To be Submitted by:
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New York Supreme Court

Appellate Division—First Department

PATROLMEN'S BENEVOLENT ASSOCIATION
OF THE CITY OF NEW YORK, INC.,

Petitioner-Appellant,

– against –

BILL DE BLASIO in his official capacity as Mayor of the City of New York, CITY OF NEW YORK, JAMES P. O'NEILL in his official capacity as Commissioner of the New York City Police Department and NEW YORK CITY POLICE DEPARTMENT,

Respondents-Respondents.

BRIEF OF *AMICI CURIAE* REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, HEARST CORPORATION, THE ASSOCIATED PRESS, INC., BUZZFEED, INC., CABLE NEWS NETWORK, INC., THE CENTER FOR INVESTIGATIVE REPORTING, DAILY NEWS, LP, DOW JONES & COMPANY, INC., GANNETT COMPANY, INC., GIZMODO MEDIA GROUP, LLC, NEW YORK PUBLIC RADIO, THE NEW YORK TIMES COMPANY, NYP HOLDINGS, INC. AND SPECTRUM NEWS NY1 IN SUPPORT OF RESPONDENTS-RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

IDENTITY AND INTEREST OF *AMICI CURIAE* 1

PRELIMINARY STATEMENT 2

BACKGROUND 3

THE CURRENT LAWSUIT 8

ARGUMENT 9

I. BODY-WORN CAMERA FOOTAGE IS NOT EXEMPT FROM DISCLOSURE UNDER SECTION 50-A 10

A. FOIL Reflects the State's Strong Public Policy Favoring Disclosure 10

B. Police Officers' Body-Worn Camera Footage Is Not a "Personnel Record" Under Section 50-a 12

C. Section 50-a Only Applies to a Specific *Subset* of "Personnel Records" – Those Likely to Be Used "Abusive[ly]" Against an Officer 19

II. THE CITY HAS THE DISCRETION TO DISCLOSE BWC FOOTAGE EVEN IF SECTION 50-A POTENTIALLY APPLIES 22

A. FOIL Does Not Prohibit the Release of Information an Agency Chooses to Disclose 22

B. The City May Choose to Release Information Potentially Exempt from Disclosure under Section 50-a 25

CONCLUSION 28

TABLE OF AUTHORITIES

Cases **Page(s)**

35 N.Y.C. Police Officers v. City of N.Y.,
34 A.D.3d 392 (1st Dep't 2006) 27

Balduzzi v. City of Syracuse,
No. 96-CV-824, 1997 WL 52434 (N.D.N.Y. Feb. 4, 1997) 26

Beyah v. Goord,
309 A.D.2d 1049 (3d Dep't 2003) 15, 16

Capital Newspapers Div. of Hearst Corp. v. Burns,
67 N.Y.2d 562 (1986) ..... *passim*

Capital Newspapers Div. of Hearst Corp. v. City of Albany,
15 N.Y.3d 759 (2010) 16

Capital Newspapers Div. of Hearst Corp. v. City of Albany,
63 A.D.3d 1336 (3d Dep't 2009) 16

Carpenter v. City of Plattsburgh,
105 A.D.2d 295 (3d Dep't 1985) 27

Chrysler Corp. v. Brown,
441 U.S. 281 (1979) 25

Daily Gazette Co. v. City of Schenectady,
93 N.Y.2d 145 (1999) 12, 13, 15, 19

Data Tree, LLC v. Romaine,
9 N.Y.3d 454 (2007) 10

Dilworth v. Westchester Cty. Dep't of Corr.,
93 A.D.3d 722 (2d Dep't 2012) 11

Doe v. City of Schenectady,
84 A.D.3d 1455 (3d Dep't 2011) 27

Erie R.R. Co. v. Int'l Ry. Co.,
209 A.D. 380 (4th Dep't 1924) 2, 3

Fink v. Lefkowitz,
47 N.Y.2d 567 (1979) 10, 11, 17, 25

Floyd v. City of N.Y.,
959 F. Supp. 2d 668 (S.D.N.Y. 2013) 16, 19, 20

Friedman v. Rice,
30 N.Y.3d 461 (2017) 10

Gallogly v. City of N.Y.,
51 Misc. 3d 296 (Sup. Ct. N.Y. Cty. 2016) 27, 28

Gannett Co. v. James,
86 A.D.2d 744 (4th Dep't 1982) 18

Gould v. N.Y.C. Police Dep't,
89 N.Y.2d 267 (1996) 21

Green v. Annucci,
59 Misc. 3d 452 (Sup. Ct. Albany Cty. 2017) ..... *passim*

Hanig v. State of N.Y. Dep't of Motor Vehicles,
79 N.Y.2d 106 (1992) 24

Hearst Corp. v. N.Y.S. Police,
132 A.D.3d 1128 (3d Dep't 2015) 14

Horne v. Buffalo Police Benevolent Ass'n,
No. 07-CV-781C, 2008 WL 11363387 (W.D.N.Y. Dec. 10, 2008) 27

Johnson v. Gillespie,
214 A.D.2d 537 (2d Dep't 1995) 17, 18

Kwasnik v. City of N.Y.,
262 A.D.2d 171 (1st Dep't 1999) 25

Laveck v. Vill. Bd. of Trustees,
145 A.D.3d 1168 (3d Dep't 2016) 11

Luongo v. Records Access Officer,
150 A.D.3d 13 (1st Dep't 2017) 25

M. Farbman & Sons, Inc. v. NYC Health & Hosps. Corp.,
62 N.Y.2d 75 (1984) 10

Maggi v. Mahoney,
No. 2000-28343, 2001 WL 36384915 (Sup. Ct. Suffolk Cty. May 3, 2001) 27

McBride v. City of Rochester,
No. 1988-02, 2004 WL 5489809 (Sup. Ct. Monroe Cty. Sept. 22, 2004) 17

