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## BY EMAIL

October 21, 2019

Honorable Jamaal T. Bailey, Chairman  
New York Senate Standing Committee on Codes  
Van Buren Hearing Room A  
Legislative Office Building, 2<sup>nd</sup> Floor  
Albany, NY 12247

Dear Chairman Bailey,

The Reporters Committee for Freedom of the Press (the “Reporters Committee”) respectfully submits the following testimony to the Senate Standing Committee on Codes regarding “Policing (S3695)” to “repeal[] provisions relating to personnel records of police officers, firefighters, and correctional officers,” which is scheduled for a hearing before the Committee today. We thank the Committee for its efforts to increase transparency in New York and to address the problematic Civil Rights Law Section 50-a (“Section 50-a”).

The Reporters Committee was founded by leading journalists and media lawyers in 1970 when the nation’s news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide pro bono legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists. The Reporters Committee strongly supports proposals, like Senate Bill S3695, that increase transparency of government agencies and officials, including law enforcement, and enable the news media to fulfill its constitutionally recognized role to gather and report newsworthy information about the activities of government.

***Access to government records about law enforcement personnel is necessary for journalists to inform the public.*** The public depends on the press to keep a watchful eye on, and keep the public informed about, the actions of their government and its officials. As New York’s Freedom of Information Law, N.Y. Pub. Off. Law §§ 84 *et seq.* (“FOIL”) states, “government is the public’s business” and “the public, individually and collectively and represented by a free press, should have access to the records of government.” The vital newsgathering and dissemination role played by the press is especially important when it comes to information about law enforcement personnel, who are sworn to protect and serve the public. In New York, members of the media routinely bring important information about law enforcement to light, including information about use of force and misconduct, that increases accountability in communities across the state.

To take just one recent example, last year BuzzFeed News published and analyzed a collection of disciplinary findings for approximately 1,800 New York Police Department (“NYPD”) employees between 2011 and 2015.<sup>1</sup> That unprecedented reporting showed that NYPD policy is not equally applied to all officers,<sup>2</sup> and that three-quarters of officers accused of conducting illegal searches were given only a verbal reprimand. BuzzFeed News’ reporting eventually led to the release of an independent panel report<sup>3</sup> that found that the NYPD’s disciplinary process was plagued by “a fundamental and pervasive lack of transparency.”<sup>4</sup>

When police misconduct and discipline is able to be analyzed and reported on by the press, members of the public gain a better understanding of how law enforcement agency policies are applied and enforced, and how that, in turn, affects their community.<sup>5</sup> More information about allegations, complaints, and lawsuits against the police can reveal patterns of misconduct and help place individual incidents of officer misconduct in context. Access to this information is necessary for journalists to be able to do their jobs effectively on behalf of the public.

***Section 50-a stymies press and public access to law enforcement records of crucial importance.*** For the past four decades, Section 50-a has been repeatedly invoked to override the presumption of government transparency that is fundamental to New York’s democratic system of government. The provision exempts personnel records used to evaluate police officers’ performance from being public disclosure pursuant to FOIL. While Section 50-a was enacted to protect public employees from unwarranted harassment, it has increasingly been used to obstruct transparency—and thus accountability—to the public about law enforcement misconduct, going far beyond its original purpose.

For example, in recent years Section 50-a has been cited as the reason the NYPD stopped releasing to the public summaries of internal officer disciplinary proceedings and outcomes of administrative trials, even with individual officers’ names redacted. Section 50-a was also used to withhold the information that formed the basis of BuzzFeed News’ groundbreaking reporting on the NYPD. And, in 2017, the New York Court of Appeals, citing Section 50-a, ruled that the disciplinary history of Daniel Pantaleo could not be disclosed in response to a FOIL request. In

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<sup>1</sup> Kendall Taggart and Mike Hayes, *Here’s Why BuzzFeed News Is Publishing Thousands Of Secret NYPD Documents*, BuzzFeed News (Apr. 16, 2018, 5:33 AM), <https://www.buzzfeednews.com/article/kendalltaggart/nypd-police-misconduct-database-explainer>.

<sup>2</sup> For example, 250 employees reportedly faced accusations of excessive force, threatening someone, fighting with another person, or firing their gun unnecessarily. School safety agents lost five vacation days for using excessive force. In contrast, a detective lost twenty vacation days after striking someone on the head and threatening to kill two people. *Id.* The NYPD also has a rule requiring that officers who lie about a “material matter” lose their jobs. However, BuzzFeed News reported that more than 100 employees accused of lying on official reports, lying under oath, or lying during an internal affairs investigation, but only a few were fired.

<sup>3</sup> Hon. Mary Jo White, Hon. Robert L. Capers and Hon. Barbara S. Jones, *The Report of the Independent Panel on the Disciplinary System of the New York City* (Jan. 25, 2019), <https://www.independentpanelreportnypd.net/>.

<sup>4</sup> Kendall Taggart, *NYPD Discipline Needs More Transparency, A Panel of Experts Said*, BuzzFeed News (Feb. 1, 2019, 3:53 PM), <https://www.buzzfeednews.com/article/kendalltaggart/nypd-discipline-independent-panel-report>.

