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

In the Matter of the Application of AUBREY VICTOR, Petitioner, for a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules - against - NEW YORK CITY OFFICE OF TRIALS AND HEARINGS, CITY OF NEW YORK DEPARTMENT OF CORRECTION, and CITY OF NEW YORK Respondents.	:	Index No. 100890/15

INTERVENOR-RESPONDENT'S MEMORANDUM OF LAW
IN SUPPORT OF CROSS-MOTION TO DISMISS
THE AMENDED VERIFIED PETITION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Regulations

PRELIMINARY STATEMENT

Petitioner Aubrey Victor ("Petitioner" or "Victor") seeks to impose a blanket rule of secrecy over all proceedings conducted by Respondent Office of Administrative Trials and Hearings ("OATH") that involve employees of Respondent Department of Corrections ("DOC"), claiming that such confidentiality is required by New York Civil Rights Law § 50-a ("Section 50-a"). His effort is entirely misdirected.

By its own terms, Section 50-a expressly applies only to "personnel records" that are "under the control" of DOC, but OATH proceedings and decisions (known as "Reports and Recommendations") are not "under the control" of DOC. To the contrary, OATH was created to provide an external forum where disputes involving city agencies and their employees could be adjudicated in a fair and impartial manner, applying uniform rules and procedures. It is a distinct, independent agency that engages in its own fact-finding and analysis.

Petitioner's novel reading of Section 50-a to require secrecy in all OATH proceedings involving DOC employees contravenes both the plain statutory language of Section 50-a and its undisputed purpose. The narrow legislative purpose behind Section 50-a was to prevent the use of unsubstantiated and irrelevant complaints of misconduct for harassment and reprisals, particularly in cross-examination by counsel during litigation. OATH proceedings involve only charges that have been investigated by DOC and determined to merit further adjudication, and therefore open OATH proceedings do not give rise to the legislature's concerns that undergird Section 50-a. In fact, OATH proceedings involving DOC employees have been public for decades with no evidence of any harassment.

Even if Section 50-a could be construed to foreclose access to OATH proceedings as Petitioner argues, applying that construction would violate the public's First Amendment right of

access to official proceedings. The First Amendment right attaches to OATH proceedings given the decades-long tradition of public access to OATH and the positive impact of public access on the functioning of its quasi-judicial proceedings. While the right of access is a qualified right, not an absolute one, Petitioner presents no compelling interest that could justify overriding the public's constitutional right of access to OATH proceedings in the blanket manner he urges.

Every year, OATH conducts thousands of disciplinary hearings just like the one at issue here. OATH hearings and the Reports and Recommendations ("Reports") they produce have always been open to the public, and they provide a vital window through which citizens are better able to monitor the actions of city agencies. Petitioner's effort to slam shut this critical window into the workings of city government should be squarely rejected as beyond the reach of Section 50-a and contrary to the public's constitutional right of access. His further demand for class action relief should likewise be rejected due to the well-settled law that Article 78 proceedings are not proper vehicles for class action claims, with few possible exceptions that do not apply here.

STATEMENT OF FACTS

A. Overview of OATH's Public, Independent Proceedings

OATH is an autonomous, free-standing city agency that exists to provide independent guidance to other agencies attempting to adjudicate disputes. It was established by Executive Order No. 32 in 1979 in an effort to professionalize New York City's administrative hearing system and was made a Charter agency in 1988. *See* Victor Pet., Ex. B, at 3. As the Charter Revision Commission explained at the time,

> [t]he purpose of formalizing OATH in the charter is to establish an independent adjudicative body that can be a resource to agencies in conducting their adjudications, while at the same time establishing an

> independent structure outside of the agency to provide an unbiased assessment of the matters to be adjudicated.

Id. (citing The New York Charter Revision Commission, *Report of the Charter Revision Commission*, Vol. 2, at 103 (1989) (hereinafter "1989 Commission Report")).

During later revisions, the Charter Revision Commission reaffirmed that OATH was intended to "function as an independent agency of government so that its judges would not be unduly influenced by the prosecutor or petitioning agency," which the Commission concluded "invite[d] a higher level of confidence in the fairness of the adjudicative process." The New York City Charter Revision Commission, *Agency Reorganization & Government Accountability*, June 26, 2003 (hereinafter "2003 Commission Report");[1] *see also* The New York City Charter Revision Commission, *The City in Transition: Interim Succession and the Mayoralty*, Sept. 3, 2002 (hereinafter "2002 Commission Report") ("The keys to OATH's structure are its impartiality and independence.").[2]

The Commission found that OATH's standing and status as a fair adjudicative body was "further secured . . . by granting five-year terms of office to OATH's administrative law judges 'to enhance their impartiality and the respect accorded to their decisions.'" 2003 Commission Report, *supra*, at 9 (quoting 1989 Commission Report, *supra*, at 104). To that end, the Commission sought to make OATH judges "fully independent of the agencies whose advocates appear before them . . . ." *Id.* In this way, OATH is able to employ a "quasi-judicial process" that serves "as a protective barrier to unwarranted or improvident Executive action." *Id.* at 9.

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[1] *Available at* http://www.nyc.gov/html/charter/downloads/pdf/government_reorganization_report.pdf.

[2] *Available at* http://www.nyc.gov/html/charter/downloads/pdf/2002_final_report.pdf.

Since its inception as "the first municipal central tribunal in the country separate from the agencies that refer cases to it," OATH has grown significantly. *About Oath*, Office of Administrative Trials and Hearings, http://www.nyc.gov/html/oath/html/about/about.shtml (last visited Mar. 10, 2016). Today, OATH is composed of four tribunals that hold over 300,000 hearings per year—or an average of 1,200 each workday. *Id.* OATH's Trials Division hears disciplinary cases for New York City's 325,000 civil servants, as well as a wide range of other disputes. Office of Administrative Trials and Hearings, *OATH: NYC's Independent and Impartial Administrative Law Court*, February 2016, *available at* http://www.nyc.gov/html/oath/downloads/pdf/oath_trib_brochures/OATH_Brochure.pdf. DOC has been referring disciplinary cases to OATH since it became a Charter agency. Anthony Mohen, *OATH at Thirty*, Office of Administrative Trials and Hearings, *available at* http://home2.nyc.gov/html/oath/html/benchnotes/bench_article0909.shtml (last visited Mar. 10, 2016).

Throughout its history, OATH Reports have been available to the press and the public. *See* Victor Pet., Ex. B, at 4. Section 1-49 of OATH's Rules of Practice mandate public access, requiring that "all proceedings shall be open to the public . . . [and] all decisions will be published without redaction" unless the administrative law judge makes a specific finding that "legally recognized grounds" for closure exist. 48 RCNY § 1-49. The Lexis/Nexis legal database has published OATH Reports, including those involving DOC officers, since at least 1992. *See* Victor Pet., Ex. B, at 4.

B. Petitioner's Effort to Impose Secrecy Over OATH Proceedings

Petitioner is a former corrections officer working for DOC. *See* Amended Verified Petition of Aubrey Victor ("Victor Am. Pet.") ¶1. In July 2011, based on its own internal

investigation, DOC charged Petitioner with improperly using deadly force against a Rikers Island prisoner by repeatedly kicking and stomping on the prisoner's head. *See* Victor Pet., Ex. C. DOC referred its charges against Petitioner to OATH, and a hearing was conducted on December 5, 2014 before Administrative Law Judge ("ALJ") Faye Lewis. *Id*.

During the hearing, Petitioner asked OATH to remove his name and any identifying information from all OATH records disclosed to the public, claiming this secrecy was required by a provision in Section 50-a that designates DOC "personnel records" confidential. *See* Victor Am. Pet. ¶22. On February 3, 2015, ALJ Lewis rejected Petitioner's request, finding that Section 50-a does not apply to OATH records because they are not "under the control" of DOC. *See* Victor Pet., Ex. B, at 2. On April 2, 2015, ALJ Lewis found Petitioner guilty of excessive force, reviewed Petitioner's prior disciplinary history, and recommended termination. Victor Pet., Ex. C, at 14–17.

Petitioner then initiated this Article 78 proceeding, seeking an Order 1) vacating and annulling OATH's denial of his request to remove his name and other identifying information from any OATH record disclosed to the public and 2) directing Respondents to comply with Section 50-a by keeping the OATH Report concerning his termination confidential, and 3) in the alternative, ordering a hearing pursuant to CPLR § 7804(h). *See* Victor Am. Pet. ¶32. Petitioner further seeks to have the confidentiality restriction in Section 50-a applied to all OATH cases involving similarly situated DOC employees. *See Id.* ¶36.

C. The New York Times Company's Intervention to Preserve Public Access

On May 23, 2016, the Court granted The New York Times Company's motion to intervene in this proceeding. The New York Times Company is the publisher of *The New York Times* ("The Times"), a daily newspaper that closely covers New York City government and

regularly reports on Respondent DOC. *See* Affirmation of David E. McCraw in Support of Motion for Leave to Intervene ("McCraw Aff."), ¶¶ 1–3. For example, The Times has published 49 articles related to Rikers Island since OATH adjudicated Petitioner's case in April 2015, including articles on mental health issues, overpopulation, drug smuggling, and the rape culture that exists at the prison.[3]

In covering Rikers Island, The Times has attended, reviewed, and reported on a number of OATH proceedings and decisions. In 2014, for example, The Times published an article about OATH's recommended employment termination for several Rikers correction officers who engaged in brutality and later lied about it, and included excerpts of the OATH findings in its reporting. McCraw Aff. ¶5. An article in 2015 focused on the persistence of brutality at Rikers and repeated abuses by specific correction officers. *Id.* ¶6. In another report, The Times used information from OATH proceedings to conduct a long-term assessment of the relationship between OATH findings and employment termination. *Id.* ¶5.

The Times now seeks an Order denying Petitioner's request to shroud all future OATH proceedings involving Rikers Island and DOC in secrecy.

ARGUMENT

I.

SECTION 50-A DOES NOT APPLY TO OATH PROCEEDINGS

As ALJ Lewis correctly recognized, Section 50-a narrowly imposes confidentiality only upon personnel records that are "under the control of . . . a department of correction." N.Y. Civ.

[3] An internal search of The Times's website, www.nytimes.com, uncovered these 49 articles concerning Rikers Island. *See Rikers Island Prison Complex*, N.Y. TIMES (Feb. 22, 2016), http://topics.nytimes.com/top/reference/timestopics/organizations/r/rikers_island_prison_complex/index.html.

R. L. § 50-a. OATH proceedings and its reports are not. Section 50-a, on its face, does not apply to OATH proceedings or reports. *See* Victor Pet., Ex. B, at 2.

Petitioner contends that OATH can somehow be considered to be "under the control of" DOC because it conducts disciplinary hearings of correction officers "on behalf of" DOC. *See* Victor Am. Pet. ¶¶ 18, 31. According to Petitioner, as DOC's "designee" to conduct these hearings, OATH should be subject to the same rights and obligations as DOC, including the confidentiality restrictions of Section 50-a. *Id*. ¶¶ 20, 31. Given OATH's purpose, history and independent role, these arguments are entirely misdirected.

OATH was established by Executive Order No. 32 in 1979 to be a strictly independent agency. Statement of Facts, *supra*, at 1–2. To separate OATH from any agency adjudicating an issue before it, OATH was created under the sole control of a Chief Administrative Law Judge with complete authority over the direction of OATH and its proceedings. Pursuant to Charter § 1049(3), the Chief Administrative Law Judge establishes "rules for the conduct of hearings" and has broad discretion over the entire hearing process, including holding conferences for settlement, administering oaths, examining witnesses, receiving evidence and overseeing discovery, subpoenaing witnesses, regulating the hearing, disposing of procedural requests, making recommendations, and taking "any other action authorized by law or agency rule consistent therewith." New York City Charter § 1049(3). In addition, OATH Rule 1-49 expressly provides that "all proceedings shall be open to the public" unless the ALJ finds that a "legally recognized ground" exists for closure. 48 RCNY § 1-49(a). OATH thus routinely makes public it proceedings and reports, which constitute OATH's own records, not the records of DOC.

Meanwhile, DOC has no administrative control over OATH's staffing, funding, or operations. Rather, DOC refers to OATH those cases that it believes to have merit in order to obtain the recommendations of an impartial, independent body and to ensure fairness in the adjudicative process. That OATH's power under the City Charter is only exercised after referrals and advisory recommendations does not make it a subsidiary entity under the control of an agency that uses its services, including DOC. In support of his argument to the contrary, Petitioner misconstrues *Prisoners' Legal Servs. v. N.Y. State Dep't of Corr. Servs.*, 73 N.Y.2d 26 (1988). That case dealt with records specifically *under DOC's control*, not the records of an independent body like OATH. Intervenor knows of no case in New York that has ever adopted Petitioner's strained reading of Section 50-a as applying to OATH proceedings.[4]

Nor was Section 50-a ever intended to reach the type of records at issue in this case. Courts have long recognized that Section 50-a specifically seeks to keep confidential those records for which there is "a substantial and realistic potential" for "the abusive use against the officers" of the information they contain. *Daily Gazette Co. v. City of Schenectady*, 93 N.Y.2d 145, 151 (1999). As enacted in 1976 and amended in 1981, Section 50-a sought to exclude from disclosure under the Freedom of Information Law the types of unsubstantiated allegations against law enforcement personnel that could be used to embarrass them on the witness stand in criminal cases. Public Officers Law § 6. Senator Marino's memorandum sponsoring the 1981 amendment makes clear the legislature's concern with the "unrestricted examinations" of correctional officers' personnel records in open court and the resulting increase in their "vulnerability to harassment or reprisals." *See Capital Newspapers Div. of Hearst Corp. v.*

[4] Petitioner cites *Sharrow v. State*, 216 A.D.2d 844 (3d Dep't 1995), but that case dealt with an arbitration determination in furtherance of an Attorney General's investigation. As ALJ Lewis correctly stated, *Sharrow* does not apply to OATH proceedings "considering OATH's independent stature under the City Charter and its judicial nature." *See* Victor Pet., Ex. B, at 4.

Burns, 67 N.Y.2d 562, 568–69 (1986). As the Court of Appeals underscored in *Prisoners' Legal Services*:

> [T]he legislative purpose underlying section 50-a when originally enacted to apply to police officers and later amended to cover correction officers was the same: 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. 73 N.Y.2d at 31–32.[5]

Consistent with this legislative intent, it is well-settled that not every record that could be relevant to the evaluation of an employee's performance is a "personnel record" within the meaning of Section 50-a, even when the record is "under the control of" the agency. *See, e.g.*, *Burns*, 67 N.Y.2d at 569 (police officer's sick pay record not a "personnel record" under Section 50-a because disclosure does not create potential for "vexatious investigation into irrelevant collateral matters"); *Daily Gazette*, 93 N.Y. 2d at 157–58 (Section 50-a applies only to records that could be used "to degrade, embarrass, harass or impeach the integrity of the officer"); *Matter of Newsday, LLC v. Nassau Cnty. Police Dep't*, 24 N.Y.S.3d 413 (2d Dep't 2016) (same); *Matter of Cook v. Nassau Cnty. Police Dep't.*, 110 A.D.3d 718, 720 (2d Dep't 2013) (same). The records of OATH proceedings do not pose such risks.

OATH proceedings do not involve unsubstantiated allegations or rumors, but litigate the merits of charges that DOC believes to be well grounded. DOC charges are referred to OATH only after the Commissioner of Correction has approved the memorandum of complaint, the Inspector General has reviewed the memorandum of complaint for legal sufficiency and prepared formal charges and specifications, and the Commanding Officer has reviewed the Inspector

[5] While *Prisoners' Legal Servs.* holds that Section 50-a is not limited to records specifically requested for use in litigation, it makes clear that the legislature did not broadly intend it to be a "blanket exemption" for all records that are relevant to employment.

General's formal charges and specifications. *See* Victor Pet., Ex. A, at 2–4. Even then the charges do not go to OATH for adjudication until DOC and its employee have had an informal conference and an opportunity to negotiate a settlement. *See id.* Once at OATH, the charges are subject to evidentiary challenge, the record created reflects the facts developed through an adversarial process, and the DOC employee is afforded a full and fair opportunity to explain. *See id.* The potential for the "abusive use" of personnel files that motivated the legislature simply does not exist for the records of OATH proceedings.

Moreover, as *Daily Gazette* instructs, a court inquiring into the potential for "abusive use" should strike a balance between the legislative values driving Section 50-a and the "competing, equally strong legislative policy of open government through broad public access to governmental agency records." *Id.* at 157. The court in *Matter of Luongo v. Records Access Officer*, 49 Misc. 3d 708, 718 (Sup. Ct. N.Y. Cnty. 2015), similarly found that a summary of police department records contained in a Civilian Complaint Review Board investigation were not subject to confidentiality under Section 50-a because they were limited in scope and did "not give rise to the risks contemplated by the Legislature . . . ." So also here, the independent records of OATH proceedings are not properly subjected to the confidentiality provisions of Section 50-a, even if they could somehow be considered to be under the control of DOC.

If Petitioner's novel theory about the expansive scope of Section 50-a were correct, the statute would require confidentiality for literally *every* record that exists about anything a corrections officer did on the job since anything done while on duty could conceivably be used to make decisions about continued employment or advancement. Even records on off-duty conduct would have to be made confidential, since, again, any record could conceivably be used to make employment-related decisions. Section 50-a never intended to create such secrecy and courts

have never accepted such a broad reading of the statute. Section 50-a narrowly imposes confidentiality on "personnel records" that are "under the control" of DOC. It does not apply to OATH proceedings or records.

II.

THE REQUESTED RELIEF WOULD VIOLATE THE PUBLIC'S CONSTITUTIONAL RIGHT OF ACCESS TO OATH PROCEEDINGS

A. The Public's First Amendment Right of Access Extends to OATH Proceedings

More than 30 years ago, the Supreme Court recognized an affirmative, enforceable First Amendment right of public access to certain government proceedings and their records. This constitutional right is grounded in the notion that "an arbitrary interference with access to important information is an abridgment of the freedoms of speech and of the press protected by the First Amendment," *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 583 (1980) (Stevens, J., concurring), and that this access is "necessary to the enjoyment of other First Amendment rights." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982).

While this right of access was first recognized as a right of the public to attend criminal trials, it applies more broadly: "[T]here is no principle that limits the First Amendment right of access to any one particular type of government process." *New York Civil Liberties Union v. N.Y.C. Transit Auth.*, 684 F.3d 286, 298 (2d Cir. 2012) (internal quotation marks omitted). Courts have expressly held that the right of access applies "to quasi-judicial administrative proceedings," similar to the proceedings conducted by OATH. *Id.* at 299–300 (internal quotation marks omitted) (applying access right to administrative proceedings conducted by a transit authority); *see also, e.g.*, *Herald Co., Inc. v. Bd. of Parole*, 131 Misc. 2d 36 (Sup. Ct. Onondaga Cnty. 1985) (granting a right of access to New York state parole hearings); *In re Astri Inv.*

Mgm't & Sec. Co., 88 B.R. 730 (D. Md. 1988) (granting a right of access to bankruptcy proceedings).

In order to establish whether a right of access applies, courts use a two-part test that considers the *history* of open access to the type of proceeding at issue and the *logic* of granting access to that proceeding. *See, e.g., Richmond Newspapers*, 448 U.S. at 573. OATH proceedings clearly satisfy both prongs of this inquiry. OATH proceedings have traditionally been public, especially proceeding involving DOC officers. Logic also dictates a public right of access to OATH proceedings, as they are both trial-like and closely aligned to the purposes of the First Amendment.

1. OATH Proceedings Have Historically Been Open

Under the first prong of the analysis, courts consider the "[t]radition of accessibility to [proceedings] of the type conducted." *Press-Enterprise Co. v. Sup. Ct. of Calif. for the Cnty. of Riverside* ("*Press-Enterprise II*"), 478 U.S. 1, 10 (1986). Establishing a history or tradition of access "does not involve asking whether the proceedings in question have a history of openness dating back to the Founding." *New York Civil Liberties Union*, 684 F.3d at 299. Instead, when dealing with more recent administrative developments, courts look to the history *of that proceeding* and whether it was traditionally open to the public. *See generally id.* at 286. OATH's consistent practice of public access dates to its very inception.

Public access has been both OATH's stated policy and actual practice. First, OATH's Rules of Practice codify the right of public access. Section 1-49 of the OATH rules states that "all proceedings shall be open to the public" with cabined exceptions; the default practice was and is to grant public access. 48 RCNY § 1-49(a); *see also* Victor Pet., Ex. B, at 4.

Second, OATH makes its Reports available to the public through a variety of methods:

> OATH makes its decisions and reports and recommendations publically available by posting them on its website. OATH also distributes its decisions to the Center for New York City Law at New York Law School, which publishes them at http://www.nyls.edu/cityadmin, and to LEXIS/NEXIS, which publishes OATH decisions, including those involving correction officers, going back to 1992.

