

**Matter of Abernethy v New York City Police Dept.**

2023 NY Slip Op 30586(U)

February 28, 2023

Supreme Court, New York County

Docket Number: Index No. 100047/2020

Judge: John J. Kelley

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. JOHN J. KELLEY** PART **56M**

*Justice*

-----X

In the Matter of  
JULIETTE ABERNETHY

Petitioner,

- v -

NEW YORK CITY POLICE DEPARTMENT,

Respondent.

-----X

INDEX NO. 100047/2020  
MOTION DATE 2/28/2023  
MOTION SEQ. NO. 001

**SUPPLEMENTAL DECISION,  
ORDER, AND FINAL  
JUDGMENT**

The following papers, numbered 1	-	29	, were read on this application to/for	<u>CPLR ART 78</u>
Notice of Motion/ Petition/ OSC - Affidavits - Exhibits	.....	No(s)	<u>1-9</u>	
Not of X-Mot – Affs- Exhs	.....	No(s)	<u>10-23</u>	
Replying	.....	No(s)	<u>24-27</u>	
Petitioner’s submissions on remittal	.....	No(s)	<u>28</u>	
Respondent’s submissions	.....	No(s)	<u>29</u>	

In this CPLR article 78 proceeding, the petitioner seeks judicial review of a February 16, 2022 New York City Police Department (NYPD) determination, made upon remittal and reconsideration, denying her request for agency records pursuant to the Freedom of Information Law (Public Officers Law § 84, *et seq.*; hereinafter FOIL). In her request, the petitioner sought the transcript of an NYPD Internal Affairs Bureau (IAB) proceeding that had been instituted against a uniformed NYPD officer based on the petitioner’s allegations. The NYPD opposes the petition. The petition is granted to the extent that the NYPD is directed produce all documents considered and generated by the NYPD and IAB in the course of the subject investigation, along with the IAB’s final determination, provided that personally identifying information of the

subject police officer, such as social security number and home address, may be redacted, and that the NYPD identify, in writing, any additional proposed redactions of other personally identifying information and provide written justifications for such redactions, and the petition is otherwise denied.

On or about December 31, 2016, the petitioner, Julianne Abernethy, filed a complaint with the IAB, alleging that a uniformed member of the NYPD had engaged in misconduct by failing to prepare and complete, at her request, a report of an assault that the petitioner's employer allegedly committed upon her. On September 1, 2017, the NYPD, upon finding the charge to be unsubstantiated, informed the petitioner that the IAB case was closed. On September 27, 2017, the petitioner submitted a FOIL request to the NYPD, seeking production of records that had been considered and generated during the IAB investigation and proceeding, including any transcript of the proceeding. On October 4, 2017, the NYPD's Records Access Officer (RAO) denied the FOIL request on the ground that the records sought by the petitioner contained information that, if disclosed, would reveal non-routine law enforcement techniques and procedures, and that the records thus were exempt from disclosure pursuant to Public Officers Law § 87(2)(e)(iv). The RAO informed the petitioner that she must file an administrative appeal to the NYPD's Records Access Appeals Officer (RAAO) within 30 days. The petitioner submitted her administrative appeal on December 28, 2018. On January 2, 2019, the RAAO denied the petitioner's administrative appeal as untimely.

On May 3, 2019, the petitioner commenced a CPLR article 78 proceeding against the NYPD to review the RAAO's determination. By order dated September 3, 2019, the Supreme Court, New York County (Edmead, J.), denied the CPLR article 78 petition, albeit without prejudice, concluding that the NYPD made no final determination on the merits of the petitioner's FOIL request. The court directed the petitioner personally to deliver to the NYPD, in writing, a request to extend her time for filing an administrative appeal from the RAO's initial denial (see *Matter of Abernethy v NYPD Legal Bureau*, Index No. 100697/19 [Sup Ct, N.Y.

County, Sep. 3, 2019]). On September 10, 2019, the petitioner delivered such a written request to the NYPD. By letter dated September 11, 2019, the RAO denied the petitioner's request for an extension of time to submit an administrative appeal. On January 10, 2020, the petitioner commenced the instant proceeding.

By order dated December 1, 2020, this court granted that branch of the NYPD's cross motion seeking remittal of the matter back to it for reconsideration of the plaintiff's initial FOIL request, in light of the 2020 amendments to the Civil Rights Law and the FOIL provisions of the Public Officers Law relating to police officers' disciplinary records. This court concluded that, while the petitioner's failure timely to exhaust her administrative remedies normally would have required this court to dismiss the petition, there had been a significant change in the Civil Rights Law and the FOIL provisions of the Public Officers Law during the pendency of this proceeding. As this court noted, where there has been a change in law as to whether certain agency records remain statutorily exempt from disclosure, the doctrine of res judicata is inapplicable (*see Matter of John P. v Whalen*, 54 NY2d 89, 94 [1981]; *see generally Matter of Hodes v Axelrod*, 70 NY2d 364, 373 [1987]). The court thus concluded that, since the petitioner could now resubmit her FOIL request and ask for de novo consideration thereof by the NYPD under current law, judicial economy warranted denying that branch of the NYPD's cross motion seeking dismissal, and granting that branch seeking remittal and reconsideration of the petitioner's initial FOIL request under the amended Civil Rights and Public Officers Laws (*see generally Matter of Porter v New York State Div. of Hous. & Community Renewal*, 51 AD3d 417, 418 [1st Dept 2008]).

