

NEW YORK SUPREME COURT
APPELLATE DIVISION: FIRST DEPARTMENT

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In the Matter of

NEW YORK CIVIL LIBERTIES UNION

Petitioner-Respondent,

against

NEW YORK CITY POLICE DEPARTMENT,
and RAYMOND KELLY, in his official capacity
as Commissioner of the New York City
Police Department,

Respondents-Appellants.

Sup. Court, New York County
INDEX NO. 102436/2012

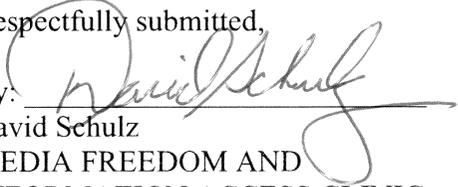
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**NOTICE OF MOTION BY AMICI CURIAE FOR LEAVE TO
FILE AMICI CURIAE BRIEF IN SUPPORT OF PETITIONER-RESPONDENT**

PLEASE TAKE NOTICE, that upon the affirmation of David A. Schulz sworn to on October 7, 2016, and all exhibits attached thereto including a copy of the proposed brief of *amici curiae*, the undersigned will move this Court at 27 Madison Avenue, New York, New York, on Thursday, October 20, 2016, at 10:00 AM, or as soon thereafter as is practicable, for an order granting leave to Advance Publications, Inc., The Associated Press, Daily News, L.P., Dow Jones & Company, Inc., Gannett Co., Inc., Hearst Corporation, The New York Times Company, News 12 Networks, Newsday, and NYP Holdings, Inc. to file with this Court a brief of *amici curiae* in support of Petitioner-Respondent, New York Civil Liberties Union, in the above-styled action.

Dated: October 7, 2016
New York, New York

Respectfully submitted,

By: 

David Schulz

MEDIA FREEDOM AND
INFORMATION ACCESS CLINIC

ABRAMS INSTITUTE FOR

FREEDOM OF EXPRESSION

YALE LAW SCHOOL

321 West 44th Street, Suite 1000

New York, New York 10036

Attorney for Amici Curiae

NEW YORK SUPREME COURT
APPELLATE DIVISION: FIRST DEPARTMENT

-----X
In the Matter of :

NEW YORK CIVIL LIBERTIES UNION :

Petitioner-Respondent, :

against :

NEW YORK CITY POLICE DEPARTMENT, :
and RAYMOND KELLY, in his official capacity :
as Commissioner of the New York City :
Police Department, :

Respondents-Appellants. :
-----X

Sup. Court, New York County
INDEX NO. 102436/2012

**AFFIRMATION OF DAVID A. SCHULZ IN SUPPORT OF MOTION
BY THE AMICI CURIAE TO FILE AMICI CURIAE BRIEF**

I, David A. Schulz, an attorney duly admitted to practice in the State of New York, hereby affirm under penalty of perjury as follows:

1. I am the co-Director of the Media Freedom and Information Access Clinic (“MFIA Clinic”), and I submit this affirmation in support of the Motion of *Amici* Advance Publications, Inc., The Associated Press, Daily News, L.P., Dow Jones & Company, Inc., Gannett Co., Inc., Hearst Corporation, The New York Times Company, News 12 Networks, Newsday, and NYP Holdings, Inc. (the “*Amici*”) for leave to file a brief as *Amici Curiae* in Support of Petitioner-Respondent in the above-captioned action.

2. Attached hereto as Exhibit A is the copy of the proposed brief *Amici* wish to submit to the Court. *Amici* have duly authorized me to submit this brief on their behalf.

3. *Amici* include international news services, the publishers of daily news and weekly newspapers and magazines, and operators of television reporters. *Amici* regularly rely on the provisions of the Freedom of Information Law, Pub. Off. L. § 84 et seq. (“FOIL”), to gather and disseminate news and other information in this state.

4. *Amici* have a direct interest in the proper resolution of the legal issues in this case. Since *Amici* regularly gather, publish, broadcast, produce, and distribute news and other information, *Amici* are in a position to identify law and arguments that may otherwise escape the Court’s attention. As members of the press, *Amici* frequently interact with and are well-informed about Section 50-a and FOIL.

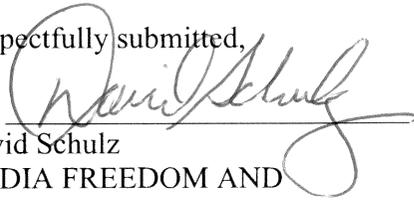
5. As required by Rule 600.2(a)(3), the notice of appeal in this matter is attached as Exhibit B, and the order sought to be reviewed is attached as Exhibit C.

