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**REPORT ON LEGISLATION BY THE
CIVIL RIGHTS COMMITTEE; CRIMINAL COURTS COMMITTEE;
COMMUNICATIONS & MEDIA LAW COMMITTEE; CORRECTIONS &
COMMUNITY REENTRY COMMITTEE; CRIMINAL JUSTICE OPERATIONS
COMMITTEE; DIVERSITY, EQUITY & INCLUSION COMMITTEE;
DRUGS & THE LAW COMMITTEE; GOVERNMENT ETHICS & STATE AFFAIRS
COMMITTEE; IMMIGRATION & NATIONALITY LAW COMMITTEE; JUVENILE
JUSTICE COMMITTEE; LESBIAN, GAY, BISEXUAL, TRANSGENDER & QUEER
RIGHTS COMMITTEE; MASS INCARCERATION TASK FORCE; NEW YORK CITY
AFFAIRS COMMITTEE; PRO BONO & LEGAL SERVICES COMMITTEE;
AND SEX & LAW COMMITTEE**

**A.2513
S.3695**

**M. of A. O'Donnell
Sen. Bailey**

AN ACT to repeal Civil Rights Law 50-a to allow for the public disclosure of police records relating to police misconduct.

THIS BILL IS APPROVED*

OVERVIEW

Transparency is vital to regulating police powers in a democracy. According to the U.S. Supreme Court, when police departments are “under the eyes of an alert public opinion,” they will deter police misconduct with effective internal policies and discipline.¹ In New York State, however, no matter how “alert” the public is, Civil Rights Law 50-a (CRL 50-a) shrouds certain types of evidence from the public—i.e., “personnel records,” even if such records reflect police misconduct. Indeed, a New York State appellate court recently held that CRL 50-a prevents the disclosure of Civilian Complaint Review Board (CCRB) records regarding whether police officers have been accused of misconduct, whether those accusations have been substantiated, and even whether officers have been penalized for substantiated misconduct.²

Because of overbroad interpretations of CRL 50-a, public awareness of police misconduct is stymied. And without transparency, officers may be less accountable to the communities they serve. The Civil Rights Committee and Criminal Courts Committee of the New York City Bar Association issue this report in support of pending legislation to repeal CRL 50-a.

* The City Bar also supports **A.10611/S.8496** which repeals CRL 50-a and amends the public officers law, in relation to the disclosure of law enforcement disciplinary records. This bill was introduced in both houses of the Legislature on June 6, 2020 as part of a police reform package.

THE HISTORY OF CRL 50-A

In the 1970s, a national movement for open government gained momentum.³ New York's first Freedom of Information Law (FOIL) was passed in 1974, and in 1977 it was expanded to include access to all public records. The 1977 FOIL expansion sought to "achieve the greatest magnitude of openness in government without sacrificing personal and privileged information" to "help instill in the citizens of the state greater trust and confidence in the governmental institutions which are playing an increasingly important role in our daily lives."⁴

Despite this movement for open government, the New York legislature in 1976 passed CRL 50-a to, among other things, prevent "harassment" by criminal defense attorneys who sought to impeach officers with unsubstantiated prior bad acts.⁵ CRL 50-a provides that "all personnel records used to evaluate continued employment or promotion, under the control of any police agency . . . shall be considered confidential and not subject to inspection or review without the express written consent of such police officer . . . except as may be mandated by lawful court order."⁶ By providing blanket protection of police officers from impeachment on cross examination, however, CRL 50-a undermines what New York's Court of Appeals recently called the "unremarkable proposition that law enforcement witnesses should be treated in the same manner as any other prosecution witness for purposes of cross-examination."⁷

Delaware is the only other state in the country that also has a law comparable to CRL 50-a that restricts the scope of law enforcement information available to the public.⁸ According to former Senator Frank Padavan, the chief sponsor of the law, CRL 50-a was never intended to block disclosure of police misconduct from the public.⁹ Its original purpose was to prevent disclosure of "unverified and unsubstantiated" civilian complaints—not to prevent disclosure of *substantiated* civilian complaints.¹⁰ Indeed, CRL 50-a was, until 2014, not widely known. It was not even a part of the public's broader police reform agenda. Instead, CRL 50-a mainly preoccupied lawyers who had to meet its high standard to obtain a subpoena for an officer's "personnel records" for litigation.¹¹