As this court previously explained, on June 12, 2020, the Legislature repealed Civil Rights Law § 50-a, a statute that had shielded personnel records of police officers, firefighters, and correction officers from public disclosure, except under very limited circumstances (*see L 2020, ch 96, § 1*). Contemporaneously with the repeal of that statute, the Legislature also amended the FOIL provisions of the Public Officers Law to provide a procedure for obtaining law enforcement disciplinary records under FOIL and to define those portions of such records

that would remain subject to redaction (see Public Officers Law §§ 86[6], [7], [8], [9], 87[4-a], [4-b], 89[2-b], [2-c]; L 2020, ch 96, §§ 2, 3, 4). Although, by order dated July 29, 2020, the United States District Court for the Southern District of New York initially granted a temporary restraining order blocking the applicability of the amended laws (see *Uniformed Fire Officers Assn. v de Blasio*, 20 CV 5441 [KPF] [SD NY, Jul. 29, 2020]), the United States Court of Appeals for the Second Circuit stayed the effectiveness of that TRO on July 30, 2020. On August 20, 2020, the Second Circuit denied a motion by several uniformed officers' unions and associations to stay of the applicability of the amended laws pending appeal, and formally dissolved the District Court's TRO (see *Uniformed Fire Officers Assn. v de Blasio*, 20-2400 [2d Cir, Aug 20, 2020]). On February 16, 2021, the Second Circuit affirmed the District Court's order denying the unions' motion to preliminarily enjoin enforcement of the new statutes (see *Uniformed Fire Officers Assn. v de Blasio*, 846 Fed Appx 25 [2d Cir 2021]).

By email correspondence dated December 10, 2021, the petitioner formally requested the NYPD to reconsider her FOIL request. By letter dated February 16, 2022, the NYPD determined that it had

"conducted a diligent search. Please note that no IAB 'transcript' exists but to the extent that records of the investigation into your IAB complaint does exist, access to those records are [sic] denied.

"We have reviewed your request in light of the current law and have denied your request for the IAB transcript in its entirety as the investigation of your complaint against the subject officer has concluded and your complaint against said officer has been determined to be 'unsubstantiated.' To the extent that you seek access to Police Officer records related to an investigation for which a finding of 'unsubstantiated,' 'unfounded,' or 'exonerated' has been issued, your appeal of the RAO determination is denied because disclosure of the records would constitute an unwarranted invasion of personal privacy [POL §87(2)(b); §89(2)]. The disclosure of unsubstantiated complaints have [sic] been considered exempt as an invasion of personal privacy (see e.g. *LaRocca v. Board of Educ*, 220 A.D.2d 424, 427 [Second Dept. 1995]), a view that is also held by the Committee on Open Government (see Advisory Opinion 19775), which specifically states, 'there is nothing in the statute to suggest that the legislature intended that any of the records of law enforcement agency employees be *more* available than the records of other government employees' (*ibid*, emphasis in original)."

The NYPD's determination on reconsideration also cited to several pre-2020 advisory opinions issued by the New York Committee on Open Government (COG), to the effect that records relating to unsubstantiated charges of misconduct should be exempt from disclosure. As indicated above, the determination relied in large part on the July 27, 2020 COG advisory opinion 19775, in which the COG was asked to consider whether, in light of the recent change in the Civil Rights and Public Officers Laws, a law enforcement agency could withhold records of a disciplinary proceeding in which charges against a law enforcement officer were found to be unsubstantiated. After reviewing its own prior advisory opinions, the COG opined that

*"in the absence of judicial precedent or legislative direction, . . . the law does not require a law enforcement agency to disclose 'unsubstantiated and unfounded complaints against an officer' where such agency determines that disclosure of the complaint would constitute an unwarranted invasion of personal privacy, but also does not require an agency to withhold such a record. Rather, as with all of the FOIL exemptions except § 87(2)(a), which no longer applies to this situation since the repeal of § 50-a, an agency may, but not must, withhold as exempt a record meeting the criteria for such exemption. In light of the repeal of § 50-a, a request for disciplinary records relating to a police officer must be reviewed in the same manner as a request for disciplinary records of any other public employee. As such, based on our prior analyses of the disclosure requirements relating to disciplinary records of government employees generally, when allegations or charges of misconduct have not yet been determined or did not result in disciplinary action, the records relating to such allegations may in our view be withheld where the agency determines that disclosure would result in an unwarranted invasion of personal privacy. In addition, to the extent that charges are dismissed, or allegations are found to be without merit, we believe that those records also may be withheld based on considerations of privacy"*

(FOIL Advisory Opn 19775, Comm. on Open Govt., Jul. 27, 2020, \*2) (emphasis added).