Molloy v. N.Y.C. Police Dep't,
50 A.D.3d 98 (1st Dep't 2008) 27

Nebraska Press Ass'n v. Stuart,
427 U.S. 539 (1976) 23, 24

Newsday, Inc. v. Empire State Dev. Corp.,
98 N.Y.2d 359 (2002) 10, 11

Newsday, Inc. v. N.Y.C. Police Dep't,
133 A.D.2d 4 (1st Dep't 1987) 18

Nieves v. Martinez,
285 A.D.2d 410 (1st Dep't 2001) 3

Poughkeepsie Police Benevolent Ass'n v. City of Poughkeepsie,
184 A.D.2d 501 (2d Dep't 1992) 25, 26, 27

Prisoners' Legal Servs. v. N.Y.S. Dep't of Corr. Servs.,
73 N.Y.2d 26 (1988) 13, 15, 19

Reale v. Kiepper,
204 A.D.2d 72 (1st Dep't 1994) 25

Simpson v. N.Y.C Transit Auth.,
112 A.D.2d 89 (1st Dep't 1985) 26, 27

Smith v. Town of Stony Point,
No. 13 CV 5000 (VB), 2014 WL 2217900 (S.D.N.Y. May 22, 2014) 26, 27

Town of Massena v. Niagara Mohawk Power Corp.,
45 N.Y.2d 482 (1978) 3

United States v. Cianfrani,
573 F.2d 835 (3d Cir. 1978) 24

Worcester Telegram & Gazette Corp. v. Chief of Police,
787 N.E.2d 602 (Mass. App. Ct. 2003) 23

Statutes

Civ. Rights Law § 50-a ..... *passim*

N.Y. Freedom of Information Law, Pub. Off. Law
§ 84 ..... 19, 23
§ 87 ..... 22, 24

IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici Curiae are members and representatives of the press who require access to records of law enforcement, including BWC footage, to fully and accurately report on public safety and criminal justice issues that are of central concern to the citizens of this State. *Amici* have obtained access to BWC footage for newsgathering purposes in the past, and intend to seek such access in the future, including pursuant to the Freedom of Information Law ("FOIL"). Further, they have reported extensively on the three police-involved shootings specifically addressed in the PBA's Petition, which are unquestionably matters of legitimate public interest and concern. *Amici* respectfully submit this *amici curiae* brief in support of Respondents-Respondents.

The identity of the *amici* are as follows: The Reporters Committee for Freedom of the Press, Hearst Corporation, The Associated Press, Inc., BuzzFeed, Inc., Cable News Network, Inc., The Center for Investigative Reporting, Daily News, LP, Dow Jones & Company, Inc., Gannett Co., Inc., Gizmodo Media Group, LLC, New York Public Radio, The New York Times Company, NYP Holdings, Inc., and Spectrum News NY1. Descriptions of the *amici* are contained in the Affirmation of Thomas B. Sullivan which accompanied the motion for leave to file this brief.

PRELIMINARY STATEMENT

Amidst a nationwide discussion about the relationship between race and the use of force by police officers, videos depicting police shootings and other use-of-force incidents have served an important, informative role for the public, and prompted many communities and law enforcement entities to adopt body-worn camera ("BWC") programs. While the use of BWC technology can increase law enforcement transparency and accountability, it can only do so when paired with a strong recognition of the public's right of access to the resulting footage. The decision of Respondents-Respondents Bill de Blasio, the City of New York, James P. O'Neill and the New York City Police Department (collectively, the "City" or "Respondents") to release some BWC footage from three incidents where individuals were shot by police officers, and the City's stated intention to release additional BWC footage from similar incidents in the future, recognizes that increased transparency and public accountability are the purpose of the City's BWC program.

In dismissing the Article 78 Petition, the IAS court held that there was no private right of action by which Petitioner-Appellant Patrolmen's Benevolent Association ("Appellant" or "PBA") could challenge the City's determination to publicly release BWC footage of three police-involved shootings. While the IAS court's ruling was clearly correct, "[a]n affirmance may be based on a different

theory, or on different grounds, or on any sufficient ground found in the evidence." *Erie R.R. Co. v. Int'l Ry. Co.*, 209 A.D. 380, 384 (4th Dep't 1924), *aff'd*, 239 N.Y. 598 (1924); *see Town of Massena v. Niagara Mohawk Power Corp.*, 45 N.Y.2d 482, 488 (1978) (defendant was "entitled to raise . . . two points in the Appellate Division as alternative grounds for sustaining the [trial court] judgment"); *Nieves v. Martinez*, 285 A.D.2d 410, 410 (1st Dep't 2001) (respondent could "advance an alternate ground for affirmance"). This brief presents two additional reasons why dismissal was proper: (1) the BWC footage in question is not a police "personnel record" subject to Civ. Rights Law § 50-a ("Section 50-a") and (2) the PBA has no legal right to require Respondents to keep secret BWC footage that they have decided should be disclosed. For the reasons set forth herein, *amici* urge this Court to affirm the judgment below.

BACKGROUND

Over the past several years, videos of use-of-force incidents—including use of lethal force by police officers in New York City—have received substantial news media coverage and prompted a nationwide discussion about the relationship between police and the communities they are sworn to serve. *See*, *e.g.*, Sarah Almukhtar, et al., *Black Lives Upended by Policing: The Raw Videos Sparking Outrage*, N.Y. Times (updated Apr. 19, 2018) (collecting videos of police use of force against, among others, Eric Garner, Laquan McDonald, and Philando

Castile), http://nyti.ms/1IMtFWL. Those discussions, in turn, have prompted the adoption of BWC programs by law enforcement agencies in New York and across the country—programs that are billed as mechanisms to increase transparency and accountability to the public. *See* Yale Law School Media Freedom & Information Access Clinic, Police Body Cam Footage: Just Another Public Record 3 (Dec. 2015) ("Yale Body Cam Report), https://perma.cc/LNW5-BWRL. Indeed, while touting the NYPD's BWC program earlier this year, Mayor de Blasio stated that police body-worn cameras "ensure community members feel the power of transparency. They build trust through transparency." *Transcript: Mayor de Blasio, Commissioner O'Neill Announce all Officers on Patrol to Wear Body Cameras by End of 2018*, Office of the Mayor (Jan. 31, 2018), https://perma.cc/RYG4-LTBB.