In 2014, however, the death of Eric Garner led to renewed focus on CRL 50-a and how its broadened interpretation shields police officers from public accountability and impedes racial justice. Mr. Garner, an African American man who was allegedly selling loose cigarettes outside of a convenience store in Staten Island, was placed in a chokehold by former Officer Daniel Pantaleo—a maneuver banned by the NYPD.¹² Mr. Garner died after repeatedly shouting "I can't breathe."¹³ Efforts by Mr. Garner's family to obtain Officer Pantaleo's disciplinary records through FOIL requests to the NYPD were denied under CRL 50-a. As the Garner case exemplifies, CRL 50-a effectively prioritizes protecting officer misdeeds over transparency and further divides communities of color from the police departments that are meant to protect them. According to an analysis by the Washington Post, since July 2015, the rate at which Black Americans are killed by police is more than twice as high as the rate for white Americans, despite accounting for 13% of the population.¹⁴ Since Mr. Garner's death, several legal organizations, including the New York Civil Liberties Union and The Legal Aid Society, have been fighting to remove the 50-a cloak on police misconduct. It also bears mentioning that until 2016, journalists had access to information

about administrative cases related to law enforcement disciplinary issues, but the NYPD later changed its practices, citing CRL 50-a.¹⁵

The recent death in 2020 of George Floyd, an African American man killed by a Minneapolis police officer, has sparked massive protests in cities across the United States and abroad calling for an end to police brutality and demanding increased transparency and accountability for law enforcement.¹⁶ In circumstances that echoed Eric Garner’s death, Mr. Floyd died of asphyxiation after a police officer refused to remove his knee from Mr. Floyd’s neck as he lay face down in handcuffs repeatedly pleading “I can’t breathe.”¹⁷ In Minnesota, police disciplinary records are accessible to the public, and reports that the officer responsible for Mr. Floyd’s death was the subject of at least a dozen police conduct complaints fueled calls for police reform.¹⁸ In New York, the event has triggered renewed calls from protesters to repeal CRL 50-a.

JUDICIAL INTERPRETATION OF CRL 50-A

In 1999, the Court of Appeals decided *In re Daily Gazette Co. v. City of Schenectady*,¹⁹ a case in which the local daily paper in Schenectady, New York, sought the identities of eighteen officers involved in off-duty misconduct and the full files pertaining to their discipline following a drunken off-duty brawl during a bachelor party.²⁰ The court in *Daily Gazette* held that records pertaining to police officer off-duty misconduct were exempt from disclosure under FOIL. Notably, it expressly left room for the discovery of on-duty misconduct.²¹

But in a 2018 decision, in *Matter of New York Civil Liberties Union v. New York City Police Department*, the Court of Appeals affirmed the holding of the First Department that CRL 50-a prevented disclosure of decisions made by the NYPD commissioner in cases of police misconduct initiated by the Civil Complaint Review Board.²²

In addition to public disclosure being stymied by the courts, litigants have struggled to discover police misconduct even with a judicial subpoena. CRL 50-a puts the burden on lawyers to demonstrate how material they cannot access is relevant to their case. Furthermore, police disciplinary records fall into a “doctrinal crack” insofar as such records may not be related to any specific case and, therefore, may elude discovery by the defense, even though such information should, under *Brady v. Maryland*, be subject to disclosure by prosecutors.²³ Given the inherent conflict of interest in prosecutors investigating the misconduct of the officers they rely on, along with a growing body of jurisprudence that casts an increasingly wide net over the types of records that are exempt from disclosure, substantiated evidence of misconduct by police officers must be available to defense attorneys and the public by means other than relying solely on private investigation and disclosure by prosecutor’s offices.²⁴

HOW CRL 50-A PREVENTS ACCOUNTABILITY FOR POLICE MISCONDUCT

More than any other government official, police officers interact with the public every day in life-changing ways. They patrol the streets, initiate contact with members of the public, and conduct frisks, searches, and arrests. As the New York State Committee on Open Government explained, “[t]he Freedom of Information Law (FOIL) today affords the public far less access to information about the activities of police departments than virtually any other public agency—even though police interact with the public on a day-to-day basis in a more visceral and tangible

way than any other public employees.”²⁵ In twelve states, the public has the right to fully access officers’ on-duty misconduct records.²⁶ There is no evidence that officers in those states are any less safe or any less capable of testifying in court to defend their conduct than officers in New York.

Robert Lewis, a reporter with WNYC, described CRL 50-a as “a huge obstacle” when journalists attempt to report stories about police misconduct.²⁷ Lewis explained,

After the death of Eric Garner a lot of people, including me, wanted to know about the officer involved in the incident[, Daniel Pantaleo]. Did he have a history of using excessive force? Had he been disciplined before? Should he have been on the street? But those questions were virtually impossible to answer in large part because of that law...Aggregate data is helpful. But a deeper analysis and examination of a system is often only possible if the public can examine the disciplinary history of specific officers.²⁸

In 2017, a CCRB²⁹ staff member leaked Officer Pantaleo’s complaint history to the press. It showed that Pantaleo had four prior substantiated complaints for abusive stops and searches. The leak further showed that “the CCRB pushed for the harshest penalties it has the authority to recommend for all four substantiated allegations” but that “the NYPD, which is not required to heed the CCRB’s recommendations, imposed the weakest disciplinary action” for two violations, and modified penalties for the other two violations.³⁰ This was not an anomaly: according to a 2015 analysis by the Office of the Inspector General for the NYPD, of 104 excessive force complaints substantiated by the CCRB, the NYPD imposed no discipline in 36% of those cases.³¹ The same report also criticized the use-of-force statistics published by the NYPD each year, which rely on self-reporting by individual officers to indicate if force was used in incident reports. Three years later, the Office of the Inspector General issued an updated report, finding that officers were still routinely under-reporting their use of force.³² The public cannot rely on self-reporting by individual officers to understand the scope of police misconduct and to hold officers accountable.

Interpretations of CRL 50-a have become increasingly broad and go far beyond the statute’s initial purpose of protecting police officers from harassment and undue invasions of their privacy; this, in turn, fuels the mistrust between communities and the NYPD officers pledged to protect them. Transparency is necessary to ensure the NYPD is held publicly accountable for whether and to what extent it disciplines officers found to have committed serious misconduct, and to prevent officers like Daniel Pantaleo from repeatedly engaging in serious misconduct. Federal authorities have recognized the importance of transparency as a pillar of the criminal justice system: President Obama’s Task Force on 21st Century Policing encouraged police departments to “embrace a culture of transparency” and to “regularly post on the department’s website information about stops, summonses, arrests, reported crime, and other law enforcement data aggregated by demographics.”³³ CRL 50-a, as interpreted by New York’s courts, is contrary to all of these efforts.

In addition, CRL 50-a jeopardizes recent police reform measures, like body cameras, aimed at ensuring public accountability for the on-duty conduct of police officers. In its 2016 Annual Report, the New York State Committee on Open Government warned that “under current

application of §50-a, many law enforcement agencies would surely contend that a recording can, in the words of §50-a, be ‘used to evaluate performance toward continued employment or promotion’ and, therefore, is exempt from disclosure. If the video can only be seen by the internal affairs unit within a police department, and there is no public disclosure, a primary purpose of the body camera would be defeated. The trust in law enforcement officers would be diminished and mistrust would grow.”³⁴

That warning proved prophetic as law enforcement agencies have repeatedly invoked CRL 50-a as a basis for blocking disclosure of body camera footage.³⁵ In 2017, for example, an inmate at Green Haven Correctional Facility sought a video recording of an altercation with a corrections officer. The state Department of Corrections and Community Supervision denied his request on grounds that the video was a document “used to evaluate the performance of an officer.”³⁶ Similarly, the Patrolmen’s Benevolent Association of New York has argued that body camera footage amounts to a “personnel record” barred from disclosure under CRL 50-a, because the body camera program was partially designed for performance evaluation purposes.³⁷ While the First Department has declined to extend 50-a protections to body camera footage, holding that “the footage being released here is not primarily generated for, nor used in connection with, any pending disciplinary charges or promotional purposes,”³⁸ the issue has not yet been decided by the Court of Appeals.

THE CITY BAR URGES REPEAL OF CRL 50-A

CRL 50-a has been interpreted so broadly that police misconduct in New York State is more secretive than any other state in the nation.³⁹ “The people,” wrote one editorial board, “have a right to know when officers are accused of transgressions, and what investigations find . . . A law that keeps such information from the public is a travesty, and must be changed.”⁴⁰ The City Bar agrees, and we urge the Legislature to repeal CRL 50-a for the following reasons.

