

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

In the Matter of,

NEW YORK CIVIL LIBERTIES UNION,

Petitioner,

-against-

FIRE DEPARTMENT OF THE CITY OF NEW
YORK,

Respondent.

For a Judgment Pursuant to Article 78 of the Civil
Practice Law and Rules.

Index No.: _____

VERIFIED PETITION

PRELIMINARY STATEMENT

1. In the summer of 2020, high-profile incidents of police killings of Black people and other egregious forms of police violence nationwide sparked a new wave of public protest and dialogue about misconduct and accountability within law enforcement.
2. As a result, the New York State legislature repealed Civil Rights Law Section 50-a, known to many as New York’s “secrecy law” because, for decades, it insulated a wide-range of law-enforcement-related misconduct and disciplinary records from public access, including those pertaining to fire departments.
3. This secrecy had a damaging effect on the public’s trust in the government’s ability to hold accountable those public officers who hold immense power over the lives and safety of the public.

4. While much of the attention around the repeal of section 50-a focused on misconduct and disciplinary records held by police departments, the call for a new era of transparency and accountability applies to agencies like the Fire Department of the City of New York.
5. The FDNY historically has struggled with rampant and egregious internal issues impacting Black and other FDNY employees of color.
6. To this day, the FDNY has failed to adequately address persisting issues related to racism and racial discrimination within the department and there is a significant public interest in knowing how the department handles allegations of discrimination and other forms of misconduct.
7. Thus, following section 50-a's repeal, on April 30, 2021, the New York Civil Liberties Union submitted a detailed yet narrow request under the Freedom of Information Law to the FDNY for records relating to the department's misconduct and disciplinary databases. Specifically, the request sought electronic databases that the FDNY maintains to collect and organize reports of employee misconduct and discipline.
8. In response, the FDNY violated its obligations under FOIL by failing to respond to the request within a reasonable amount of time, failing to produce a single record, and failing to respond to the NYCLU's subsequent administrative appeal. The FDNY's failure to respond to the request undermines FOIL and the repeal of section 50-a's purpose of increased transparency, as well as the public's interest in monitoring and holding accountable public agencies with great power over public safety.
9. Having exhausted administrative remedies, the NYCLU now seeks judicial relief to compel the FDNY to respond to the FOIL request and produce promptly all responsive records.

10. The NYCLU also seeks an award of attorney's fees and costs in light of the FDNY's failure to adhere to FOIL's statutory requirements.

VENUE

11. Pursuant to CPLR 7804 [b] and 506 [b], venue in the proceeding lies in Kings County, in the judicial district in which the material events described in this petition took place, where the respondent took portions of the action challenged, and where the office of the respondent is located.

PARTIES

12. The New York Civil Liberties Union ("NYCLU" or "petitioner") is a not-for-profit corporation that seeks to defend civil rights and civil liberties on behalf of individuals who have experienced injustice and to promote transparency in government. For seventy years, the NYCLU has been involved in litigation and public policy advocacy on behalf of New Yorkers to demand government accountability and transparency.

13. The Fire Department of the City of New York ("FDNY" or "respondent") is a public agency subject to the requirements of the Freedom of Information Law, New York Public Officers Law § 85 *et seq.*

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The Repeal of Section 50-a

14. Following the murder of George Floyd by a Minneapolis police officer, nationwide protests erupted, prompting public outrage and dialogue around the issues of violence, misconduct, and a lack of accountability within law-enforcement-related agencies.

15. As a result, lawmakers across the country began to reexamine the public's interest in changing a culture of lack of transparency and accountability in law-enforcement and other public agencies.
16. New York State was no exception, especially given the long-standing criticism of New York's strict Civil Rights Law Section 50-a ("section 50-a"), which shielded a broad swath of law-enforcement misconduct and disciplinary records from public disclosure, including those pertaining to fire departments.
17. In response, New York made the landmark decision to repeal the law in June 2020 (*see* Civil Rights Law § 50-a, repealed by 2020 NY Senate-Assembly Bill S8496, A10611; *Schenectady Police Benevolent Assn. v. City of Schenectady*, No. 2020-1411, 2020 WL 7978093, *6 [Sup Ct, Schenectady County, Dec. 29, 2020] ["It strikes the Court that the legislature intended not just a change in law, rather, a change in culture."]).
18. Prior to the repeal, the law "had been expanded in the courts to allow . . . departments to withhold from the public virtually any record that contains any information that could conceivably be used to evaluate the performance of a[n] . . . officer" and was described by many as the most secretive in the country (*see* Committee on Open Government, 2014 Annual Report 3–6, available at <https://video.dos.ny.gov/coog/pdfs/2014AnnualReport.pdf> [last accessed Oct. 28, 2021]; Senate Bill S8496, *Justification*, <https://www.nysenate.gov/legislation/bills/2019/s8496> [last accessed Oct. 28, 2021] ["S8496 Justification"]).
19. Though many of these legal developments had occurred in the context of police records, the law shielded fire departments' misconduct and disciplinary records as well and lawmakers leading the section 50-a repeal efforts recognized the need for transparency in law

enforcement generally (*see, e.g.*, S8496 Justification [stating that the public’s inability to access “complaints or findings of law enforcement misconduct” was the primary purpose behind the repeal]). Therefore, when the bill was signed into law, New York State effected a complete rejection of the prior regime of default categorical secrecy within New York’s law-enforcement and other related agencies. (*See id.*)

