NEW YORK COURT OF APPEALS ROUNDUP

FOIL AND CONFIDENTIALITY OF LAW ENFORCEMENT PERSONNEL RECORDS

WILLIAM T. RUSSELL, JR. AND LYNN K. NEUNER*
SIMPSON THACHER & BARTLETT LLP

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The Court of Appeals issued a decision last month addressing the confidentiality of law enforcement personnel records in response to a request pursuant to New York's Freedom of Information Law (FOIL). In *In the Matter of New York Civil Liberties Union v. New York City Police Department*, the court rejected a FOIL request by the New York Civil Liberties Union (NYCLU) for certain New York Police Department (NYPD) disciplinary records on the grounds that they are exempted from disclosure by §50-a of the Civil Rights Law. A number of bar associations and other organizations, including the New York City Bar Association and the Legal Aid Society, have criticized the broad reach of §50-a and called for its repeal. In light of the Court of Appeals' recent 5-2 decision, it is clear that any limitation on the scope of §50-a's protections will have to come from the legislature.

In August 2011, the NYCLU submitted a FOIL request to the NYPD seeking all final decisions from Jan. 1, 2001 to the present from the NYPD's internal disciplinary proceedings conducted in response to charges referred by the Civilian Complaint Review Board (CCRB). The NYCLU also requested documents identifying the discipline imposed on police officers in conjunction with each of those decisions. The NYPD rejected the request on the grounds that the records were exempt from disclosure under several FOIL exceptions, including Public Officers Law §87(2)(a) which provides an exception for records that are "specifically exempted from disclosure by state or federal statute." The NYPD pointed to §50-a of the Civil Rights Law in particular. That section provides that "[a]ll personnel records used to evaluate performance toward continued employment or promotion … shall be considered confidential and not subject to inspection or review." The only exceptions are if the officer at issue consents to the disclosure or a court authorizes disclosure after observing several procedural safeguards, including providing the officer at issue an opportunity to be heard and determining after an in camera review that "records are relevant and material in the action before" the court.

The NYCLU appealed administratively and the NYPD granted the appeal in part by producing certain disposition forms with information regarding the subject officers and complainants redacted, but continued to withhold the actual decisions resolving the complaints referred by the CCRB. The NYCLU commenced an Article 78 proceeding seeking disclosure of all the requested disciplinary records. The Supreme Court, New York County, denied the NYPD's motion to dismiss and ordered the NYPD to select five decisions at random, redact information identifying the subject of the complaint, submit the five decisions for an in camera review, and notify the officers at issue. The NYPD complied with the Supreme Court's direction but also submitted an

* **William T. Russell, Jr.** *and* **Lynn K. Neuner** *are partners at Simpson Thacher & Bartlett LLP.*

answer arguing that disclosing the documents, even as redacted, was prohibited by §50-a because the redactions could not adequately conceal the officers' identities. The five officers at issue also objected. The Supreme Court rejected these objections, deemed the redactions adequate, and ordered that "[a]ll future requests are to be done as the five in camera submissions."

The NYPD appealed and the Appellate Division, First Department, reversed and dismissed the proceeding. The First Department then granted the NYCLU leave to appeal.

The Court of Appeals, in a decision written by Judge Michael Garcia and joined by Chief Judge Janet DiFiore and Judges Eugene Fahey and Paul Feinman, affirmed the First Department's dismissal of the Article 78 proceeding. The majority deemed this a "straightforward application" of §50-a of the Civil Rights Law and §87(2)(a) of the Public Officers Law. Section 87(2)(a) is clear that an agency may deny access to records that are "specifically exempted from disclosure by state or federal statute," and the parties agreed that the disciplinary records requested by the NYCLU were covered by §50-a. The majority rejected the NYCLU's argument that §50-a's protections are limited to the context of actual or potential litigation. The court found that §50-a only *permits* disclosure in the context of an ongoing litigation and reasoned that §50-a's protections are not limited to any specific pending action because the statute was enacted to prevent any potential exploitation of information in an officer's personnel file irrespective of the initial purpose for which it was disclosed. The majority accordingly ruled that because the NYCLU's request was not part of any pending litigation, §50-a prohibited disclosure of the requested records.

The majority acknowledged the policy arguments made by the NYCLU and various amici that public access to NYPD disciplinary decisions is important to maintaining public confidence in police integrity, but observed that the legislature was well aware of these considerations when it enacted §50-a.

Finally, the majority rejected the notion that redacting identifying information would render disclosure permissible under FOIL and §50-a. The majority pointed to the fact that other FOIL exceptions, such as those set forth in Public Officers Law 87(2)(b) providing for an exception for documents whose disclosure would constitute an unwarranted invasion of personal privacy, expressly provide for the redaction of records to delete the offending information but that there is no such redaction provision in §87(2)(a) at issue here. The majority noted that the Court of Appeals had relied on this omission in holding that redacted disclosure could not be compelled under §87(2)(a) in its decisions in *Matter of Short v. Board of Mgrs. of Nassau County Med. Ctr.*, 57 N.Y.2d 399 (1982), and *Matter of Karlin v. McMahon*, 96 N.Y.2d 842 (2001).

Judge Stein issued a short concurring opinion in which he joined in the majority's ruling that disclosure of the requested records is precluded by Civil Rights Law §50-a, but found it unnecessary to rely on the court's earlier decision in *Matter of Short*. According to Judge Stein, Public Officers Law §87(2)(a)'s reference to records exempted from disclosure by state or federal statute is an express acknowledgement that confidentiality of the records at issue may be mandated by another provision of law. Here, disclosure is prohibited by §50-a, which contains its own express exemptions—none of which are implicated here—and FOIL does not provide any other mechanism for an agency to avoid the confidentiality mandate of a statute like §50-a.

Judges Jenny Rivera and Rowan Wilson both dissented. Judge Rivera issued a lengthy opinion in which she argued that the majority opinion would effectively shield all police employment records from public view except in the limited circumstances where the records are material to a pending litigation. Judge Rivera pointed to the important public policy considerations of open government embodied in FOIL and argued that

the confidentiality concerns reflected in Civil Rights Law §50-a can be addressed effectively by redacting all identifying information concerning the police officer at issue.

Judge Wilson dissented on different grounds. He argued that because the actual disciplinary proceedings themselves are, as a default matter, open to the public, there is no basis to withhold information from those proceedings under FOIL, particularly given the fact that the subject officer had an opportunity to seek confidential treatment during the disciplinary hearing itself (by requesting a closure of the hearing room for all or part of the hearing). As such, Judge Wilson opined that the proper way to consider the FOIL request at issue would be to redact only the information, if any, that the Deputy Commissioner of Trials found to be confidential during the proceedings at issue.

As noted above, several organizations have taken issue with a broad interpretation of Civil Rights Law §50-a's protections. In light of the Court of Appeals' recent decision in *In the Matter of New York Civil Liberties Union v. New York City Police Department*, any efforts to limit the statute's scope will have to be addressed to the legislature.