After the issuance of that advisory opinion, however, judicial precedent has indeed made it quite clear that there is no blanket exemption from disclosure for law enforcement disciplinary records where the underlying charges were found to be unsubstantiated. As the Appellate Division, First Department, very recently explained

*"[t]he personal privacy exemption set forth in Public Officers Law § 87(2) allows state agencies to protect sensitive matters, which are of little or no public interest, and which may include unsubstantiated allegations. However, Public Officers Law § 87(2) does not create a categorical or blanket exemption from disclosure for unsubstantiated complaints or allegations of uniformed officers' misconduct (see Matter of New York Civ. Liberties Union v City of Syracuse, 210 AD3d 1401,*

1403-1404 [4th Dept 2022]; *Matter of Thomas v New York City Dept. of Educ.*, 103 AD3d 495, 497 [1st Dept 2013])”

(*Matter of New York Civ. Liberties Union v New York City Dept. of Correction*, \_\_\_\_\_ AD3d\_\_\_\_\_, 2023 NY Slip Op 00930, \*2 [1st Dept., Feb. 16, 2023] [some citations omitted]). Rather, “[d]ocuments concerning unsubstantiated complaints or allegations should be disclosed to the extent that they can be redacted to prevent an unwarranted invasion of personal privacy, including the removal of identifying details” (*id.*; see *Matter of New York Civ. Liberties Union v City of Syracuse*, 210 AD3d 1403, 1405 [4th Dept 2022]; *Matter of Sell v New York City Dept. of Educ.*, 135 AD3d 594, 594 [1st Dept 2016]; *Matter of Thomas v New York City Dept. of Educ.*, 103 AD3d 495, 499 [1st Dept 2013]; *Matter of LaRocca v Board of Educ. of Jericho Union Free School Dist.*, 220 AD2d 424, 427 [2d Dept 1995]). In its recent decision, the First Department concluded that, inasmuch as the respondent agency there “failed to establish that identifying details in the records or data requested could not be redacted to prevent an unwarranted invasion of privacy,” the Supreme Court “properly required [the agency] to disclose the requested records, subject to redactions with specific justification under Public Officers Law § 87(2). The court also properly required that [the agency] sufficiently document its justification for redactions, to facilitate potential in camera review” (*Matter of New York Civ. Liberties Union v New York City Dept. of Correction*, at \*1).

Applying the First Department’s analysis here, it is clear that the NYPD must disclose the records considered and generated in connection with IAB complaint 2016-45757, subject only to those redactions that are necessary to protect the subject officer’s personal privacy, which are limited to personally identifying information such as social security number and home address, and any other such personally identifying information, which shall be identified by the NYPD in writing with written justifications for each such redaction. Given the nature of the IAB proceeding here, and the extent of the NYPD’s submissions, there has been no showing that

the release of the subject records would compromise any other privacy interests of the subject officer or any other member of the NYPD.

The parties' remaining contentions are without merit.

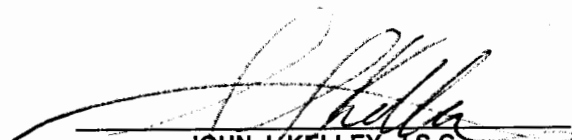
Accordingly, it is

ADJUDGED that the petition is granted to the extent that the February 16, 2022 determination of the respondent New York City Police Department to withhold agency records from the petitioner, made upon remittal and reconsideration, is vacated and annulled, except for the portion of the determination withholding personally identifying information of the subject police officer, such as social security number and home address, the petition is otherwise denied, and the proceeding is otherwise dismissed; and it is,

ORDERED that the respondent New York City Police Department shall, within 30 days of the entry of this Supplemental Decision, Order, and Final Judgment, provide the petitioner with copies of the records that it considered and generated in connection with IAB complaint 2016-45757, subject only to the redaction of personally identifying information of the subject police officer, such as social security number and home address and the identification, in writing, of proposed redactions of other personally identifying information, along with written justifications for such redactions.

This constitutes the Supplemental Decision, Order, and Final Judgment of the court.

2/28/2023  
DATE

  
JOHN J. KELLEY, J.S.C.

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input type="checkbox"/>	GRANTED		
<input type="checkbox"/>	SETTLE ORDER		
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		

<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input checked="" type="checkbox"/>	GRANTED IN PART		
<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: