is to say that we don't presume that
19 redaction would be authorized in - - - in all situations
20 where the legislature hasn't made clear that - - - that it
21 would be.

22 But in Short, there was an important footnote
23 saying, we are unwilling to presume on the record before us
24 that the legislature - - - that the only purpose of the
25 legislature was to preserve confidentiality and that that



1 purpose would be fully served by redaction. So - - - so -
2 - - so we won't presume that. However, leaving open the
3 possibility that in a unique situation - - - and I think we
4 have that unique situation here, 50-a, which is focused on
5 a specific use of records to embarrass an officer, that
6 purpose would be served if redaction can be done
7 effectively.

8 JUDGE RIVERA: So to - - - to clarify, is your
9 position that - - - that redaction will depend on how the
10 document is written?

11 MR. BLOOM: The ability to effectively redact it?

12 JUDGE RIVERA: Yeah, well, I'm sorry, I'm not
13 being - - -

14 MR. BLOOM: Yes, it could. Yes, it definitely
15 could. And I think that - - -

16 JUDGE RIVERA: I'm sorry, I'm not being clear.
17 Really, what I want to know is that your position is that
18 redaction should be available, the court should try and
19 harmonize these cases in the way you've suggested. But in
20 this case, with these documents, redaction is not, I think
21 you said meaningfully effective?

22 MR. BLOOM: Yes.

23 JUDGE RIVERA: And so these documents should not
24 be turned over even - - - even redact - - - in a redacted
25 form. But does that mean that these - - - the class of



1 these documents never get turned over? Or it depends on
2 how it was written, and I have to make that decision for
3 each particular document?

4 MR. BLOOM: I think - - - I think it's a - - - I
5 think it's a case by case determination based on the nature
6 of the documents. I think we can look at the - - - the,
7 you know - - - this type of document here. But that's not
8 to say that some other agency might not call - - - might
9 call something by a similar name. I think each case you
10 have to look at the type of document and how it is written.

11 JUDGE RIVERA: So - - - so do you agree that it
12 might be possible, just your adversary's hypothetical, that
13 you could have one of these final decisions that's written
14 in such a way that you redact all the facts, you redact all
15 the names, all that, and then you have pure legal analysis
16 that does nothing more than in his example let him know
17 whether or not a particular legal doctrine is being applied
18 that he would argue is not applicable?

19 MR. BLOOM: Well, I guess it's possible. But the
20 prob - - - I mean, the - - - it is possible, I suppose.
21 But the problem would be also whether by doing all of that,
22 one has effectively made that pure legal analysis
23 acontextual and thus not really representative of - - -
24 it's unclear how it was being applied in what way. So if
25 the purpose is to assess whether the NYPD is properly



1 applying legal principles, doing so when all the facts are
2 deleted, I don't believe would be - - - would be
3 appropriate.

4 JUDGE RIVERA: But that's not the standard for
5 any other FOIL document, right?

6 MR. BLOOM: Well, I think that - - -

7 JUDGE RIVERA: I mean, lots of - - - taking his
8 point, documents get redacted regularly. And the person
9 who gets it may say, this is telling me nothing, or this
10 seems to tell me A, B, and C, and it's not what the
11 government entity thinks the document really represents. I
12 mean, isn't that the problem that's inherent, let me put it
13 that way, in the redacting process, and there's nothing one
14 can do about that?

15 MR. BLOOM: It - - - it can be inherent in the
16 redacting process. But I don't think that it's typically
17 the case that you have a decision that has to be - - -
18 where - - - where so - - - so - - - so much of it has to be
19 redacted, then you leave a sentence here or there. And
20 then the question is whether enough of those sentences in
21 enough of the - - - enough of the decisions add up to
22 something that could meaningfully contribute to the - - -
23 to the purpose of the request. I guess I want to address
24 just we didn't speak about some of the - - - the
25 information that is available. As - - - as Your Honors may



1 know, a - - - if the documents are made available, they
2 would be available to the public, they could be posted on
3 the website. The hearings are open to the public. Also,
4 there have been - - - there is a - - - there are civil
5 lawsuits that often involve the same facts as these - - -
6 these complaints.

7 There is also - - - there are also news reports.
8 There's also something called - - - there's a - - - the
9 Legal Aid has compiled a database of information from civil
10 lawsuits, from news reports, from other - - - from - - -
11 potentially from leaked documents - - - from other
12 documents that have come out in - - - in trials that - - -
13 that it has shared with all of the - - - the criminal
14 defense bar with over 10,000 police officers in it.