6. All parties consent to the filing of this brief.

7. For these reasons, *Amici* seek the Court’s permission to file the attached *amici curiae* brief.

Dated: October 7, 2016
New York, New York

Respectfully submitted,

By: 

David Schulz
MEDIA FREEDOM AND
INFORMATION ACCESS CLINIC
ABRAMS INSTITUTE FOR
FREEDOM OF EXPRESSION
YALE LAW SCHOOL
321 West 44th Street, Suite 1000
New York, New York 10036

Attorney for Amici Curiae

EXHIBIT A

New York Supreme Court
Appellate Division—First Department

In the Matter of the Application of
NEW YORK CIVIL LIBERTIES UNION,

Petitioner-Respondent,

For a Judgment under Article 78 of the Civil Practice Law and Rules,

– against –

NEW YORK CITY POLICE DEPARTMENT and RAYMOND KELLY, in his
official capacity as Commissioner of the New York City Police Department,

Respondents-Appellants.

**BRIEF FOR *AMICI CURIAE* THE NEW YORK TIMES
COMPANY, ADVANCE PUBLICATIONS, INC.,
THE ASSOCIATED PRESS, INC., DAILY NEWS L.P.,
DOW JONES & COMPANY, INC., GANNETT CO., INC.,
HEARST CORPORATION, NEWSDAY LLC, NEWS 12
NETWORKS LLC, AND NYP HOLDINGS, INC.**

Of Counsel:

HANNAH BLOCH-WEHBA, ESQ.
127 Wall Street
New Haven, Connecticut 06511
(203) 436-5824
hannah.bloch-wehba@ylsclinics.org

DAVID A. SCHULZ, ESQ.
MEDIA FREEDOM & INFORMATION
ACCESS CLINIC
ABRAMS INSTITUTE FOR FREEDOM
OF EXPRESSION
YALE LAW SCHOOL
Attorney for Amici Curiae
321 West 44th Street, Suite 1000
New York, New York 10036
(212) 850-6100
dschulz@lskslaw.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

IDENTITY AND INTEREST OF AMICI CURIAE v

PRELIMINARY STATEMENT 1

ARGUMENT 2

I. ACCESS TO THE FINAL DECISIONS ON NYPD DISCIPLINE IS
NEEDED TO REPORT ON MATTERS OF PUBLIC CONCERN..... 3

II. NYPD’S PROPOSED INTERPRETATION OF SECTION 50-A WOULD
IMPROPERLY DENY ACCESS TO INFORMATION THAT NEWS
ORGANIZATIONS NEED TO FURNISH A FULL PUBLIC
ACCOUNTING OF NYPD’S DISCIPLINARY PROCESS 7

A. Journalists Rely on FOIL to Inform the Public About Police
Discipline 7

B. Section 50-a Does Not Impose the Broad Prohibition Urged by
NYPD, and FOIL Requires a Narrower Approach 12

CONCLUSION..... 13

TABLE OF AUTHORITIES

CASES

<i>Capital Newspapers Div. of Hearst Corp. v. Burns</i> , 67 N.Y.2d 562, 565 (1986) ..	10
<i>Daily Gazette Co. v. City of Schenectady</i> , 93 N.Y.2d 145, 159 (1999).....	13
<i>Matter of Fink v. Lefkowitz</i> , 47 N.Y.2d 567, 571 (1979).....	8
<i>Prisoners' Legal Servs of N.Y. v. N.Y. State Dep't of Corr. Servs.</i> , 73 N.Y.2d 26, 31–32 (N.Y. 1988)	13

STATUTES

Civil Rights Law § 50-a	passim
Freedom of Information Law, Pub. Off. L. §§ 84.....	passim

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David A. Graham, <i>What Can the U.S. Do to Improve Police Accountability?</i> , The Atlantic (Mar. 8, 2016), http://theatlntc/2dVGBwS/	3
Editorial, <i>Two Deaths and No Excuses</i> , N.Y. Times (May 29, 2003), http://nyti.ms/2dhZN6H	9
Graham Kates, <i>The ‘Crisis of Confidence’ in Police-Community Relations</i> , Crime Report (Sept. 6, 2014), http://bit.ly/2dBIhvA	3
Jeffery M. Jones, <i>U.S. Confidence in Police Recovers From Last Year’s Low</i> , Gallup (June 19, 2015), http://bit.ly/2cVhVr9	4
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Mark Fazlollah, <i>Audit: N.Y. Police Panel Let Misconduct Cases Lapse</i> , Philadelphia Inquirer (Sept. 3, 1998), http://bit.ly/2dvZ5FW	9
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Rivka Gewirtz, <i>More NYPD No-Knocks: New Yorkers Tell Their Tales of Botched Raids</i> , Village Voice (June 18, 2003), http://bit.ly/2dmLLmm	9

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William K. Rashbaum, *CCRB Memo Sez City Auditing Lost Cases*, N.Y. Daily News (Nov. 21, 1998), <http://nydn.us/2dvZp7v> 9

William K. Rashbaum, *Woman Dies After Police Mistakenly Raid Her Apartment*, N.Y. Times (May 17, 2003), <http://nyti.ms/2cVhbCj>..... 9

REGULATIONS

38 RCNY § 15-04 6

38 RCNY § 15-06 5

IDENTITY AND INTEREST OF AMICI CURIAE

Amici curiae are The New York Times Company, Advance Publications, Inc., The Associated Press, Daily News, L.P., Dow Jones & Company, Inc., Gannett Co., Inc., Hearst Corporation, News 12 Networks, Newsday, and NYP Holdings, Inc. *Amici* regularly rely on the provisions of the Freedom of Information Law, Pub. Off. L. § 84 et seq. (“FOIL”), to gather and disseminate news and other information in this state and have a direct interest in the proper resolution of the legal issues in this case.

1. *Amicus* Advance Publications, Inc. (“Advance”), directly and through its subsidiaries, publishes more than 20 print and digital magazines with nationwide circulation, local news in print and online in ten states, and leading business journals in over 40 cities throughout the United States. Through its subsidiaries, Advance also owns numerous digital video channels and internet sites.

2. *Amicus* The Associated Press, Inc. (“AP”) is a news cooperative organized under the Not-for-Profit Corporation Law of New York. The AP’s members and subscribers include the nation’s newspapers, magazines, broadcasters, cable news services and Internet content providers. The AP operates from 280 locations in more than 100 countries. On any given day, AP’s content can reach more than half of the world’s population.

3. *Amicus* Daily News, L.P. (“Daily News”) publishes the New York Daily News, a daily newspaper that serves primarily the New York City metropolitan area and is the ninth-largest paper in the country by circulation. The Daily News’ website, NYDailyNews.com, receives approximately 26 million unique visitors each month.

4. *Amicus* Dow Jones & Company, Inc. (“Dow Jones”) is a global provider of news and business information, delivering content to consumers and organizations around the world across multiple formats, including print, digital, mobile and live events. Dow Jones has produced unrivaled quality content for more than 130 years and today has one of the world’s largest newsgathering operations globally. It produces leading publications and products including the flagship Wall Street Journal, America’s largest newspaper by paid circulation; Factiva; Barron’s; MarketWatch; Financial News; DJX; Dow Jones Risk & Compliance; Dow Jones Newswires; and Dow Jones VentureSource.

5. *Amicus* Gannett Co., Inc. (“Gannett”) is an international news and information company that publishes 109 daily newspapers in the United States and Guam, including the Binghamton Press & Sun-Bulletin, Elmira Star-Gazette, The Ithaca Journal, Poughkeepsie Journal, Rochester Democrat and Chronicle, The Journal News in Westchester and USA TODAY. Each weekday, Gannett’s newspapers are distributed to an audience of more than 8 million readers and

the digital and mobile products associated with the company's publications serve online content to more than 100 million unique visitors each month.

6. *Amicus* Hearst Corporation ("Hearst") is one of the nation's largest diversified media and information companies. Its major interests include ownership of 15 daily and more than 30 weekly newspapers, including the Albany Times Union, Houston Chronicle, San Francisco Chronicle and San Antonio Express-News; 30 television stations, which reach a combined 18 percent of U.S. viewers, including WPTZ-TV in Plattsburg NY; hundreds of magazines around the world, including Good Housekeeping, Cosmopolitan, ELLE and O, The Oprah Magazine; ownership in leading cable networks, including Lifetime, A&E, HISTORY and ESPN; significant holdings in automotive, electronic and medical/pharmaceutical business information companies; a majority stake in global ratings agency Fitch Group; Internet and marketing services businesses; television production; newspaper features distribution; and real estate.

7. *Amicus* The New York Times Company ("The Times") is the publisher of The New York Times and nytimes.com.

8. *Amicus* News 12 Networks is the leader in hyper-local content, providing news, weather, traffic, and sports exclusively to cable subscribers in the New York/New Jersey/Connecticut tri-state area. News 12 Long Island was the first of its kind when it launched in 1986, bringing news focused on a previously

under-served market to an around the clock format at the viewer's convenience. Today the network includes seven individual local 24-hour news channels serving New Jersey, Connecticut, Westchester, Hudson Valley (Rockland and Orange Counties), the Bronx, and Brooklyn, as well as Long Island. In addition to the news channels, News 12 extends its hyper-local focus to the key content areas of traffic, weather, and sports to Optimum customers. The Network includes five traffic and weather channels, providing constantly updated information 24/7 in those two key subject areas. News 12 Varsity provides local high school sports coverage including games, highlights, and commentary available on the web, interactive channel 614, and via mobile app. News 12 also features the award winning news12.com, News 12 Interactive, channel 612 on Optimum TV, and mobile service, News 12 to Go. News 12 Networks is owned and operated by Altice USA.