<sup>5</sup> Ali Winston, *Looking for Details on Rogue N.Y. Police Officers? This Database Might Help*, N.Y. Times (Mar. 6, 2019), <https://www.nytimes.com/2019/03/06/nyregion/nypd-capstat-legal-aid-society.html>; see also Jake Bittle, *The law that shields police records, explained*, Brooklyn Daily Eagle (Apr. 23, 2019), <https://brooklyneagle.com/articles/2019/04/23/50-a-explained/>.

2014, then-NYPD officer Pantaleo placed Eric Garner in a fatal chokehold, ending Mr. Garner’s life, and sparking calls for greater police accountability in New York City and across the state.

Records like these—currently blocked from disclosure by Section 50-a—are precisely the information that it is crucial for the public to have. Access to more information about prior claims of police misconduct not only increases law enforcement accountability, it increases public trust in law enforcement.

***Section 50-a is unnecessary and an outlier.*** New York is one of only two states that specifically shield police officers’ records from public disclosure under the state’s open records law.<sup>5</sup> Unless Section 50-a is repealed or substantially transformed, New York will continue to lag behind other jurisdictions that make records reflecting police use of force and possible (or actual) misconduct publicly available.

California recently reformed its law to increase public access to police disciplinary records. In California, there is now a general requirement of disclosure in response to a public records request for records and information relating to “critical incidents.” Cal. Penal Code § 832.7 (2019). These incidents include officers discharging their firearms at a person; the use of force by an officer causing death or great bodily injury; incidents where law enforcement or oversight agencies find that officers committed a sexual assault; and incidents where officers were dishonest in their reporting. *Id.* California law also now requires agencies to produce both video and audio recordings of critical incidents in response to a public records request.

In other jurisdictions like Chicago, individuals can submit public records requests to the Chicago Police Board to receive records of proceedings in disciplinary cases before the board, including the board’s findings and decisions.<sup>6</sup> The Chicago Reporter publishes a database—“Settling for Misconduct”—that uses publicly available information about police officers and civil lawsuits that the Chicago Police Department has paid to settle.<sup>7</sup>

In addition to being an outlier, Section 50-a is wholly unnecessary. FOIL already has a privacy exemption that incorporates a balancing test; it requires that the privacy interest of an individual be weighed against the public’s interest in access to the information requested.<sup>8</sup> Under that test, information can be withheld if its release would constitute a clearly unwarranted invasion of the individual’s privacy. This flexible, case-specific standard not only adequately protects legitimate privacy interests but also ensures that information that is in the public interest is not shielded from disclosure.

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<sup>5</sup> Robert Lewis, Noah Veltman and Xander Landen, *Is Police Misconduct a Secret in Your State?*, WNYC News (Oct. 15, 2015), <https://www.wnyc.org/story/police-misconduct-records/>.

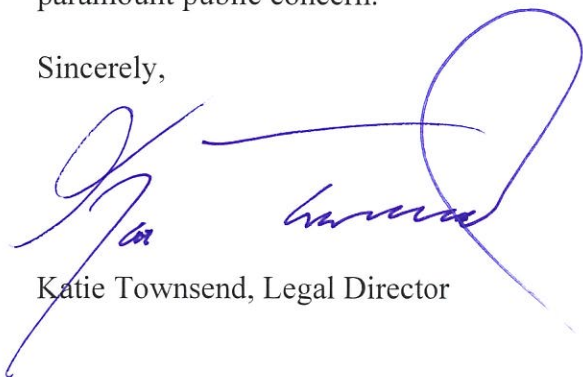
<sup>6</sup> These findings have been used to impact local journalism in Chicago. See Elly Rivera, *Chicago police officers fired over Laquan McDonald testimony were accused of another ‘cover up,’* The Chicago Reporter (Aug. 9, 2019), <https://www.chicagoreporter.com/chicago-police-officers-fired-over-laquan-mcdonald-testimony-were-accused-of-another-cover-up/>. See also Matt Kiefer, *How the Chicago Police Department fought — and ultimately lost — its FOIA battle to keep cop names from the public,* The Chicago Reporter (Aug. 29, 2019), <https://www.chicagoreporter.com/how-the-chicago-police-department-fought-and-ultimately-lost-its-foia-battle-to-keep-cop-names-from-the-public/>.

<sup>7</sup> The Chicago Reporter, *Settling for Misconduct*, <http://projects.chicagoreporter.com/settlements>.

<sup>8</sup> N.Y. Pub. Off. Law § 87(2)(b).

***Section 50-a should be repealed or substantially reformed to make New York a leader in government transparency.*** New York has a long history of open and transparent government. It can and should continue that tradition by becoming a national leader in law enforcement transparency and accountability. Repealing or fundamentally changing Section 50-a is necessary to ensure that the public and the press have access to law enforcement records that are of fundamental importance to citizens across the state, and critical to ensuring trust between law enforcement and the communities that they serve. The Reporters Committee supports Senate Bill S3695 because it would improve transparency and accountability with respect to an issue of paramount public concern.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Katie Townsend', is written over a large, stylized blue scribble or flourish.

Katie Townsend, Legal Director

- cc: Senator Fred Akshar  
Senator Brian A. Benjamin  
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