First, New York is one of only two states in the nation that gives specific statutory protection to officers’ records.⁴¹ Among these two states, New York’s CRL 50-a has the highest standard of scrutiny. By repealing CRL 50-a, New York would join Maine, Washington, Minnesota, Wisconsin, Ohio, Alabama, Georgia, Connecticut, Utah, Arizona, Florida, and California in promoting transparency of police disciplinary systems. We note that since this Report was first issued in May 2018 and the City Bar joined the call of many organizations across the state of New York to repeal CRL 50-a, the state of California passed their Right To Know Act, which gives the public the right to access three categories of records related to investigation and discipline of police officers (records related to any incident where a law enforcement officer fired a gun at a person or used force that resulted in serious injury or death; records related to incidents where the agency found that an officer committed sexual assault against a member of the public; records related to incidents where the agency found that an officer engaged in dishonesty in the investigation, reporting, or prosecution of crime or police misconduct).⁴² There is no evidence that transparency endangers officers in those states or inhibits the administration of justice.

Second, CRL 50-a should be repealed because the concerns of the law’s original sponsors over the privacy of police officers are adequately addressed by way of other FOIL exceptions.⁴³ For example, New York’s Public Officers Law already prevents records from being disclosed when they would constitute an unwarranted invasion of personal privacy, are compiled for law

enforcement purposes or endanger the life or safety of any person, in addition to other circumstances. Public Officers Law § 87(2)(b), (e), (f).⁴⁴

Third, judges are already charged with restraining lawyers from asking irrelevant, immaterial and abusive cross examination questions. The Court of Appeals recently laid out a clear framework for attorneys to follow when cross-examining officers about prior misconduct.⁴⁵ The first step is demonstrating a “good faith basis” for the questions. Attorneys may not rely in good faith on allegations that have been disproven. Attorneys must then demonstrate that the specific allegation is relevant to the witness’s credibility. Even then, the Court ruled that judges still have discretion in most cases to determine whether the inquiry will “confuse or mislead the jury”.⁴⁶

Fourth, CRL 50-a should be repealed because simply revising its language will not address concerns that police departments will continue to seek, and courts will grant, a broad interpretation of what types of records qualify as “personnel records” that can be protected from disclosure.⁴⁷ Merely tweaking the definition of “personnel records,” as one previous bill proposed,⁴⁸ would not prevent widespread categorizing of information as “personnel” files. Members of the public or media may not have the resources to litigate FOIL cases in the courts and challenge these interpretations. CRL 50-a has become a sword wielded by police departments against transparency and accountability, rather than a legitimate shield against abusive litigation tactics, as was originally intended.

Fifth, without the repeal of CRL 50-a, recent police reform efforts, such as police body cameras, could be rendered wholly ineffective.⁴⁹ The New York State Committee on Open Government recently warned that, under a broad interpretation, CRL 50-a may prevent public disclosure of footage from body cameras used to monitor their interactions with the public.⁵⁰ While some courts have thus far rejected police claims that body camera footage is protected by CRL 50-a, the issue remains an open question.

For all of these reasons, the City Bar urges the Legislature to repeal CRL 50-a. As the bill’s sponsors memo states, “the evolution of § 50-a has defeated [FOIL’s] goal of accountability and transparency.”⁵¹ New York should join other states and prioritize public transparency of police misconduct to ensure accountability and racial equity. Repealing CRL 50-a will be one step in the direction toward combating the searing legacy of systemic racism that continues to mar our country and our state.

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¹ *Wolf v. Colorado*, 338 U.S. 25, 31 (1949) (holding that the exclusionary rule did not need to be extended to the states) (overruled by *Mapp v. Ohio*, 367 U.S. 643, 655 (1961)).

² *Luongo v. CCRB Records Officers and Daniel Pantaleo*, 150 A.D.3d 13 (1st Dep’t 2017) (reversing order granting access to Daniel Pantaleo’s substantiated CCRB history).

³ *History of FOIA*, ELECTRONIC FRONTIER FOUND., <https://www.eff.org/issues/transparency/history-of-foia> (all websites last visited June 4, 2020).

⁴ “Letter from Sen. Marino,” Bill Jacket L. 1977, ch. 933.

⁵ Bill Jacket L. 1977, ch. 933 at 6 (“This bill would afford some protection to police officers who must testify in criminal proceedings.”); *id.* at 20 (“It has been brought to my attention that, often simply as a harassment tactic,

defense attorneys in criminal cases have been making an unrealistically high number of requests for personnel files of police officers.”); *id.* at 23 (“The purpose of this bill is to insulate policemen from meaningful cross-examination in cases in which they are witnesses.”); *id.* at 29 (“The purpose of the Act is to restrict a defendant’s ability to subpoena the personnel files of prospective police officer/witnesses.”). Prior bad acts are those that courts have said generally demonstrate “an untruthful bent or significantly reveal[] a willingness or disposition . . . voluntarily to place the advancement of [a witness’s] individual self-interest ahead of principle or of the interests of society.” *People v. Walker*, 633 N.E.2d 472, 461 (N.Y. 1994). *See, e.g.*, Letter from William G. Connelie, NYPD Superintendent, to unknown recipient (June 8, 1976); Letter from Sanford D. Garelik, Chief of NYC Police for the Transit Auth., to Frank Padavan, N.Y. Sen. (Apr. 20, 1976); Letter from John Maye, Chairman of Patrolmen’s Benevolent Ass’n, NYC Transit Auth. Police Dep’t, to Hugh L. Carey, N.Y. Governor (June 18, 1976); Letter from Mario Merola, Dist. Att’y of Bronx Cty., to Judah Gribetz, Counsel to N.Y. Governor (June 7, 1976); Memorandum from Al Sgaglione, President of Police Conference, to unknown recipient (June 14, 1976); Letter from Thomas R. Sullivan, Dist. Att’y of Richmond Cty., to Judah Gribetz, Counsel to N.Y. Governor (June 9, 1976). All sources in this footnote are included in the 1976 N.Y. Governor’s Bill Jacket, available from the Legislative Secretary to the New York Governor’s Counsel.

⁶ N.Y. CIV. RIGHTS LAW § 50-a.

⁷ *People v. Charles Smith*, 27 N.Y.3d 652, 659 (2016).

⁸ *See* Robert Lewis, Noah Veltman & Xander Landen, *Is Police Misconduct a Secret in Your State?*, WNYC (Oct. 15, 2015), <http://www.wnyc.org/story/police-misconduct-records/> (finding that only California, Delaware and New York have laws that specifically make police personnel records “confidential”); *Access to CA Police Records*, Am. Civ. Liberties Union So. Cal., <https://www.aclusocal.org/en/know-your-rights/access-ca-police-records> (In 2018, the California Legislature passed SB1421, The Right To Know Act, which gives the public the right to access records related to any incident where a law enforcement officer fired a gun at a person or used force that resulted in serious injury or death; incidents where the agency found that an officer committed sexual assault against a member of the public; and incidents where the agency found that an officer engaged in dishonesty in the investigation, reporting, or prosecution of crime or police misconduct.) Delaware’s exemption for personnel records is limited to disclosures that would constitute an “invasion of privacy” under state and federal law, which is arguably narrower than New York’s unrestricted “personnel records used to evaluate performance,” yet has followed New York law in requiring a factual predicate that records are relevant prior to judicial inspection. *Snowden v. State*, 672 A.2d 1017, 1024 (Del. 1996) (*quoting People v. Gissendanner*, 399 N.E.2d 924, 928 (N.Y. 1979)).

⁹ Brendan Lyons, *Court rulings shroud records*, TIMES UNION (Dec. 10, 2016), <http://www.timesunion.com/tuplus-local/article/Court-rulings-shroud-records-10788517.php>.

¹⁰ Mem. of Senator Padavan and Assemblyman DeSalvio, Bill Jacket, L. 1977, ch. 413.

¹¹ The New York State Committee on Open Government’s Annual Report did, however, make 50-a its central recommendation in a report published in December 2014. *See* Brendan Lyons, *State committee urges Cuomo, legislators to open police files*, TIMES UNION (Dec. 19, 2014), <http://www.timesunion.com/local/article/Report-says-police-files-should-be-open-to-public-5967527.php>. For a discussion of 50-a statutory language, legislative history and cases interpreting it as an exemption to public disclosure laws, *see* Cynthia Conti-Cook “Defending the Public: Police Accountability in the Courtroom,” *Seton Hall Law Review*: Vol. 46 : Iss. 4 , Article 3, available at <http://scholarship.shu.edu/shlr/vol46/iss4/3/>, pgs 1067-1070 (2016).