9. *Amicus* Newsday LLC (“Newsday”) is the publisher of the daily newspaper, Newsday, and related news websites and mobile applications. Newsday is one of the nation’s largest daily newspapers, serving Long Island through its portfolio of print and digital products. Newsday has received 19 Pulitzer Prizes and other esteemed awards for outstanding journalism.

10. *Amicus* NYP Holdings, Inc. (“NYP”) is the publisher of the New York Post, a daily newspaper with the seventh largest circulation in the

country. The Post's digital network, which includes nypost.com and pagesix.com, has approximately 32 million unique visitors per month.

PRELIMINARY STATEMENT

This appeal raises issues of vital importance to journalists who cover the New York City Police Department (“NYPD”) and to the public accountability of the largest police force in this nation. At issue is the refusal of NYPD to disclose the disciplinary decisions it makes on all complaints of excessive force, abuse of authority, discourtesy, or offensive language that have been substantiated by the Civilian Complaint Review Board (“CCRB”). Access to NYPD’s decisions is needed for journalists to provide the public a sufficiently robust account of the disciplinary process triggered when officers are accused of improper or illegal conduct, and transparency surrounding NYPD’s disciplinary actions is essential to maintaining public confidence in the integrity of the police force.

Under procedures followed since 1993, the CCRB has independently reviewed and made findings in all cases of alleged misconduct by New York City police officers. But when the CCRB substantiates a claim of misconduct, the matter is referred to an NYPD administrative law judge, who reviews the matter and issues a decision on the appropriate discipline. The Police Commissioner then approves or modifies that recommendation (the “Final Decision”). NYPD now contends that Civil Rights Law § 50-a (“Section 50-a”) categorically exempts these Final Decisions in their entirety from the disclosure mandate of the Freedom of Information Law, Pub. Off. L. §§ 84, *et seq.* (“FOIL”). Its argument cannot be

squared with Section 50-a and FOIL, for all the reasons set forth in the brief of Petitioner-Respondent New York Civil Liberties Union (“NYCLU”). If adopted by this Court, NYPD’s interpretation of Section 50-a would deprive journalists of information needed to accurately report on discipline imposed by NYPD and to hold it accountable to the public it serves.

Ten news organizations submit this *amicus* brief in support of the arguments advanced by NYCLU to underscore both the high degree of public interest in understanding the NYPD’s disciplinary process and the vital importance of properly construing Section 50-a. As the Committee on Open Government has cautioned, an overly broad construction of Section 50-a, unmoored from the legislature’s narrow objective, will create a “corrosive absence of transparency” that can only “undermine[] accountability and diminish[] public trust.” Comm. On Open Gov’t, Annual Report to the Governor and Legislature (Dec. 2015) at 5.

ARGUMENT

This case concerns access to the Final Decisions that represent the culmination of NYPD’s disciplinary processes. NYCLU seeks disclosure under FOIL of the decisions relating to hearings on substantiated allegations of misconduct by New York City police officers. Public access to these Final Decisions is proper and is needed for journalists to provide the type of full and fair

account of NYPD's discipline decisions that enables public accountability and promotes public trust in the City's police force.

I.

ACCESS TO THE FINAL DECISIONS ON NYPD DISCIPLINE IS NEEDED TO REPORT ON MATTERS OF PUBLIC CONCERN

Public confidence in the police is at extraordinarily low levels. "There's nearly bipartisan consensus these days that something has gone wrong in the relationship between police and the public in the United States. Shootings of unarmed people, videos of excessive force, and massive protests from coast to coast attest to the problem."¹ Gallup found that the public's confidence in police is at just 56 percent in 2016, recovering only slightly from a twenty-two-year low of 52 percent recorded in 2015.² A 2015 Reuters poll revealed that 31 percent of Americans believe that police officers routinely lie to serve their own interests.³ And a USA TODAY/Pew Research Center Poll found that Americans, by a 2-to-1 ratio, say police departments nationwide do not do a good job in holding officers

¹ David A. Graham, *What Can the U.S. Do to Improve Police Accountability?*, The Atlantic (Mar. 8, 2016), <http://theatltn.tc/2dVGBwS>. See also Graham Kates, *The 'Crisis of Confidence' in Police-Community Relations*, Crime Report (Sept. 6, 2014), <http://bit.ly/2dBIhvA>.

² Jeffery M. Jones, *U.S. Confidence in Police Recovers From Last Year's Low*, Gallup (June 19, 2015), <http://bit.ly/2cVhVr9>.