20. Since the repeal, some law enforcement agencies have published narrow sets of data and records that were previously covered by section 50-a. However, misconduct and disciplinary records pertaining to the FDNY—a department plagued by a long history of racial discrimination and hostility toward Black and other employees of color—have yet to see the light of day (*see* Aguirre Affirmation, Exhibit G, Astead W. Herndon & Ali Watkins, NY Times, *How a Racist Scandal at the F.D.N.Y. Led to Its Biggest Suspensions Ever*, Oct. 1, 2021; *see also* *U.S. v City of New York*, 717 F.3d 72 [2d Cir 2013] [upholding virtually all injunctive relief ordered by the lower district court in a racial discrimination case against the FDNY]¹).

21. The FDNY’s lack of published discipline and misconduct information does not indicate that it does not possess such information. For example, publicly available court filings confirm the existence of at least one responsive database—an “EEO case management database” used to “track the progress of investigations, identify patterns of violations and potential violations, and identify cases where investigations have exceeded the presumptive 90-day limit” (*U.S. v City of New York*, 07-cv-02067, Doc No. 1861 at 36–37 [*Monitor’s 24th Periodic Report to the Court*] [July 17, 2018])—and suggest the existence of at least one

¹ This case resulted in a federal court monitorship, overseeing the implementation of reforms to the FDNY to address racial discrimination and improve diversity within its ranks. The federal court monitorship continues to date.

more (*see id.*, Doc No. 2004 at 45–46, n 27 [*Monitor’s 32nd Periodic Report to the Court*] [Feb. 1, 2021] [describing FDNY’s ability to “track and connect . . . all the findings and remedial actions” of “BITS,” its Bureau of Investigations and Trials, which “prepares charges, conducts investigations, and prosecutes disciplinary cases for violations of Department policy”]).

The NYCLU’s FOIL Request to the FDNY

22. On April 30, 2021, following New York City’s publication of two narrow databases pertaining to officer misconduct records for the NYPD and New York City Department of Correction, whose records were also shielded by section 50-a, the NYCLU sent a FOIL request to the FDNY’s FOIL Officer. The request sought four categories of records relating to databases that track misconduct complaints and discipline maintained by the agency:

1. Documents sufficient to identify all databases maintained by or on behalf of the Department that include information about (a) complaints or reports of misconduct against Department employees, or (b) discipline of Department employees in response to a complaint or set of complaints.
2. For each database identified in request 1 (above), please provide any documents that include the following:
 - a. A description of the database’s structure or format;
 - b. A description of each field or column in the database;
 - c. An explanation of all abbreviations or acronyms in the database.
3. Any databases maintained by or on behalf of the Department that include information about complaints or reports of misconduct against Department employees, including the following data regarding each complaint or report of misconduct:
 - a. The name, position, and duty station of the Department employee;
 - b. The type of complaint (e.g. use of force, discourtesy, racial profiling or bias, etc.);
 - c. The date and location of the alleged incident that is the subject of the complaint or report;
 - d. Whether the complaint or report of misconduct was investigated;
 - e. The division of the Department or the name of the entity that investigated the complaint or report;
 - f. What the outcome of the investigation was (e.g. substantiated/found to be

- true and not compliant with policy; exonerated/found to be true and compliant with policy; unfounded/found to be untrue; unsubstantiated/insufficient evidence to determine truth or falsity or compliance with policy); and
- g. For each substantiated complaint, whether the investigation resulted in the initiation of a disciplinary process, any disciplinary settlement, or the imposition of discipline.
4. Any databases maintained by or on behalf of the Department that include information about discipline of Department employees in response to a complaint or set of complaints, including the following data regarding each instance in which a disciplinary process was initiated other than for a technical infraction that did not involve a member of the public:
- a. The name, position, and duty station of the Department employee;
 - b. The type of disciplinary charges (e.g. use of force, discourtesy, racial profiling or bias, etc.);
 - c. The date and location of the alleged incident that is the subject of the disciplinary charges;
 - d. The outcome of the disciplinary charges (e.g. sustained, not sustained, settled); and
 - e. The discipline, if any, imposed (e.g. termination, suspension, loss of pay or vacation days, admonition).

(Aguirre Affirmation, Exhibit A, FOIL Request by the NYCLU dated April 30, 2021 [“FOIL Request”].)

23. On May 5, 2021, the FDNY acknowledged the NYCLU’s FOIL request and set an expected response date of September 15, 2021 (Aguirre Affirmation, Exhibit B, FOIL Request Acknowledgment dated May 5, 2021 [“Acknowledgment Letter”]).