¹² *See* Jessica Hopper, John Kapetaneas, Candace Smith, & Anthony Rivas, *Eric Garner’s mother reacts to George Floyd’s death: ‘It is a recurring nightmare.’* ABC NEWS (May 28, 2020), <https://abcnews.go.com/US/eric-garners-mother-reacts-george-floyds-death-recurring/story?id=70914217>.

¹³ *Id.*

¹⁴ *See* Niall McCarthy, *Police shootings: Black Americans disproportionately affected*, FORBES (May 28, 2020), <https://www.forbes.com/sites/niallmccarthy/2020/05/28/police-shootings-black-americans-disproportionately-affected-infographic/#41f466d059f7>.

¹⁵ Rocco Parascandola & Graham Rayman, *EXCLUSIVE: NYPD suddenly stops sharing records on cop discipline in move watchdogs slam as anti-transparency*, N.Y. DAILY NEWS (Aug. 24, 2016), <https://www.nydailynews.com/new-york/exclusive-nypd-stops-releasing-cops-disciplinary-records-article-1.2764145>.

¹⁶ Libor Jany, *Minneapolis police, protesters clash almost 24 hours after George Floyd's death in custody*, STAR TRIBUNE (May 27, 2020), <https://www.startribune.com/minneapolis-police-marchers-clash-over-death-of-george-floyd-in-custody/570763352/>.

¹⁷ See Brian Dakss, *Video shows Minneapolis cop with knee on neck of motionless, moaning man who later died*, CBS NEWS (May 26, 2020), <https://www.cbsnews.com/news/minneapolis-police-george-floyd-died-officer-kneeling-neck-arrest/>; Matt Furber, Audra D. S. Burch & Frances Robles, *What happened in the chaotic moments before George Floyd died*, N.Y. TIMES (May 29, 2020), <https://www.nytimes.com/2020/05/29/us/derek-chauvin-george-floyd-worked-together.html>.

¹⁸ Eric Ortiz & Donna Mendell, *Minneapolis police officer at center of George Floyd's death had history of complaints*, NBC NEWS (May 27, 2020), <https://www.nbcnews.com/news/us-news/minneapolis-police-officer-center-george-floyd-s-death-had-history-n1215691>.

¹⁹ *In re Daily Gazette Co. v. City of Schenectady*, 710 N.E.2d 1072 (1999).

²⁰ *Id.*

²¹ *Id.* at 1078; see also *In re Capital Newspapers Division of the Hearst Corp. v. Burns*, 496 N.E.2d 665, 669–70 (N.Y. 1986) (holding that agency was required to disclose the material requested by reporter who sought a one-month record of sick leave requests from named officer); cf. *In re Fink v. Lefkowitz*, 393 N.E.2d 463, 471–72 (N.Y. 1979) (holding that agency was not required to produce specialized investigative techniques of nursing home industry that would potentially compromise pending investigations).

²² *Matter of N.Y. Civ. Liberties Union v. N.Y. City Police Dept.*, 32 N.Y.3d 556 (2018), *affirming* 148 A.D.3d 642 (1st Dep't 2017); see also *Luongo v. CCRB and Maccaron*, 161 A.D.3d 1079 (2d Dep't 2018); *Luongo v. CCRB Records Officers and Daniel Pantaleo*, 150 A.D.3d 13 (1st Dep't 2017).

²³ *Brady v. Maryland*, 373 U.S. 83 (1963) (seminal Supreme Court case requiring prosecutors to disclose exculpatory evidence in criminal cases). See Jonathan Abel, *Brady's Blind Spot: Impeachment Evidence in Police Personnel Files and the Battle Splitting the Prosecution Team*, 67 STAN. L. REV. 743, 778 (2015) (discussing the reversal of burdens for disclosing police records) and 754 (discussing ambiguity in prosecutor's obligation under *Brady* to be familiar with evidence of police misconduct in police officer witness's personnel file even if such misconduct is unrelated to specific case); note 48, at 754; see also *Kyles v. Whitley*, 514 U.S. 419, 437 (1995) (announcing prosecutor's duty to learn); *United States v. Bagley*, 473 U.S. 667, 682 (1985) (plurality opinion) (eliminating requirement for defense to request impeachment material); *Giglio v. United States*, 405 U.S. 150, 154–55 (1972) (expanding *Brady* to impeachment material).

²⁴ *Id.*

²⁵ COMM. ON OPEN GOV'T, STATE OF N.Y. DEP'T OF STATE, ANNUAL REPORT TO THE GOVERNOR AND STATE LEGISLATURE (Dec. 2014), at 3, <http://www.dos.ny.gov/coog/pdfs/2014AnnualReport.pdf> [hereinafter N.Y. ANNUAL REPORT].