Transparency, and the resulting contribution to building the public's trust, are possible only if BWC footage is made available to the public. As the former Executive Director of the Police Executive Research Fund has stated:

> A police department that deploys body-worn cameras is making a statement that it believes the actions of its officers are a matter of public record. . . . [W]ith certain limited exceptions . . . body-worn camera video footage should be made available to the public upon request—not only because the videos are public records but also because doing so enables police departments to demonstrate transparency and openness in their interactions with members of the community.

Ltr. from the PERF Executive Director in Implementing a Body-Worn Camera Program: Recommendations and Lessons Learned, United States Dep't of Justice (2014), http://1.usa.gov/1s7UIxl. Access to BWC videos by members of the news media is critical to ensuring that the public knows and understands actions taken by law enforcement officers, particularly in the context of use-of-force incidents. For example, following the 2016 fatal shooting of Gerald Hall by D.C. Metro Police in Washington, D.C., there were conflicting reports about whether Mr. Hall had a weapon at the time of the shooting. *See* Tom Roussey, *Family Says Man Killed in Police-Involved Christmas Day Shooting in D.C. was 'not armed'*, ABC7: WJLA (Dec. 27, 2016), http://bit.ly/2oEvQmc. The public release of BWC video of the incident enabled the news media to walk the public through it moment by moment, pausing at crucial points to show that Mr. Hall did, in fact, have a knife. *See* Garrett Haake, *Body Camera Video Shows D.C. Man Armed with Knife When Shot by Police*, WUSA9 (updated Jan. 5, 2017), http://on.wusa9.com/2BN5lW7. In some instances, public release of bodycam video has contradicted officers' accounts of use-of-force incidents. In Denver, for example, a local TV station obtained—through a public records request—BWC video that showed an officer placing his knee on a suspect's neck during an arrest. *See* Brian Maass, *New DPD Body Cam Video Shows Excessive Force*, CBS4 Denver (Mar. 12, 2015), http://cbsloc.al/2CecSy1. While the officer had stated he "initially held [the

suspect] down by placing [his] knee on the back of [the suspect's] upper shoulders . . . ," the BWC video "seem[ed] to show that for several minutes, [the officer] actually had his knee on the man's neck. At one point on the video the suspect shouts 'I'm trying to breathe . . . trying to live . . . trying to breathe.'" *Id.*

Moreover, the routine (or standardized) release of BWC footage by law enforcement entities allows the public and the press to evaluate the official conduct not only of individual officers on specific occasions, but of department-wide practices. *See, e.g.*, Vivian Ho, *Body Cam Study Finds Oakland Police Speak Less Respectfully to Black People*, Governing Mag. (June 6, 2017) ("An analysis of 981 traffic stops made by 245 Oakland officers in April 2014 found that officers were more apt to use terms of respect such as 'sir,' 'ma'am,' 'please' and 'thank you' when dealing with white motorists when compared to black ones . . . . After stopping black people, officers more often used terms deemed to be disrespectful, calling them by their first names, 'bro' or 'my man,' and instructing them to keep their hands on the wheel, the study found."), https://perma.cc/KY98-BGLT.

Here in New York, *amici* have used the BWC footage of the shootings of Miguel Antonio Richards, Paris Cummings, Cornell Lockhart, and Michael Hansford released by Respondents to report on those incidents, which are unquestionably matters of public interest and concern. *See, e.g.*, Colleen Long, *Video Is Released of 1st Fatal NYPD Shooting Since Bodycams*, Associated

Press (Sept. 14, 2017), https://perma.cc/ABC2-K2C8; Mary Ann Georgantopoulos, *New York Police Released Their First Bodycam Video Of An Officer Fatally Shooting Someone*, BuzzFeed News (Sept. 14, 2017), http://bzfd.it/2x3q7fy; Tina Moore & Max Jaeger, *NYPD Releases First Bodycam Footage of Fatal Police Shooting*, N.Y. Post (Sept. 14, 2017), http://nyp.st/2f9Qufw; Rocco Parascandola & Graham Rayman, *SEE It: Bodycam Footage Shows Bronx Cops Fatally Shooting Suspect at Center for Mentally Ill*, N.Y. Daily News (Nov. 29, 2017), http://nydn.us/2j3Lgka; Ashley Southall & Joseph Goldstein, *Police Release Body Camera Footage of Shooting Death in Bronx*, N.Y. Times (Sept. 14, 2017), https://nyti.ms/2eYIxWG; Rocco Parascandola, Kerry Burke, Laura Dimon, & Leonard Greene, *SEE IT: Bodycam video shows cops shoot knife-wielding man after responding to suicide call*, N.Y. Daily News (Nov. 28, 2017), http://nydn.us/2k7XZp6; Amanda Woods, *NYPD bodycam footage shows fatal shooting of knife-wielding man*, N.Y. Post (Feb. 22, 2018), http://nyp.st/2on83ZY.