³ Bill Schneider, *Do Americans Trust Their Cops to be Fair and Just? New Poll Contains Surprises*, Reuters (Jan. 15, 2015), <http://reut.rs/1yfndlH>.

accountable for misconduct, treating racial groups unequally, and using force disproportionately.⁴

Amici believe that recent declines in public confidence can be attributed in part to the lack of transparency surrounding the actions of police, including an unwillingness to inform the public about disciplinary decisions. With the immense public controversy over the death of Eric Garner on Staten Island and widespread allegations of abuse by officers using stop-and-frisk techniques, the public may rightly wonder whether the NYPD is taking effective steps to monitor and discipline its officers. Members of the public rely on news organizations like *amici* to furnish the facts necessary for them to determine whether these concerns are justified or misplaced. News organizations, however, can inform the public about NYPD responses to these concerns only to the extent that they are able to access NYPD records, including the Final Decisions at issue in this appeal.

The Final Decisions constitute the formal, final record of public government adjudications, and should be open to the public and the press. Without access to the Final Decisions, journalists who cover NYPD and the CCRB are unable to assess the legal reasoning that undergirds the disciplinary decision that is taken. If released, the Final Decisions—even with officer names and identifying

⁴ Susan Page, *Poll: Whites and Blacks Question Police Accountability*, USA Today (Aug. 26, 2014), <http://usat.ly/1p9Lmot>.

information redacted—will illustrate how the Deputy Commissioner of Trials and Assistant Deputies evaluate the law in order to arrive at the recommendation they transmit to the Police Commissioner. *See* 38 R.C.N.Y. § 15-06(a)–(c); *see also* R 154. Likewise, the Final Decisions may reveal the Police Commissioner’s reasoning on occasions when he modifies the Deputy or Assistant Deputy’s recommendation. *See id.* § 15-08(a).

Nor can a journalist covering the NYPD assess the legal consistency and reliability of the reasoning and outcome of disciplinary cases without access to the Final Decisions. The record indicates that the Deputy and Assistant Deputies cite to internal precedent from other decisions in making their Final Decisions. *See* R 154. The Final Decisions reveal how the NYPD applies the law to similar facts—whether the decisions reflect careful and evenhanded application of settled principles or appear arbitrary and result driven. Either way, disclosure is in the public interest, particularly in today’s environment of growing mistrust for police among certain demographics.⁵

⁵ *See* Quinnipiac University, New York City Poll, (Aug. 2, 2016) (questions 35, 38-39), *available at* <http://bit.ly/2dvSAFo> (showing that Black and Hispanic respondents are more likely than White respondents to “disapprove of the way the New York City police are doing their job” and to think that police corruption is a serious and widespread issue); *cf.* Nathan James et al., Cong. Research Serv., R43904, *Public Trust and Law Enforcement—A Brief Discussion for Policymakers 2* (2016), *available at* <https://www.fas.org/sgp/crs/misc/R43904.pdf>.

Other publicly available information cannot fill these gaps. Even if a reporter had the time to attend every disciplinary hearing (and we know of none who do), those hearings do not reveal the legal reasoning that underlies the disciplinary decisions made by the Deputy and Assistant Deputies. *Cf.* 38 R.C.N.Y. § 15-04.

Access to the Final Decisions is particularly important given the reality that NYPD tends toward leniency for officers against whom the CCRB has substantiated civilian complaints. A recent review by the NYC Department of Investigation of 92 substantiated use-of-force allegations from 2010 to 2014 found that “NYPD departed downward from CCRB’s disciplinary recommendations—or imposed no disciplinary action whatsoever—67.4% of the time.”⁶ This discrepancy between the recommendations made by the civilian-run CCRB based on evidence disclosed at public hearings and the ultimate discipline actions taken by NYPD in excessive-force cases raises significant questions about the effectiveness of the NYPD’s disciplinary process; the denial of access to the Final Decisions makes it impossible to answer them.

⁶ N.Y. City Dep’t of Investigation, Office of the Inspector General for the NYPD (OIG-NYPD), *Police Use of Force in New York City: Findings and Recommendations on NYPD’s Policies and Practices* 4 (Oct. 1, 2015), <http://on.nyc.gov/1YR6xLM>.

In light of the apparent discrepancy between findings of misconduct by the CCRB and the discipline imposed by the NYPD, the press and public require access to NYPD's Final Decisions to assess whether the disciplinary system is functioning in an effective and even-handed manner. This is precisely the sort of information crucial to the ability to expose "negligence and abuses on the part of government" and thereby "hold the governors accountable to the governed."

Matter of Fink v. Lefkowitz, 47 N.Y.2d 567, 571 (1979).

II.