²⁶ For a discussion about national public access laws as they pertain to police disciplinary records (and bodyworn camera footage), see Cynthia Conti-Cook, *Open Data Policing*, 106 GEO. L.J. ONLINE (2017), available at <https://georgetownlawjournal.org/articles/243/open-data-policing>.

²⁷ Daniel Denvir, *New York's public secrecy law: de Blasio fights to keep NYPD abuse records from the public*, SALON (June 6, 2016), https://www.salon.com/2016/06/29/new_yorks_police_secretary_law_de_blasio_backs_nypd_to_keep_misconduct_records_from_the_public/.

²⁸ *Id.*

²⁹ The CCRB is an independent city agency tasked with investigating complaints of police misconduct. See <http://www1.nyc.gov/site/ccrb/about/frequently-asked-questions-faq.page>.

³⁰ Jack Jenkins & Carimah Townes, *The disturbing secret history of the NYPD officer who killed Eric Garner*, THINKPROGRESS (Mar. 21, 2017), <https://thinkprogress.org/daniel-pantaleo-records-75833e6168f3/>.

³¹ N.Y.C. Department of Investigation, Office of the Inspector General for the N.Y.P.D., *Police Use of Force In New York City: Findings And Recommendations On NYPD's Policies And Practices* (Oct. 1 2015), at 47, http://www1.nyc.gov/assets/oignypd/downloads/pdf/oig_nypd_use_of_force_report_-_oct_1_2015.pdf.

³² N.Y.C. Department of Investigation, Office of the Inspector General for the N.Y.P.D., *DOI Investigation Finds Non-Compliance by NYPD with New Use-of-Force Reporting Requirements* (Feb. 6 2018), https://www1.nyc.gov/assets/doi/press-releases/2018/feb/08Use_of_Force_Report_020618.pdf.

³³ U.S. Dep't of Justice, Final Report of The President's Task Force on 21st Century Policing (2015) at 13, https://static1.squarespace.com/static/55b673c0e4b0cf84699bdfbf/t/5a188ea553450a9c540ad94b/1511558829397/taskforce_finalreport.compressed.pdf.

³⁴ COMM. ON OPEN GOV'T, STATE OF N.Y. DEP'T OF STATE, ANNUAL REPORT TO THE GOVERNOR AND STATE LEGISLATURE (Dec. 2016), at 5, <https://www.dos.ny.gov/coog/pdfs/2016%20Annual%20Report.pdf>.

³⁵ Joseph Velasquez & B. Colby Hamilton, *New York's top court's big test: Law shielding police personnel records*, N.Y. LAW JOURNAL (Oct. 4, 2017), <https://www.law.com/newyorklawjournal/almID/1202799657207/>.

³⁶ *Id.*

³⁷ *See Matter of Patrolmen's Benevolent Assn. of the City of N.Y. v. de Blasio*, 171 A.D.3d 636, 637 (1st Dep't 2019).

³⁸ *Id.* at 638.

³⁹ N.Y. ANNUAL REPORT, *supra* note 25, 3–5; Robert Lewis, Xander Landen & Noah Veltman, *New York leads in shielding police misconduct*, WNYC (Oct. 15, 2015), <http://www.wnyc.org/story/new-york-leads-shielding-police-misconduct/>. Police internal affairs records and citizen complaints are “mostly unavailable” from FOIL disclosure in twenty-three states, but only considered “confidential” by statute in two other states (California and Delaware). Records are more accessible in fifteen states depending on whether severe discipline resulted from the misconduct. *Id.*; *see also* ME. REV. STAT. ANN. tit. 30-a, § 503 (2015); OKLA. STAT. ANN. tit. 51, § 24A.7(B)(4) (West 2016); UTAH CODE ANN. § 63G-2-301(3)(o)(i) (West 2007) (exempting formal charges of misconduct until and unless the charges are sustained and the action is complete). Texas's statute makes internal affairs documents relating to deadly force public. It exempts internal affairs documents that determine the officer did not engage in misconduct, and it makes public the documents where disciplinary action is decided. TEX. LOC. GOV'T CODE ANN. §§ 143.1214, 143.089 (West 2015). In twelve states, these documents are public record in most circumstances. Many state statutes are vague. *See* Jenny Rachel Macht, *Should police misconduct files be public record? Why Internal Affairs investigations and citizen complaints should be open to public scrutiny*, 45 CRIM. L. BULL. 1006 (2009).