Continued access to BWC video in New York for *amici* and members of the public pursuant to New York's Freedom of Information Law, Pub. Off. Law §§ 84-90 ("FOIL"), is vital if the public is to have the information it needs to evaluate the actions of law enforcement officers in the context of both future use-of-force incidents and past incidents for which footage has not been released. Indeed, given the fact that the NYPD is the country's largest municipal police force, its actions

play an important role in this evaluation nationwide. Such disclosure is particularly important given that the Inspector General recently reported that NYPD "officers are still not properly documenting all reportable use-of-force incidents, including an under-reporting of force incidents in arrest reports." Press Release, City of N.Y. Dep't of Investigation, DOI Investigation Finds Non-Compliance by NYPD with New Use-of-Force Reporting Requirements, at 1 (Feb. 6, 2018), https://perma.cc/8GYA-FSH6.

THE CURRENT LAWSUIT

On January 9, 2018, the PBA filed its Petition pursuant to Article 78 seeking to prevent Respondents from releasing BWC footage to the public, including *amici*. The Petition sought to compel Respondents to withhold BWC footage under Section 50-a. The PBA subsequently filed an Order to Show Cause seeking a temporary restraining order preventing Respondents from releasing such footage to the public during the pendency of this proceeding. The IAS court denied that motion, finding that the standards for such relief were not met.

At a May 3, 2018 conference, the IAS court dismissed the PBA's Petition, finding that there was no private right of action under Section 50-a or in the context of an Article 78 petition by which the PBA could seek an injunction barring the City from releasing BWC footage. *Amici* had sought to intervene in the matter below. That motion was held in abeyance by the IAS court until it decided

the City's dismissal motion and then denied as moot after the motion to dismiss was granted.

The PBA filed its notice of appeal on May 11. On May 14, the PBA moved for an order enjoining the release of BWC footage during the pendency of this appeal, and an interim stay was granted until the motion could be adjudicated. *Amici* filed a cross-motion for leave to file an *amici curiae* brief in connection with the motion on May 25. On July 3, a panel of this Court granted the PBA's motion and *amici*'s motion to file their *amici* brief. Merits briefing followed.

ARGUMENT

In this time of increased public attention to law enforcement operations, the PBA is seeking to deny members of the public the right to know what their government is doing by requesting the entry of an order barring the City from releasing BWC footage absent court permission. Even if a private right of action potentially existed to allow a police union to challenge the City's decision, (1) BWC footage is not a "personnel record" under Section 50-a, and (2) even if Section 50-a could apply, which it does not, Respondents had discretion to voluntarily release the footage at issue. Therefore, this Court should affirm the decision below.[1]

[1] This Court's consideration of these alternate grounds for affirmance is particularly apt due to the PBA's suggestion that this Court should reverse the order below rather than remand for further proceedings. *See* Brief for Petitioner-Appellant ("PBA Br.") at 9.

I. BODY-WORN CAMERA FOOTAGE IS NOT EXEMPT FROM DISCLOSURE UNDER SECTION 50-A

A. FOIL Reflects the State's Strong Public Policy Favoring Disclosure

New York's Freedom of Information Law, N.Y. Pub. Off. Law §§ 84-90, reflects the State's "strong commitment to open government and public accountability," *Capital Newspapers Div. of Hearst Corp. v. Burns*, 67 N.Y.2d 562, 565 (1986), and imposes a broad standard of disclosure upon governmental entities, *M. Farbman & Sons, Inc. v. NYC Health & Hosps. Corp.*, 62 N.Y.2d 75, 79-80 (1984). "The law's 'premise [is] that the public is vested with an inherent right to know and that official secrecy is anathematic to our form of government.'" *Friedman v. Rice*, 30 N.Y.3d 461, 475 (2017) (quoting *Fink v. Lefkowitz,* 47 N.Y.2d 567, 571 (1979)). Indeed, one of the law's "salient features is its capacity to expose 'abuses on the part of government; in short, to hold the governors accountable to the governed.'" *Id.* (quoting *Fink*, 47 N.Y.2d at 571).

Under FOIL, all records of a public agency are declared to be open for public inspection unless they are specifically exempted from disclosure by statute. *Data Tree, LLC v. Romaine*, 9 N.Y.3d 454, 462 (2007). Those statutory exemptions must be narrowly construed, and the burden is on an "agency to demonstrate that 'the material requested falls squarely within the ambit of one of the[] statutory exemptions.'" *Newsday, Inc. v. Empire State Dev. Corp.*, 98 N.Y.2d

359, 362 (2002) (quoting *Fink*, 47 N.Y.2d at 571). An agency denying access to government documents or other materials must articulate a "particularized and specific justification" for not disclosing requested documents. *Fink*, 47 N.Y.2d at 571. "[C]onclusory assertions, unsupported by facts, will not suffice." *Laveck v. Vill. Bd. of Trustees*, 145 A.D.3d 1168, 1169-70 (3d Dep't 2016); *accord Dilworth v. Westchester Cty. Dep't of Corr.*, 93 A.D.3d 722, 724 (2d Dep't 2012) ("Conclusory assertions that certain records fall within a statutory exemption are not sufficient; evidentiary support is needed.").

The PBA seeks to turn this public policy on its head. Instead of arguing that a specific piece of BWC footage should not be disclosed based on a particularized showing with respect to that video, it seeks a presumptive rule that all BWC footage, regardless of its subject or contents, is barred from release unless the City or a third-party pursuing a FOIL request, like a member of news media, goes through a lengthy court process to obtain approval. But, as the Court of Appeals has made clear, Section 50-a does not "provide[] a blanket exemption foreclosing disclosure without [an officer's] consent of any police personnel records used to evaluate his performance." *Burns*, 67 N.Y.2d at 567. Even leaving the improper breadth of the PBA's position, the PBA cannot meet its burden to show that BWC footage is subject to Section 50-a. To do so, the PBA must show that:

(1) such footage is a "personnel record," which requires a showing that its purpose is *primarily* for use in evaluating the performance of the officer(s), by supervisors, in periodic personnel reviews;

(2) that the nature of the material is subjective, unsubstantiated, and in the nature of "unconfirmed allegations"; **and**

(3) that if disclosed to a litigant, or the public, the records have a high probability of being used for the purpose of degrading, embarrassing, harassing or impeaching the integrity of (i.e. abusing) the officer(s) in question.

As discussed herein, Appellant has not met—and cannot meet—its burden with respect to any one of the above-required elements, much less all three.

B. Police Officers' Body-Worn Camera Footage Is Not a "Personnel Record" Under Section 50-a

The statutory provision upon which the PBA relies is not applicable to BWC recordings. Section 50-a provides an exemption from disclosure under FOIL for "personnel records used to evaluate performance toward continued employment or promotion." Civ. Rights Law § 50-a(1). Contrary to the PBA's suggestion, *see* PBA Br. at 34-38, this provision does not exempt from disclosure every record that could be said to concern the conduct of police officers. *See Daily Gazette Co. v. City of Schenectady*, 93 N.Y.2d 145, 157 (1999) (explaining that "it is not sufficient merely to demonstrate that the recorded data may be 'used to evaluate performance toward continued employment or promotion' of the officers").

Indeed, Section 50-a, like any other exception to FOIL's broad mandate of disclosure, must be "narrowly construed to provide maximum access." *Burns*, 67 N.Y.2d at 566.

"[W]hether a document qualifies as a personnel record . . . depends upon its nature and its use in evaluating an officer's performance." *Prisoners' Legal Servs. v. N.Y.S. Dep't of Corr. Servs.*, 73 N.Y.2d 26, 32 (1988). The exemption is construed to apply only to "personnel records used to evaluate performance toward continued employment or promotion" and only "to the extent reasonably necessary to effectuate the purposes of [Section 50-a]—to prevent the potential use of information in the records in litigation to degrade, embarrass, harass or impeach the integrity of the officer." *Daily Gazette*, 93 N.Y.2d at 157-58; *see id.* at 159 (stating that exemption only applies to extent the agency "demonstrate[s] a substantial and realistic potential of the requested material for the abusive use against the officer").

These authorities make clear that Appellant cannot meet its burden of establishing that contemporaneous recordings of police officers discharging their official duties by interacting with members of the public (oftentimes in public places) fits within the narrow statutory definition of "personnel record." Indeed, in the most analogous decision *amici* are aware of, *Green v. Annucci*, 59 Misc. 3d 452 (Sup. Ct. Albany Cty. 2017), the court found that Section 50-a did not apply to

video footage from an incident at a correctional facility involving an inmate and correctional officers, finding that

> while the subject video recording was a medium used to evaluate the performance of the officer(s), this is coincidentally the video's use and not exclusively its nature and use. The court finds this video recording to be a mixed use material, meaning it could be used for several purposes including that of an officer(s) evaluation. The video footage is not confidential and personal, but a video record of an event and incident that occurred at a correctional facility . . . . Officer evaluation was not the nature and use of the video subject to the FOIL request.

Id. at 455. The court explained that "[t]o hold otherwise would allow *every* video recording to be held under such exemption, whether that be in a correctional facility such as an incident like this or on a police officer's body cam[era] recording . . . ." *Id*. The court went on to further hold that because "the video footage that is sought just depicts the actual acts and conduct of individuals, not unsubstantiated allegations or complaints," to the extent "these acts or conduct depicted subsequently degrade, embarrass, or impeach the integrity of an officer, such would be due to the subjective fault of the actor(s)." *Id.* at 455-56.

The same reasoning applies with equal force to police BWC recordings. Like the video recording in *Green*, BWC footage is not "generated for the purpose of assessing an employee's alleged misconduct," *contra Hearst Corp. v. N.Y.S. Police*, 132 A.D.3d 1128, 1129-30 (3d Dep't 2015). Instead, body-worn cameras are designed to be turned on whenever an officer engages in any number of

everyday, unremarkable "police actions," such as arrests, uses of force, or vehicle stops—the vast majority of which involve no police misconduct whatsoever. Respondents have been clear that body-worn cameras are, first and foremost, tools to promote transparency and accountability.[2] Listing the benefits of the program, the NYPD states that the cameras provide a contemporaneous, objective record of encounters, facilitate review by supervisors, foster accountability, and encourage lawful and respectful interactions between the public and the police. Although Appellant narrows its focus to only one of those listed uses—"review by supervisors," PBA. Br. at 36, —in context, it is clear that is not the primary "nature and use" of BWC footage.

Where a document or other material is potentially relevant to an employee's performance, but was not created primarily for that purpose, courts appropriately have been reluctant to find that Section 50-a applies. This is because Section 50-a does not apply to "neutral" or objective information. *See Daily Gazette*, 93 N.Y.2d at 158; *cf. Prisoners' Legal Servs.*, 73 N.Y.2d at 31 (noting that the goal of the statute is to protect officers against "*unsubstantiated* and *irrelevant* complaints of misconduct" (emphasis added)). Thus, for example, the Court of Appeals found

[2] This is consistent with the approach taken by other jurisdictions. *See* Yale Body Cam Report at 3-5 (noting that legislatures and police departments have created bodycam programs to increase transparency). As then-U.S. Attorney General Loretta Lynch stated, "[b]ody-worn cameras hold tremendous promise for enhancing transparency, promoting accountability, and advancing public safety for law enforcement officers and the communities they serve." Press Release, United States Dep't of Justice, Justice Department Announces $20 Million in Funding to Support Body-Worn Camera Pilot Program (May 1, 2015), perma.cc/9QM8-QGDZ.

that Section 50-a did not apply to "records containing statistical or factual tabulations of sick time" for a particular officer over the course of one month. *See Burns*, 67 N.Y.2d at 565; *see also Beyah v. Goord*, 309 A.D.2d 1049, 1051 (3d Dep't 2003) (finding that employee interviews are not personnel records). There is no doubt that these types of records can be (and routinely are) considered in annual and other periodic evaluations of officer performance; nevertheless, that fact, alone, does not render them "personnel records" under Section 50-a.