15 So there is a - - - in this case, I think a
16 substantial - - - substantial possibility that these types
17 of records, even if the identifying details are taken out,
18 they could be identified to particular officers. And once
19 you start going beyond sort of discreet identifying details
20 to the facts of the case, it's hard to say, take out this
21 fact and not this fact, without going the rest of the way.
22 So - - -

23 CHIEF JUDGE DIFIORE: Thank you, counsel.

24 MR. BLOOM: Thank you, Your Honor.

25 CHIEF JUDGE DIFIORE: Mr. Dunn?



1 MR. DUNN: Just a couple quick points. With
2 respect to this notion about these are categorically not
3 redactable, redaction is a document by document exercise.
4 Judges do it all the time.

5 JUDGE GARCIA: That's not what happened here,
6 right? You sent five examples in and the judge said, yeah,
7 these look good, do the rest. So how can you say it's a
8 document by document process?

9 MR. DUNN: Well, Your Honor, I'm saying, Judge
10 Garcia, in terms of the general process - - - and I want to
11 be clear that to the extent that the members of this court
12 think that what needs to happen is a similar process for
13 the balance of the documents, the court can do that.

14 JUDGE GARCIA: And then would the police officer
15 involved in that particular document have an opportunity to
16 be heard as well?

17 MR. DUNN: Yes. Just as they did here. But I
18 want to be clear, that's a situation where the City agrees
19 that's not necessary. But to the extent the court
20 obviously thinks it is, that's a process that can take
21 place. It took place for the five that we had here.

22 JUDGE GARCIA: How many are the total universe?
23 I forget.

24 MR. DUNN: Well, there's a dispute about that.
25 We think based upon the record there are about 120 of these



1 cases. The City believes that there are more. With
2 respect to the issue about redactability - - - and Judge
3 Stein, you asked about whether or not there's any basis for
4 distinguishing within 87(2) (a) between 50-a and other
5 statutes, I do want to be clear, we mentioned this before,
6 50-a allows disclosure.

7 The statutes for instance in Short, which dealt
8 with intimate personal information, namely abortion records
9 of private individuals, did not allow for any disclosure.
10 So Short, which is not a 50-a case, can be fairly
11 understood to be a case that deals with private individuals
12 with statutes that never allowed any disclosure, whereas
13 50-a deals with police officers and policing, something at
14 the heart of FOIL, and it allows disclosure under certain
15 circumstances.

16 And that is the basis right there for
17 distinguishing between these types of records and the
18 records that might be covered elsewhere by Section 87.

19 Finally, in terms of this - - -

20 JUDGE RIVERA: Let me - - - let me ask you this.
21 Let's say you have a case - - - let's say you wanted ten
22 years of documents. Just make up a number. And in those
23 ten years - - - and we'll stay with police officers, since
24 that's the focus. Obviously, 50-a covers more than just
25 police officers, but we'll stick with the police officers.



1 There's been one case of a police officer putting someone
2 in a chokehold, the individual dies. Is it your position
3 that they would be able to redact that - - -

4 MR. DUNN: If that would - - -

5 JUDGE RIVERA: - - - in a way that they could
6 turn that over if that's the only case with that kind of
7 fact pattern?

8 MR. DUNN: They can absolutely redact that, Your
9 Honor. If that's going to identify Daniel Pantaleo as a
10 member of the police department, who was a subject of the
11 disciplinary proceeding, of course they can redact that.
12 The standard is, you get to redact sufficient to conceal
13 the identity of the officer.

14 JUDGE RIVERA: But how is that going to be if - -
15 - if there is only one individual that fits that category?

16 MR. DUNN: Well, they would redact the word
17 "chokehold", and Staten Island, and 2014, and Eric Garner.
18 And it may be that, you know, in other decisions - - - and
19 let's say you were the one looking at it, you would say
20 with submissions from the officer perhaps, okay, these are
21 other things that have to come out.

22 JUDGE STEIN: But what if that was the only
23 hearing in that - - - in that period of time, and that
24 hearing was a public hearing?

25 MR. DUNN: Well, that might be an instance, Your



1 Honor, where - - - uniquely where they could withhold the
2 entire document. That's okay. You know, again - - -

3 CHIEF JUDGE DIFIORE: Thank you, counsel.

4 MR. DUNN: All right. Thank you, Your Honors.

5 CHIEF JUDGE DIFIORE: You're welcome.

6 (Court is adjourned)

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

I, Amber Minton, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of New York Civil Liberties Union v. New York City Police Department, No. 133 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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