24. On June 3, 2021, the NYCLU timely filed an administrative appeal in accordance with Public Officers Law 89 [4] [a] (Aguirre Affirmation, Exhibit C, NYCLU Administrative Appeal Letter dated June 3, 2021). The appeal noted that the proposed response date, on September 15, 2021, which was over four months after the May 5, 2021 date of acknowledgment, was not reasonable under the circumstances “[g]iven that the request is sufficiently narrowed to existing *electronic* databases that the Department maintains or has access to.” (*Id.* [emphasis in original]).

25. On July 12, 2021, after several follow-up attempts to obtain information on the status of the NYCLU's administrative appeal,² the FDNY responded to the NYCLU stating "[y]ou are not able to submit an Appeal regarding this FOIL request at this time as [the request] is still active/ open [sic]." (See Aguirre Affirmation, Exhibit D, FDNY Response Email dated July 12, 2021). The NYCLU received no records or substantive response to its April 30th FOIL request on September 15, 2021.
26. On October 20, 2021, the NYCLU submitted an administrative appeal to the FDNY for the agency's failure to respond to its request and meet its own September 15, 2021 deadline (see Aguirre Affirmation, Exhibit E, NYCLU Administrative Appeal Letter dated October 20, 2021). On October 21, 2021, the FDNY Appeals Unit confirmed receipt of the NYCLU's appeal and wrote that it would provide a determination of the NYCLU's appeal within thirty days, or by November 19, 2021 (see Aguirre Affirmation, Exhibit H, FDNY FOIL Appeal Email dated October 21, 2021). The FDNY did not provide a determination by November 19, 2021, nor has it provided any determination in the time since.
27. Despite the push for transparency within law-enforcement-related agencies in New York, the FDNY continues to withhold crucial information regarding potential misconduct and disciplinary matters from the public by denying the request in the manner challenged here.

CAUSES OF ACTION UNDER ARTICLE 78

1. The petitioner repeats and realleges paragraphs 1–27 hereof as if fully set forth herein.

² On June 7, 2021, the FDNY provided an additional response informing the NYCLU that the request had been denied and referred to an "attached determination letter." (Aguirre Affirmation, Exhibit D, FDNY Response Email dated June 7, 2021). However, no such letter was included as an attachment. The NYCLU then made several attempts from June 8, 2021 to June 22, 2021 to seek clarification about this response and the status of the request (see Aguirre Affirmation, Exhibit F, NYCLU Emails dated June 8, 2021, June 17, 2021, and June 22, 2021). The July 12, 2021 email from the FDNY clarified that the request was still "in progress." (See Exhibit D, FDNY Response Email dated July 12, 2021).

2. Article 78 is the appropriate method for review of agency determinations concerning FOIL requests.
3. The petitioner has a clear right to production of the records responsive to items 1 through 4 of the request.
4. There is no basis in law or fact for the respondent to fail to respond to the initial FOIL request or the administrative appeal.
5. The respondent's obligation under FOIL to respond to a FOIL request, respond to a FOIL administrative appeal, and produce documents is mandatory, not discretionary.
6. The petitioner exhausted its administrative remedies with the respondent when it appealed the respondent's constructive denial of the request and did not receive records or an adequate response to the appeal within ten business days as required by Public Officers Law § 89 [4][a].
7. The petitioner has no other remedy at law.
8. The petition is timely under CPLR § 217.

REQUESTED RELIEF

WHEREFORE, the petitioner seeks judgment:

- (1) Pursuant to CPLR § 7806, directing the respondent to comply with their duty under FOIL and disclose the records sought by the petitioner in Requests 1 to 4 in the FOIL request dated April 30, 2021;
- (2) Awarding reasonable attorneys' fees and litigation costs as allowed under New York Public Officers Law § 89; and
- (3) Granting such other relief as the Court deems just and proper.

Respectfully Submitted,



NEW YORK CIVIL LIBERTIES UNION
FOUNDATION

By: Guadalupe Victoria Aguirre

Robert Hodgson

Christopher Dunn

125 Broad St., Floor 19

New York, NY 10004

Tel: (212) 607-3300

Fax: (212) 607-3318

Email: laguirre@nyclu.org

Date: March 3, 2022
New York, New York

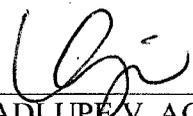
Counsel for Petitioner

VERIFICATION

STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK)

Guadalupe Victoria Aguirre, an attorney admitted to practice in the State of New York, affirms pursuant to C.P.L.R. § 2106 under penalties of perjury:

1. I am an attorney for the Petitioner in the within proceeding. I make this Verification pursuant to C.P.L.R. § 3020 [d] [3].
2. I have read the attached Verified Petition and know its contents.
3. All of the material allegations of the Verified Petition are true to my personal knowledge or upon information and belief. As to those statements that are based upon information and belief, I believe those statements to be true.


GUADALUPE V. AGUIRRE

Dated: March 3, 2022
New York, New York

Sworn and subscribed to me
this 3rd day of March 2022

ROBERT ANDREW HODGSON
NOTARY PUBLIC, STATE OF NEW YORK
Registration No. 02H06298810
Qualified in Kings County
Commission Expires 3/17/2022