Similarly, the Court of Appeals has found that "gun tags"—records concerning the purchase of assault rifles for personal, nonofficial use by police officers—are not personnel records. *See Capital Newspapers Div. of Hearst Corp. v. City of Albany*, 15 N.Y.3d 759, 761 (2010). In reaching that conclusion, the Court reversed the decision of the Third Department, which had held that the gun tags were personnel records because "when coupled with other information they may be used to implicate officers in misconduct." *See Capital Newspapers Div. of Hearst Corp. v. City of Albany*, 63 A.D.3d 1336, 1338 (3d Dep't 2009). BWC footage similarly falls outside the narrow scope of what constitutes a personnel record. Like the video at issue in *Green*, BWC footage "creat[es]an irrefutable record of what occurred," *Floyd v. City of N.Y.*, 959 F. Supp. 2d 668, 685 n.65 (S.D.N.Y. 2013); *see Green*, 59 Misc. 3d at 455-56. It is neither unverified nor unsubstantiated; it presents "just the facts" of the recorded encounter. The mere

fact that such objective, contemporaneous recordings of events can be used as part of the process of evaluating police officer performance does not transform such a "neutral" record into a "personnel record." To rule otherwise would effectively exempt any document showing any potential misconduct by a police officer from disclosure, because that information could in some hypothetical way impact his or her employment. That would be directly contrary to the purpose of FOIL. *See Burns*, 67 N.Y.2d at 565-66 (stating that FOIL is designed to "provid[e] the electorate with sufficient information to 'make intelligent, informed choices with respect to both the direction and scope of governmental activities' and with an effective tool for exposing waste, negligence and abuse on the part of government officers" (quoting *Fink*, 47 N.Y.2d at 571)).

Even in cases involving far more subjective materials, courts have declined to find that Section 50-a applies. For example, in a case involving an accident between a stolen vehicle being pursued by police officers and another vehicle, the trial court found that two witness statements, a post-pursuit form filled out by the officers involved, and a narrative of the incident prepared by a police lieutenant were not protected by Section 50-a as they were merely "descriptions of the incidents." *McBride v. City of Rochester*, No. 1988-02, 2004 WL 5489809 (Sup. Ct. Monroe Cty. Sept. 22, 2004), *rev'd on other grounds*, 17 A.D.3d 1065, 1066 (4th Dep't 2005); *accord Johnson v. Gillespie*, 214 A.D.2d 537, 537-38 (2d Dep't

1995) ("certain records, reports, and statements related to an accident between a police vehicle and a bicycle" were not personnel records used to evaluate the officer's performance). Similarly, in *Gannett Co. v. James*, the court found that "use of force forms" filed by police officers over a number of years were not personnel records under Section 50-a, as they were not used to evaluate performance. 86 A.D.2d 744, 745 (4th Dep't 1982). The court distinguished such records from complaints made to internal affairs divisions of the two agencies from which records were sought. *Id.* Relying on *Gannett*, this Court later reached the same conclusion. *See Newsday, Inc. v. N.Y.C. Police Dep't*, 133 A.D.2d 4, 5-6 (1st Dep't 1987).[3] BWC footage—which provides a far more objective documentation of events than written accounts from witnesses or officers—is simply not a "personnel record" for the purposes of Section 50-a.

The PBA attempts to distinguish the gun tag and use-of-force form precedents in its brief by arguing that, unlike those records, "supervisors are required to review them for the specific purpose of evaluating a police officer's performance." *See* PBA Br. at 35-36 (internal marks and citation omitted). But the documents cited by the PBA show that, at most, only a highly limited subset of

[3] In both cases, the court found that the use-of-force forms were exempt from disclosure under a separate exemption as inter-agency materials. That exemption would have no application to BWC footage, which is purely objective.

the recordings will be reviewed. This hardly justifies the issuance of an order barring the release of all such footage.

C. Section 50-a Only Applies to a Specific *Subset* of "Personnel Records" – Those Likely to Be Used "Abusive[ly]" Against an Officer

In addition, even when material can be considered a personnel record, it is still subject to disclosure unless the agency can "demonstrate a substantial and realistic potential of the requested material for the abusive use against the officer." *See Daily Gazette*, 93 N.Y.2d at 159; *accord Prisoners Legal Servs.*, 73 N.Y.2d at 33 ("records having remote or no such potential [abusive] use, like those sought in *Capital Newspapers*, fall outside the scope of the statute"). Here, just like the footage in *Green*, any embarrassment or questions raised about an officer's integrity following the release of BWC footage will be caused by the officer's own actions. Legitimate criticism of governmental conduct based on objective facts, by definition, cannot be "abusive." *See* 59 Misc. 3d at 453-54. To the contrary, it furthers the very purpose of the FOIL; "free society is maintained when government is responsive and responsible to the public," Pub. Off. Law § 84; *see id.* ("government is the public's business").

Further, in many cases, the release of BWC footage may demonstrate to the public that the use of deadly force was justified. *See Floyd*, 959 F. Supp. 2d at 685 ("Video recordings will be equally helpful to members of the NYPD who are

wrongly accused of inappropriate behavior."); *see also* Yale Body Cam Report at 7 ("Body cams also have the potential to speed up the process of exonerating police officers who have not committed misconduct and to reduce the frequency of frivolous complaints because those complainants will know that officers have good information with which to exonerate themselves." (footnote omitted)). After Respondents' release of BWC footage of the shooting of Miguel Richards, the news site DNAinfo watched the video with a retired NYPD detective sergeant who concluded that the officers involved "showed great restraint and followed departmental procedures to a T—despite the highly charged nature of the encounter." Trevor Kapp, *Fatal Police Shooting of Mentally Ill Man Done by the Book, Expert Says*, DNAinfo (Oct. 18, 2017), https://www.dnainfo.com/new-york/20171018/concourse/miguel-richards-deborah-danner-police-shooting-body-cameras. Similarly, the release of footage from the Cornell Lockhart shooting was said to "dramatically contradict[] a claim" from a witness that police had commanded Mr. Lockhart to drop his knife only three times. *See Body Cam Footage Contradicts Witness Claims About Deadly NYPD Shooting*, CBS New York (Nov. 29, 2017), http://newyork.cbslocal.com/2017/11/29/bronx-shelter-nypd-shooting-body-cam/. To the extent BWC footage shows that officers acted properly, it cannot reasonably be said to degrade or harass them.

The PBA's position—that *all* BWC footage is a personnel record—is precisely the extreme position rejected by the court in *Green*. *See Gould v. N.Y.C. Police Dep't*, 89 N.Y.2d 267, 275 (1996) ("blanket exemptions for particular types of documents are inimical to FOIL's policy of open government"). The overbreadth of Appellant's request is perhaps best demonstrated by incidents involving no use of force at all. For example, BWC footage of two Brockport officers trying to corral a squirrel which had broken into an apartment and eaten some holiday cookies went viral at the end of last year. *See Cookie-stealing Squirrel Lunges at Police Officer*, NBC 5 (Dec. 30, 2017), http://www.mynbc5.com/article/cookie-stealing-squirrel-lunges-at-police-officer/14522422. In another incident, the body-worn camera of a police officer in Macedon captured that officer saving a woman pulled underwater while kayaking in the Erie Canal. *See* Ali Touhey, *Only on 8: Police Body Camera Shows Water Rescue*, Rochester First (Sept. 9, 2015), http://www.rochesterfirst.com/news/local-news/only-on-8-police-body-camera-shows-water-rescue/231511127. In neither case could the release of such BWC footage subject the officers involved to embarrassment or abuse and, at least with respect to the squirrel video, it is difficult to see how it could play any role in an evaluation of the officers' job performance. But the relief sought by the PBA here—a blanket ban on the release of *all* BWC footage—would bar disclosure of *all* similar recordings in the future.

Relatedly, the PBA's stated concern about "massive unintended consequences" whereby anyone with a grudge against a police officer could "submit a FOIL request for that specific officer's BWC footage covering an entire year (or a decade) of his work and then exploit anything potentially embarrassing that ever happened during the officer's time at work," PBA Br. at 37-38, is misplaced. First, given the NYPD's ability to charge fees for the cost of reproducing such records, *see* Pub. Officers Law § 87(1), it would take a truly motivated (and wealthy) person to make such a broad request. Second, while the PBA acknowledges only in passing that material could be "protected for an independent reason," *id.* at 37, several other exemptions could apply, depending on the circumstances. Regardless, that is not the factual scenario actually presented in this case, where the City has released only limited footage of incidents of extreme interest to the public.

In sum, BWC footage is not a personnel record subject to Section 50-a. Accordingly, the decision below should be affirmed.

II. THE CITY HAS THE DISCRETION TO DISCLOSE BWC FOOTAGE EVEN IF SECTION 50-A POTENTIALLY APPLIES

A. FOIL Does Not Prohibit the Release of Information an Agency Chooses to Disclose

For the reasons set forth above, Respondents correctly determined that Section 50-a does not apply to the BWC footage that was released in connection

with the three police shootings cited in the PBA's Petition. Yet even assuming, *arguendo*, that the released BWC footage was potentially exempt from disclosure under FOIL, the City still had discretion to release the videos to the public. And, indeed, given that one of the primary goals of instituting a BWC program is to promote public confidence in the integrity of its police department, withholding the recordings from the public would have been profoundly counterproductive. *Cf. Worcester Telegram & Gazette Corp. v. Chief of Police*, 787 N.E.2d 602, 608 (Mass. App. Ct. 2003) ("It would be odd, indeed, to shield from the light of public scrutiny . . . the workings and determinations of a process whose quintessential purpose is to inspire public confidence."); *see also* Steven D. Zansberg, *Why We Shouldn't Hide What Police Body Cameras Show*, Governing Mag. (Aug. 29, 2016), (arguing that a regime of secrecy defeats the purpose of building public trust: "withholding the [BWC] recordings feeds the public's suspicion that there is something to hide."), http://www.governing.com/gov-institute/voices/col-police-body-camera-recordings-transparency.html; *cf.* Pub. Officers Law § 84 ("The more open a government is with its citizenry, the greater the understanding and participation of the public in government. . . . [I]t is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible."); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 587 (1976)) (Brennan, J., concurring) (with respect to the conduct of the judicial branch of government,

noting that "[s]ecrecy . . . can only breed . . . distrust of courts and suspicion concerning the competence and impartiality of judges"); *United States v. Cianfrani*, 573 F.2d 835, 851 (3d Cir. 1978) ("Public confidence cannot long be maintained where important . . . decisions are made behind closed doors and then announced in conclusive terms to the public, *with the record supporting the [government's] decision sealed from view*." (emphasis added)).

In keeping with this State's public policy favoring disclosure, "while an agency is permitted to restrict access to those records falling within [FOIL's] statutory exemptions, the language of the exemption provision contains permissive rather than mandatory language, and it is within the agency's discretion to disclose such records, with or without identifying details, if it so chooses." *Burns*, 67 N.Y.2d at 567; *accord Hanig v. State of N.Y. Dep't of Motor Vehicles*, 79 N.Y.2d 106, 109 (1992) ("Even where records fall within an exemption, an agency in its discretion may disclose them in whole or in part."); *see* Pub. Off. Law § 87(2) (when an exemption applies, an "agency *may* deny access to records or portions thereof" (emphasis added)); *see also* N.Y.S. Comm. on Open Gov't, Opinion No. FOIL-AO-15701 (Dec. 20, 2005), https://docs.dos.ny.gov/coog/ftext/f15701.htm ("Even when agencies may have the ability to deny access to records, they are not

required to do so and may assert their discretionary authority to disclose.").[4] Like the federal Freedom of Information Act ("FOIA"), upon which FOIL is based, the exemptions to disclosure under the statute "demarcate[] the agency's obligation to disclose; [they do] not foreclose disclosure."[5] *Chrysler Corp. v. Brown,* 441 U.S. 281, 291-92 (1979).