NYPD'S PROPOSED INTERPRETATION OF SECTION 50-A WOULD IMPROPERLY DENY ACCESS TO INFORMATION THAT NEWS ORGANIZATIONS NEED TO FURNISH A FULL PUBLIC ACCOUNTING OF NYPD'S DISCIPLINARY PROCESS

News organizations in this State regularly rely on FOIL to report on matters relating to law enforcement agencies. NYPD's broad reading of Section 50-a as a blanket limitation on the disclosure mandate in FOIL would deprive journalists of information vitally needed for public oversight and the accountability of NYPD.

A. Journalists Rely on FOIL to Inform the Public About Police Discipline

The news media play a central role in enabling public oversight of the NYPD disciplinary system. For example:

- In 1998, the press covered the mishandling of more than 100 cases of police misconduct, which were deemed credible by the CCRB but never forwarded to NYPD.⁷
- In 2003, a *New York Times* article covered the death of Alberta Spruill from a heart attack after an apartment raid prompted by faulty information.⁸ Only after this incident did NYPD reveal it had received a secret memo from the CCRB recommending the creation of a database to track search-warrant practice, an omission that otherwise could easily have gone unnoticed if the triggering incident had not been reported. *Id.*
- In 2005, the press reported that high-ranking NYPD officers ignored requests to appear before the CCRB when the board was investigating alleged misconduct during the 2004 Republican National Convention.⁹

This reporting shed light on the actions of the NYPD, and it underscores the importance of independent review and analysis of police officer discipline. The

⁷ Michael Cooper, *Police Say Panel Withheld Findings Against 108 Officers*, N.Y. Times (Sept. 2, 1998), <http://nyti.ms/2cMp3pp>; , Mark Fazlollah, *Audit: N.Y. Police Panel Let Misconduct Cases Lapse*, Philadelphia Inquirer (Sept. 3, 1998), <http://bit.ly/2dvZ5FW> ; William K. Rashbaum, *CCRB Memo Sez City Auditing Lost Cases*, N.Y. Daily News (Nov. 21, 1998), <http://nydn.us/2dvZp7v>.

⁸ William K. Rashbaum, *Woman Dies After Police Mistakenly Raid Her Apartment*, N.Y. Times (May 17, 2003), <http://nyti.ms/2cVhbCj> ; *see also* Kerry Burke & Maki Becker, *City Rules Raid Caused Her To Die*, N.Y. Daily News (May 28, 2003), <http://nydn.us/2dvOWeV>; Editorial, *Two Deaths and No Excuses*, N.Y. Times (May 29, 2003), <http://nyti.ms/2dhZN6H>; Rivka Gewirtz, *More NYPD No-Knocks: New Yorkers Tell Their Tales of Botched Raids*, Village Voice (June 18, 2003), <http://bit.ly/2dmLLmm>; Christopher Dunn & Donna Lieberman, *Opinion, A Review Board in Name Only*, N.Y. Times (July 19, 2003), <http://nyti.ms/2d8FgBG>.

⁹ Michael Wilson, *Top Officers Are Said to Ignore Complaint Board's Inquiry*, N.Y. Times (Sept. 15, 2005), <http://nyti.ms/2d8H1P0>.

type of transparency such reporting provides is necessary for meaningful public oversight of the NYPD and its response to substantiated civilian complaints.

The press cannot perform its public-oversight role when it does not have access to important NYPD records such as the Final Decisions. Consider an analogy familiar to the Court—could the press effectively inform the public about the workings of the state courts without access to a single judicial opinion? It is equally impossible to effectively inform the public about the workings of NYPD’s discipline system without a single disciplinary opinion.

FOIL is a primary means through which journalists, and the public, are able to access NYPD records. *See* FOIL § 84 (“[T]he public, individually and collectively and represented by a free press, should have access to the records of government . . .”). FOIL expresses 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 time and again since has made it possible for journalists to inform the public about the steps taken to discipline officers who allegedly engage in misconduct.

Public records have been critical to journalists’ ability to report on systemic issues related to NYPD’s disciplinary process. In 2010, for example, using NYPD records obtained through FOIL by NYCLU, the *New York Times* was able to report that nearly 2,000 NYPD officers had been arrested between 1992 and 2008, and

that cases involving abuse of suspects by NYPD officers had risen significantly over time.¹⁰ Similarly, using FOIL the *Daily News* was able to identify the cases filed against NYPD officers who have been sued 10 or more times between 2003 and 2013, and to locate where the most civilian complaints were being filed.¹¹

FOIL requests by the press have also uncovered valuable data about the costs of NYPD misconduct, such as an analysis of the \$428 million paid out by the City in police-related settlements between 2009 to 2014,¹² and enabled meaningful critiques of troubling NYPD training practices.¹³ Under FOIL, NYPD has been compelled to disclose key information relating to officer shootings of civilians.¹⁴ And more recently, after Eric Garner's death in 2014 *The Village Voice* was able to

¹⁰ Al Baker & Jo Craven McGinty, *N.Y.P.D. Confidential*, N.Y. Times (Mar. 26, 2010), <http://nyti.ms/2dv97Vc>.