⁴⁰ Editorial Board, *Cop misconduct shouldn't be kept a secret*, NEWSDAY (Sept. 9, 2015), <https://www.newsday.com/opinion/editorial/cop-misconduct-shouldn-t-be-kept-secret-1.10825198>.

⁴¹ Robert Lewis, Noah Veltman, Xander Landen, *Is police misconduct a secret in your state?*, WNYC (Oct. 15, 2015), <https://www.wnyc.org/story/police-misconduct-records/>.

⁴² *Supra* note 8.

⁴³ *People v. Smith*, 27 N.Y.3d 652, 662 (2016).

⁴⁴ *See also Malcolm v. NYPD*, Index No. 100466/2017, N.Y. Sup. Ct. (Dec. 22, 2017) at 7 (detailing the sufficient existing protections in Public Officers Law 87).

⁴⁵ *People v. Smith*, 27 N.Y.3d 652, 662 (2016).

⁴⁶ *Id.* at 663.

⁴⁷ *Luongo v. CCRB and Pantaleo (Luongo I)*, 150 A.D.3d 13 (1st Dep't 2017); *Luongo v. CCRB and Maccaron (Luongo II)*, 161 A.D.3d 1079 (2d Dep't 2018).

⁴⁸ *See* A.3335/S.2850, 2017-2018 Leg. Sess. (N.Y. 2017), http://assembly.state.ny.us/leg/?default_fld=&leg_video=&bn=A03335&term=2017&Summary=Y&Memo=Y&Text=Y. This recommendation to the Legislature was first made by the Committee on Open Government Annual Report, December 2014. N.Y. Annual Report, *supra* note 25.

⁴⁹ *See Wolf v. Colorado*, 338 U.S. 25, 31 (1949) (describing administrative and political alternatives to routine judicial review of police misconduct that could be effective if functional accountability systems and transparency were in place), *overruled by* *Mapp v. Ohio*, 367 U.S. 643 (1961). *See also supra* notes 2–5 regarding recent reforms. The City Bar has provided comments on the NYPD's body-worn camera policies, including that recordings of police-civilian encounters should be made available promptly to the civilian who was recorded,

subject to relevant safety and privacy limitations in the Freedom of Information Law, *see* http://s3.amazonaws.com/documents.nycbar.org/files/2017126-BodyCamerasNYPD_FINAL_8.16.17.pdf.

⁵⁰ N.Y. ANNUAL REPORT, *supra* note 25.

⁵¹ *See* Memorandum from N.Y. State Assemb. in Support of Assemb. B. A.2513, 243rd Leg. Sess. (N.Y. 2017), https://assembly.state.ny.us/leg/?default_fld=&leg_video=&bn=A02513&term=2019&Summary=Y&Memo=Y.

*This report was first published in April 2018, the product of an intensive drafting and review process by the membership of two identified sponsoring Association committees, the Civil Rights Committee and the Criminal Courts Committee, plus inputs from multiple other committees. It was reviewed by City Bar policy staff and approved for release by a City Bar Vice President (upon the recusal of the President at the time, John Kiernan). Two of the principal authors of the original report, Philip Desgranges (who chaired the Civil Rights Committee and was named in that capacity) and Cynthia Conti-Cook (who participated significantly in drafting the report) were, at the time, employed respectively at the New York Civil Liberties Union and the Legal Aid Society, both of which were engaged in litigation over the appropriate interpretation of the scope of section 50-a. Like the New York City Police Department, which has advocated for broadening legislative revisions to section 50-a but has also advocated in court for a narrow interpretation of the language of the statute as it currently exists, the report and the committees that approved it expressly treat the issue of whether section 50-a should be repealed by the legislature – the subject of this report – as different from the issues being litigated in court about proper interpretation of the current language of the statute. Mr. Desgranges and Ms. Conti-Cook disclosed their affiliations to members of the relevant committees during deliberations, and Ms. Conti-Cook’s publications on section 50-a are cited several times in the report. They did not dictate the outcome of the multiple discussions and sets of commentary on the report as it was being drafted. In the interests of enhanced transparency, though, the City Bar amended its report in May 2018 to add this footnote so that their affiliations would be fully presented to readers.