B. The City May Choose to Release Information Potentially Exempt from Disclosure under Section 50-a

Like any other exception to FOIL's mandate of disclosure, a government agency may choose not to invoke Section 50-a. Indeed, this Court reaffirmed this just last year. *See Luongo v. Records Access Officer*, 150 A.D.3d 13, 24 (1st Dep't 2017), *leave to appeal denied*, 30 N.Y.3d 908 (2017). In an earlier case, *Reale v. Kiepper*, 204 A.D.2d 72 (1st Dep't 1994), this Court reversed a trial court order enjoining posting of disciplinary dispositions of transit authority police officers in a departmental bulletin. The panel found that the proposed postings would not violate Section 50-a because, among other reasons, "respondents, themselves, have chosen voluntarily to make such disclosure." *Id.* at 73-74; *see Poughkeepsie Police Benevolent Ass'n v. City of Poughkeepsie*, 184 A.D.2d 501, 501 (2d Dep't 1992) ("the use of such information by a governmental entity, in furtherance of its

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[4] "[C]ourts should defer" to opinions of the Committee in interpreting FOIL. *See Kwasnik v. City of N.Y.*, 262 A.D.2d 171, 172 (1st Dep't 1999).

[5] New York courts may look to the federal FOIA for guidance in interpreting FOIL. See *Fink*, 47 N.Y.2d at 572 n* (because FOIL was patterned after FOIA, federal case law and legislative history on FOIA is relevant to interpretation of FOIL).

official functions, is unrelated to the purpose of Civil Rights Law § 50-a"); *see also Smith v. Town of Stony Point*, No. 13 CV 5000 (VB), 2014 WL 2217900, at *3 (S.D.N.Y. May 22, 2014) ("New York courts have repeatedly upheld disclosures of the contents of police personnel files outside of the context of litigation, and in furtherance of the police departments' official functions.").

Courts in this State have repeatedly rejected attempts by officers and their representatives to force police departments to assert Section 50-a, or to impose liability for a department's decision to release documents that *could have been withheld* under that provision. Indeed, it was on this ground that the IAS court dismissed the Petition below. *See Balduzzi v. City of Syracuse*, No. 96-CV-824, 1997 WL 52434, at *16 (N.D.N.Y. Feb. 4, 1997) ("New York courts that have addressed similar arguments have unanimously concluded that there is no private right of action on the part of police officers for violations of § 50-a."). For example, *Simpson v. N.Y.C Transit Auth.*, 112 A.D.2d 89 (1st Dep't 1985) involved the NYCTA's voluntary release, over a former transit officer's objection and without the issuance of a court order, of a former transit officer's personnel records to a plaintiff who brought suit after the officer shot him. *Id.* at 89-90. The officer attempted to bring claims against the NYCTA, alleging a violation of Section 50-a. *Id.* This Court found that summary judgment should have been awarded to the NYCTA, as the officer had no private right of action under the

statute. *Id.* at 90-91; *see 35 N.Y.C. Police Officers v. City of N.Y.*, 34 A.D.3d 392, 394 (1st Dep't 2006) ("the statute does not create a private right of action for police officers for a claimed violation of Civil Rights Law § 50–a"); *accord Doe v. City of Schenectady*, 84 A.D.3d 1455, 1457 (3d Dep't 2011); *Poughkeepsie Police Benevolent Ass'n*, 184 A.D.2d at 501; *Carpenter v. City of Plattsburgh*, 105 A.D.2d 295, 298-99 (3d Dep't 1985), *aff'd*, 66 N.Y.2d 791 (1985); *Maggi v. Mahoney*, No. 2000-28343, 2001 WL 36384915 (Sup. Ct. Suffolk Cty. May 3, 2001); *Horne v. Buffalo Police Benevolent Ass'n*, No. 07-CV-781C, 2008 WL 11363387, at *2 (W.D.N.Y. Dec. 10, 2008).

The two cases cited by the PBA on this point, *Molloy v. N.Y.C. Police Dep't*, 50 A.D.3d 98 (1st Dep't 2008) and *Gallogly v. City of N.Y.*, 51 Misc. 3d 296 (Sup. Ct. N.Y. Cty. 2016), are not to the contrary. In *Molloy*, the NYPD expressly asserted that Section 50-a did apply to the records sought, but failed to respond to the requester's administrative appeal within the required period. This Court rejected the petitioner's argument that, because of the police department's legal error, it should be required to produce the requested materials. 50 A.D.3d at 99-101. The Court concluded only that Section 50-a protection "should not be deemed automatically waived by the inaction of the Department." *Id.* at 100; *see also id.* (stating that Section 50-a makes records "immune from *indiscriminate disclosure*" (citation omitted)). It said nothing about an intentional decision to

release requested materials. *Gallogly* similarly involved an argument that the NYPD waived the application of Section 50-a by failing to raise it before the institution of an Article 78 proceeding, not an intentional decision by the department to release records. *See* 51 Misc. 3d at 300-01.

In short, even if Section 50-a could apply to BWC footage—which it does not—Respondents would still have the discretionary authority not to assert Section 50-a and to release such footage to the public. For that reason too, the decision below should be affirmed.

CONCLUSION

For all the foregoing reasons, *amici* urge this Court to affirm the decision below.

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Respectfully submitted,

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