¹¹ Barry Paddock et al., *Staten Island, borough where Eric Garner died, has highest number of most-sued NYPD officers*, N.Y. Daily News (Jul. 28, 2014), <http://nydn.us/116urNh> (“At least 129 of those cases—or 21%—name one or more officers assigned to the Staten Island narcotics unit, totaling \$6 million in payouts.”).

¹² Caroline Bankoff, *The City Has Paid Almost Half a Billion Dollars in NYPD-Related Settlements Over the Past 5 Years*, N.Y. Mag. (Oct. 12, 2014), <http://nym.ag/1Bgscj7>.

¹³ See, e.g., Michael Powell, *In Police Training, a Dark Film on U.S. Muslims*, N.Y. Times (Jan. 23, 2012), <http://nyti.ms/1mOC8IV> (finding that NYPD showed an Islamophobic film to officers during police training).

¹⁴ Al Baker, *Judge Orders City to Release Reports on Shots Fired by Police at Civilians Since 1997*, N.Y. Times (Feb. 22, 2011), <http://nyti.ms/2cJtRIb>.

use FOIL to inform the public about the CCRB disciplinary actions regarding NYPD's continued use of chokeholds.¹⁵

Although such access to NYPD records under FOIL enables the press to inform the public about police activities, NYPD routinely fails to disclose records about its actions when asked.¹⁶ In 2013, then-Public Advocate Bill De Blasio evaluated the responsiveness of New York City agencies to FOIL requests and gave NYPD an “F”, ranking it dead last out of all agencies that had received more than 1,000 FOIL requests over a three-month period in 2011.¹⁷ NYPD recently moved even further away from open-government principles by revealing in August that it would no longer disclose “personnel orders” on its clipboard in the NYPD public information office, even though journalists—and therefore the public—have had access to this officer discipline information for decades.¹⁸ Its additional effort

¹⁵ Jon Campbell, *I was choked by the NYPD’: New York’s Chokehold Problem Isn’t Going Away*, *The Village Voice* (Sep. 23, 2014), <http://bit.ly/2dfy4Xm>

¹⁶ See, e.g., CJ Ciaramella, *Secrets of the NYPD*, *Salon* (May 8, 2013, 4:17 PM), <http://bit.ly/2dybqsc> (“[NYPD] regularly flouts transparency laws, in an effort to make the records of how it perform its duties and the crimes it responds to next to impossible for the average citizen to obtain.”).

¹⁷ Bill De Blasio, *Breaking Through Bureaucracy: Evaluating Government Responsiveness to Information Requests* at 13 (Apr. 2013), available at <http://bit.ly/2dyb9FC>.

¹⁸ See Rocco Parascandola & Graham Rayman, *NYPD Suddenly Stops Sharing Records on Cop Discipline in Move Watchdogs Slam as Anti-Transparency*, *N.Y. Daily News* (Aug. 24, 2016, 10:57 PM), <http://nydn.us/2bO0sgk>.

in this appeal to restrict access to Final Decisions of disciplinary proceedings only further undermines the goal of FOIL and impedes the ability of the press to report on matters of vital public concern.

B. Section 50-a Does Not Impose the Broad Prohibition Urged by NYPD, and FOIL Requires a Narrower Approach

Section 50-a was meant to advance a narrow legislative objective: “to protect the officers from the use of records—including *unsubstantiated* and irrelevant complaints of misconduct—as a means for harassment and reprisals and for purposes of cross-examination by plaintiff’s counsel during litigation.”

Prisoners’ Legal Servs of N.Y. v. N.Y. State Dep’t of Corr. Servs., 73 N.Y.2d 26, 31–32 (N.Y. 1988) (emphasis added). Recognizing this limited goal, the Court of Appeals has instructed that Section 50-a was never meant to prevent the press from “fulfill[ing] [its] important function of dissemination of matters of legitimate public interest.” *Daily Gazette Co. v. City of Schenectady*, 93 N.Y.2d 145, 159 (1999). NYPD’s proposed interpretation of Section 50-a and FOIL to shield legal opinions issued by administrative law judges after open hearings, diverges dramatically from the its purpose and would impede the ability of the press to “fulfill its important function.”

NYPD asks this Court to curtail access by the press and public, not to unsubstantiated and frivolous complaints, but to its final recommendations made

following public hearings on the most serious, substantiated allegations of misconduct. NYPD's position is breathtakingly broad—its argument suggests that *all* records “pertaining to misconduct” should be exempt from disclosure, whether they are the unsubstantiated complaints of prisoners or the final decisions of administrative law judges. This Court should reject the false equivalence upon which NYPD relies in suggesting that records of serious and substantiated misconduct by police officers may not be released—in whole or in any part—to the press and public.

