



MEMORANDUM OF SUPPORT
A.2513 (O'Donnell)/S.3695 (Bailey)
March 25, 2019

Title:

An act to repeal section 50-a of the civil rights law, relating to personnel records of police officers, firefighters and correction officers

Summary:

A.2513 (O'Donnell)/S.3695 (Bailey) would repeal Section 50-a of the Civil Rights Law.

Statement of Support:

The effect of Section 50-a is to significantly deprive the public of information necessary to ensure the accountability of police officers for misconduct and of the Police Department for ensuring such accountability through its systems of civilian complaints and disciplinary proceedings. Without information as to the outcome of such proceedings in substantiated cases, it is impossible to know if those systems are functioning properly.¹ We, at Citizens Union, have firsthand experience of the problem. At our urging, the Police Department and the Civilian Complaint Review Board entered into a Memorandum of Understanding in 2012 in which the Police Department authorized the CCRB to undertake all administrative prosecutions of civilian complaints against police officers which have been substantiated by the CCRB and in which the CCRB has recommended that charges and specifications be preferred. The MOU further provides that in any case substantiated by the CCRB in which the Police Commissioner intends to impose discipline that is of a lower level than that recommended by the CCRB or by an NYPD Trial Commissioner, the Police Commissioner shall send the CCRB a detailed, written explanation of the reasons for deviating from that recommendation including each factor the Police Commissioner considered in making his decision. In light of the position of the Police Department that all disciplinary records are confidential under Section 50-a, Citizens Union is unable to monitor compliance with this provision.

One potential argument against repeal (as opposed to modification) of Section 50-a is that police officers should be protected against the disclosure of records pertaining to *unsubstantiated* complaints or charges against them. We are sympathetic to that concern but believe that police officers, like other public officials and employees, already enjoy significant (if not absolute) protection against such disclosure. FOIL exempts from its requirements records the disclosure of which would constitute an unwarranted invasion of personal privacy [Public Officers Law §§ 87(2)(b) and 89(2)(b)]. The Committee on Open Government has issued two advisory opinions stating that the personal privacy exemption is applicable when allegations or charges of misconduct have not yet been determined or did not result in disciplinary action [FOIL AO-10399 (Oct. 31, 1997) (police officers)], or when allegations of misconduct were not substantiated [FOIL AO-12005 (Mar. 21, 2000) (prison inmates)]. Although the Advisory Opinions of the Committee on Open Government “are not binding authority, they may be considered on the strength of their reasoning and analysis” [*Matter of TJS of N.Y., Inc. v. New York State Dep't of Taxation & Fin.*,

¹ The extent to which the confidentiality of police disciplinary records may have kept the public in the dark about significant wrongdoing and the absence of an adequate response is presented in the recent article “Secret NYPD Files: Officers Can Lie And Brutally Beat People – And Still Keep Their Jobs”, https://www.buzzfeed.com/kendalltaggart/secret-nypd-files-hundreds-of-officers-committed-serious?utm_term=.qjdpGnPE#.upjABvEBEO.

89 A.D.3d 239, 242 n.1 (3d Dep't 2011)]. The reasoning here appears correct at least with respect to documents that reveal the identity of the individuals against whom the unsubstantiated complaints were made.

That is not to say that FOIL would *never* require disclosure of documents relating to unsubstantiated reports of misconduct or that such disclosure would *always* be inappropriate. For example, in a high-profile case in which the nature of the complaint and the name of the police officer were already a matter of public knowledge, and where there was controversy surrounding the adequacy of the investigation, the appropriate balance between the public interest in the matter and the privacy interest of the police officer might tip in favor of disclosure. It is precisely that kind of careful weighing of factors that FOIL mandates, and Section 50-a precludes.

For the foregoing reasons, we urge the New York State Legislature to pass A.2513 (O'Donnell)/S.3695 (Bailey) and repeal CRL Sec. 50-a this session.

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