See Victor Pet., Ex. B, at 4. As a result of this tradition of access, *The New York Times* and other members of the press have consistently been able to access OATH proceedings involving DOC officers, as evidenced through a series of reporting on OATH disciplinary proceedings. *See* McCraw Aff. ¶¶ 4–6. Given the long-standing openness of the proceedings in question, history recommends establishing a right of access in this case.

2. Public Access Promotes the Functioning of OATH Proceedings

The logic prong of the constitutional analysis is also satisfied here, since public access promotes the proper functioning of OATH's trial-like proceedings.[6] When a proceeding is "sufficiently like a trial" to recommend granting access and "public access to [the proceedings] as they are conducted . . . plays a particularly significant positive role in the actual functioning of the process," the logic test is met. *Press-Enterprise II*, 478 U.S. at 11. OATH proceedings fulfill both criteria.

[6] The logic prong alone can suffice to establish the existence of the constitutional access right in the absence of a clear tradition of access. In *Press-Enterprise II*, the Court noted that "some pretrial proceedings have no historical counterpart, but, given the importance of the pretrial proceeding to the criminal trial, the traditional right of access should still apply." 478 U.S. at 10 n.3; s*ee also United States v. Suarez*, 880 F.2d 626, 631 (2d Cir. 1989) (access right applies to court forms approving payment for court-appointed counsel and other services) despite the absence of any "long tradition of accessibility"); *United States v. Simone*, 14 F.3d 833, 840 (3d Cir. 1994) ("Though experience provides little guidance, logic counsels that access to these proceedings will in general have a positive effect."). This is especially true when there was no specific historical counterpart to the proceeding in question. *See United States v. Criden*, 675 F.2d 550, 555 (3d Cir. 1982) ("[A]t common law, the public apparently had no right to attend pretrial proceedings," but "[o]n the other hand, there was no counterpart at common law to the modern suppression hearing.").

First, OATH proceedings are similar to trials. An OATH hearing is conducted in front of an independent arbiter who attempts to make findings of fact based on a record compiled through an adversarial process. N.Y. City Charter § 1049(3). This adversarial process in many ways mimics the procedural requirements and safeguards in a criminal or civil trial. Among other features, a petitioner must comply with commonly established notice principles for trial proceedings, including "a short and plain statement of the matters to be adjudicated . . . [and] the law, rule, regulation, contract provision, or policy that was allegedly violated." 48 RCNY § 1-22. OATH rules also provide for discovery, including for depositions and "demand for identification of witnesses, for production of documents, or for inspection of real evidence to be introduced at trial." 48 RCNY § 1-33. The rules allow for pre-trial motions and procedures for subpoenaing witnesses. 48 RCNY §§ 34, 43.

Indeed, OATH rules borrow from the legal system directly: Section 1-46 states that "principles of civil practice and rules of evidence may be applied to ensure an orderly proceeding and a clear record, and to assist the administrative law judge in the role as trier of fact." Section 1-46. Taken together, these provisions clearly demonstrate a trial-like proceeding that is subject to many of the same challenges—and deserving of the same scrutiny—as an actual trial. This is sufficient to meet the logic prong of the test for a right to access these OATH proceedings.

Second, public access to OATH proceedings also achieves many of the goals that have been recognized as central to the First Amendment right of access. As the Supreme Court noted when preserving the right of access to criminal trials, "[t]he value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed." *Press-Enterprise Co. v. Sup. Ct. of Calif., Riverside Cnty.* ("*Press-Enterprise I*"), 464 U.S. 501, 508 (1984). Given OATH's role in establishing a systematic hearing process for city

officials, it is crucial that the public be allowed to check the fairness of these processes, both for the sake of the officials whose conduct is in question and for the OATH officials who run the proceedings.

Furthermore, courts have noted the "significant community therapeutic value" that resulted from "public acceptance of both the process and its results." *Id.* at 570. OATH proceedings are used to hold public officers accountable for a variety of offenses that society finds deeply serious. Allowing for transparency in these processes helps promote public confidence in government institutions and the fact that government officials are being held responsible for their actions.

These interests extend beyond the interests of the individual Petitioner to those of the public at large. *See First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978) ("The Constitution often protects interests broader than those of the party seeking their vindication. The First Amendment, in particular, serves significant societal interests."). A public right of access to OATH proceedings therefore complies with a logical interpretation of the role of the First Amendment and the rights of access it mandates.

In sum, OATH proceedings fully satisfy both the history and logic prong of the *Richmond Newspapers* test and a First Amendment right of access plainly applies to its proceedings and records. As the supreme law of the land, this constitutional right of access necessarily supersedes any statutory right to secrecy that Petitioner might otherwise claim under Section 50-a. *See, e.g.*, *New York Times Co. v. Biaggi*, 828 F.2d 110, 115–16 (2d Cir. 1987) (statutory confidentiality provisions in Wiretap Act "cannot override" constitutional access right). To obtain the confidentiality he seeks, Petitioner must instead satisfy the strict standards that govern the First Amendment right of access.

B. Petitioner Fails to Present any Compelling Interest That Could Justify Denying Public Access

The constitutional access right is a qualified, not an absolute right. But to justify an abridgment of that right, Petitioner must demonstrate that sealing is essential to protect some transcendent value. *Press-Enterprise I*, 464 U.S. at 510; *Globe Newspaper Co.*, 457 U.S. at 606-07. More specifically, as the party seeking to deny access Petitioner must [i] "advance an overriding interest that is likely to be prejudiced, [ii] the closure must be no broader than necessary to protect that interest, [iii] the trial court must consider reasonable alternatives to closing the proceeding, and [iv] it must make findings adequate to support the closure." *Waller v. Georgia*, 467 U.S. 39, 48 (1984); *New York Civil Liberties Union*, 684 F.3d at 304. Petitioner fails to make these showings.

Petitioner's stated desire to keep secret the facts surrounding correction officers' abuse of their authority is not a compelling interest. Public employees generally have a diminished expectation of privacy in the performance of their public duties. *See Mulgrew v. Bd. of Educ. of City Sch. Dist. of New York*, 31 Misc. 3d 296, 301–02 (Sup. Ct. N.Y. Cnty.) (collecting cases), *aff'd*, 87 A.D.3d 506 (1st Dep't 2011). "Courts have repeatedly held that release of job-performance related information, even negative information such as that involving misconduct, does not constitute an unwarranted invasion of privacy." *Id.* Correction officers in particular "are traditionally among the most heavily regulated groups of governmental employees and also among those who accept the greatest intrusions upon their privacy." *Id.* at 62; *see also Seelig v. Koehler*, 76 N.Y.2d 87, 93 (1990) (listing limitations on corrections officers' privacy). In many situations, diminished privacy does not constitute a *compelling* interest for the purposes of the First Amendment access right, especially when balanced against "historic values . . . and the

need for openness." *Press-Enterprise I*, 464 U.S. at 512. Petitioner's minimal privacy expectation is clearly not sufficient to overcome the public right of access.[7]

Of course, even if the court were to conclude that Petitioner had some privacy expectation that warranted protection, it would still be obligated to "minimize the risk of unnecessary closure" by sealing or redacting no more than essential, and making written findings to explain the basis for the redactions. *Press-Enterprise I*, 464 U.S. at 512–13.

III.

PETITIONER MAY NOT PURSUE CLASS ACTION CLAIMS IN AN ARTICLE 78 PROCEEDING

Under CPLR Section 901, a class action is only appropriate if it "is superior to other available methods for the fair and efficient adjudication of the controversy." N.Y. C.P.L.R. § 901(a)(5). In New York, however, "'[i]t is well settled that a class action is not considered the superior method for the fair and efficient adjudication of a controversy against a governmental body.'" *Matter of Jones v. Bd. of Educ. of Watertown City Sch. Dist*., 30 A.D.3d 967, 970 (4th Dep't 2006) (quoting *Bd. of Educ. of City Sch. Dist. of New Rochelle v. Cnty. of Westchester*, 724 N.Y.S.2d 422 (2d Dep't 2001)).

[7] Petitioner suggests that New York City Charter § 1048(2) preserves his privacy under Section 50-a in OATH proceedings and requires a different result. Petitioner's Memorandum of Law in Support of the Verified Petition, at 12. This claim is baseless. Section 1048 was adopted in 2010 to protect *pre-existing* privacy rights, so as not to alter or impair rights that agency employees had enjoyed before referrals to OATH became mandatory in 2010. *See* NY City Charter § 1048(2) ("No *existing* right or remedy of any character shall be lost, impaired or affected by reason of a transfer of a tribunal or part thereof or category of adjudications pursuant to this subdivision except as may be necessary to implement such transfer.") (emphasis added). DOC began *voluntarily* referring charges to OATH in 1992, however, meaning the amendment therefore had no effect on privacy protections for DOC employees. *See* Victor Am. Pet. ¶14. OATH Report and Recommendations concerning corrections officers were public both before and after the amendment.

Accordingly, "[c]lass action certification is inappropriate in Article 78 proceedings." *Conrad v. Regan*, 155 A.D.2d 931, 958 (4th Dep't 1989);[8] *see also Daniel v. N.Y. State Div. of Hous. & Cmty. Renewal*, 179 Misc. 2d 452, 459–60 (Sup. Ct. N.Y. Cnty. 1998). Rather, potential class members are "adequately protected by principles of *stare decisis*." *Daniel*, 683 N.Y.S.2d at 460; *see also Ferguson v. Barrios-Paoli*, 279 A.D.2d 396, 398 (1st Dep't 2001) ("[T]his is a proceeding involving a challenge to administrative action, in which context class action status is deemed unnecessary—whether relief is sought by way of CPLR article 78 or a plenary action—on the reasoning that *stare decisis* operates to the benefit of any person or entity similarly situated.") (internal citations omitted).

One court has found that a few limited exceptions exist. "For instance, class certification is warranted in situations where the government entity has 'revealed a demonstrated reluctance to extend mandated relief to parties other than the individual plaintiffs before the court.'" *DeBlasio v. City of New York*, 24 Misc. 3d 789, 799 (Sup. Ct. N.Y. Cnty. 2009). Where, "however, petitioners have not demonstrated that respondents have been, or will be, unwilling or reluctant to extend relief to any subsequent petitioners who are affected by the . . . decision or who will be affected by a decision in the instant proceeding," Article 78 class actions remain inappropriate. *Id.*

In that same case, the court found that a case involving a "well-defined and limited group of plaintiffs," minimal administrative burden, or a "prohibitive" or undue burden on individuals seeking relief outside of the class action may be exempt from the general prohibition against

[8] The *Conrad* court goes on to say that, "where, as here, plaintiffs have sued on behalf of a class of persons and challenge an administrative determination impacting upon the entire class, a declaratory judgment action is a proper procedural device." *Conrad*, 548 N.Y.S.2d at 958. Therefore, seeking a declaratory judgment in an Article 78 proceeding is similarly improper insofar as Petitioner seeks relief for a class of persons.

class action Article 78 proceedings. *Id.* at 852–53. When Petitioner's calculation of potential class members or administrative burden is "speculative," however, no exception applies.

Petitioner's request that Section 50-a apply to all "similarly situated" individuals is thus inappropriate in the context of an Article 78 proceeding. First, Petitioner has not demonstrated that OATH would refuse to mandate relief to other parties if so ordered by this Court. As it stands, there is no reason to believe that OATH would not extend relief to subsequent petitioners.

Second, as Respondent points out in its opposition, the putative class is ill-defined and unlikely to be adequately represented by Petitioner. *See* Memorandum of Law in Support of Respondents' Cross-Motion to Dismiss the Verified Petition ("Resp'ts' Mem."), at 8–10. Unlike Petitioner, for example, other corrections officers may want to have OATH Report and Recommendations made available to the public as a means of exoneration. *Id.* Other officers who do not want OATH Report and Recommendations public might also not be in the position of making those reports public themselves, as Petitioner did, making them unlikely to be class members. *Id.* As such, Petitioner's attempt to seek relief for a nebulous "class" of corrections officers is, at best, based on speculation.

Finally, potential class members are free to seek relief individually outside of the class action. Again, Petitioner has not offered any evidence to suggest that subsequent petitioners will not be able to have their day in court. Accordingly, Petitioner has not demonstrated that a class action is "superior to other available methods for the fair and efficient adjudication of the controversy." Accordingly, Petitioner's request for declaratory judgment must fail.

CONCLUSION

For each and all the foregoing reasons, The Times respectfully asks this Court to grant The Times's cross-motion to dismiss the Amended Verified Petition in its entirety and with prejudice, and to grant such other and further relief as this Court deems just and proper.

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Respectfully submitted,

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