This Court should follow, instead, the path the Court of Appeals set forth in *Daily Gazette*: redaction is a permissible and prudent way to give effect to the animating concerns of both Section 50-a and FOIL. *See id* at 159. In order for the press to report on the NYPD disciplinary process in a manner that fosters public trust and accountability, the Court should adopt a narrow construction of Section 50-a to facilitate the transparency intended by FOIL and the CCRB structure.

CONCLUSION

For all the reasons stated herein and in the brief of Petitioner-Appellee NYCLU, this Court should affirm the decision of the trial court.¹⁹

¹⁹ This brief has been prepared by the Media Freedom & Information Access Clinic, a program of the Abrams Institute for Freedom of Expression and the Information Society Project at Yale Law School. The brief does not purport to express the school's institutional views, if any. Counsel wish to thank Mark Doré,

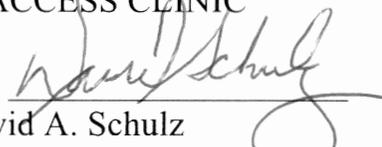
Dated: October 7, 2016

Of Counsel:

Hannah Bloch-Wehba
127 Wall Street
New Haven, CT 06511
(203) 436-5824

Respectfully submitted,

MEDIA FREEDOM & INFORMATION
ACCESS CLINIC

By: 
David A. Schulz
ABRAMS INSTITUTE FOR FREEDOM
OF EXPRESSION
YALE LAW SCHOOL
321 West 44th Street, Suite 1000
New York, NY 10036
(212) 850-6103

Attorney for Amici Curiae

Rumela Roy, Regina Wang, and Ian MacDougall for their outstanding assistance in preparing this brief.

**APPELLATE DIVISION – FIRST DEPARTMENT
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I hereby certify pursuant to 22 NYCRR § 600.10 that the foregoing brief was prepared on a computer using Microsoft Word.

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Dated: New York, New York
October 7, 2016

David A. Schulz
MEDIA FREEDOM &
INFORMATION
ACCESS CLINIC
ABRAMS INSTITUTE FOR
FREEDOM
OF EXPRESSION
YALE LAW SCHOOL
321 West 44th Street, Suite 1000
New York, NY 10036
(212) 850-6103

Attorney for Amici Curiae

EXHIBIT B

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

-----x
In the Matter of the Application of
NEW YORK CIVIL LIBERTIES UNION,

Petitioner,

For a Judgment under Article 78
of the Civil Practice Law and Rules,

-against-

NEW YORK CITY POLICE DEPARTMENT, and
RAYMOND KELLY, in his official capacity as
Commissioner of the New York City Police
Department,

Respondents.
-----x

NOTICE OF APPEAL

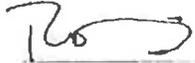
Index No. 102436/12

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SEP 24 2015
NEW YORK COUNTY CLERK'S OFFICE

PLEASE TAKE NOTICE that Respondents, hereby appeal to the Appellate Division of the Supreme Court, First Department, from the decision and order (one paper) of the Honorable Shlomo Hagler J.S.C. herein dated April 21, 2015 and entered in the office of the Clerk of New York County on April 21, 2015.

Dated: New York, New York
September 24, 2015

ZACHARY W. CARTER
Corporation Counsel of the
City of New York,
Attorney for Respondents,
100 Church Street,
New York, New York 10007.
(212) 356-2500

By: 
RICHARD P. DEARING,
Chief, Appeals Division

TO: CHRISTOPHER DUNN,
New York Civil Liberties Union Foundation,
Attorneys for Petitioner,
125 Broad Street, 19th Floor,
New York, New York 10004.
(212) 607-3300

CLERK
County of New York

EXHIBIT C

EA
4/21/15
E

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: SHLOMO HAGLER
J.S.C.
Justice

PART 17

Index Number : 102436/2012
NEW YORK CIVIL LIBERTIES UNION
vs.
N.Y.P.D.
SEQUENCE NUMBER : 001
ARTICLE 78

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APR 21 2015

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Notice of Motion/Order to Show Cause — Affidavits _____ | No(s) _____
Answering Affidavits — Exhibits _____ | No(s) _____
Replying Affidavits _____ | No(s) _____

Upon the foregoing papers, it is ordered that this motion is

petrhan
deferred
as set forth by Justice Wright
in his prior rulings dated
October 9, 2012, July 23, 2014
and September 30, 2014 as set
forth on the record today.
This Court does not make any
substantive decisions in this matter
as Justice Wright's prior rulings
are "law of the case."

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 4/21/15

SHLOMO HAGLER J.S.C.
J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE