Police Benevolent Association
Of The City Of New York, Inc.

NEW YORK CITY COUNCIL
COMMITTEES ON PUBLIC SAFETY & JUSTICE SYSTEM
Joint Committee Hearing on Police Discipline
February 7, 2019, 10:00am
Council Chambers - City Hall

STATEMENT OF NYC PBA PRESIDENT PATRICK J. LYNCH

The Police Benevolent Association of the City of New York, Inc. ("NYC PBA") and its over 24,000 members, who patrol New York City's streets and do the difficult and dangerous work of protecting every resident, every visitor and every business operating within the five boroughs, opposes the eight introductions and resolutions to be considered during today's hearing, which largely consist of duplicative and counter-productive measures designed to once again demonize police officers, seemingly for pure political gain.[1]

By rushing through these bills, the Council plainly has not considered the negative impact they will have on all New Yorkers, including New York City police officers and their families, and the New York City residents they protect. For example, with respect to the resolution calling for a repeal of Civil Rights Law § 50-a ("CRL § 50-a"), the Council has simply ignored both the serious risks to police officer safety and the reputational harm of publishing false allegations—which will unfairly impact the careers of good police officers that keep all New Yorkers safe—in favor of purported "criminal justice reform." However, a recent analysis by a commentator who has considered these issues concludes that it is "safe to say" that making police disciplinary records public would be a "step in the wrong direction for those who wish to see our criminal justice system bend toward humanity," a goal that the Council presumably supports. And just as troubling, the Council's call for repeal creates an egregious double-standard—on the one hand, the Council keeps investigations into the misconduct of its members confidential even though "nothing in the Council rules requires [them] to be done in secret," yet on the other it calls for investigations into the alleged misconduct of police officers to be made public. The Council's resolution does not explain why it believes that New York City's elected officials should receive preferential treatment over New York City's police officers, firefighters, correction officers, paramedics, parole officers, and probation officers.

[1] The specific introductions and resolutions are Int 1105-2018, Int 1309-2018, T2019-3704, T2019-3705, T2019-3706, T2019-3707, T2019-3708, and T2019-3709.

While the NYC PBA opposes all eight bills, its objections to the Council's abridged process and certain proposals—including the CRL § 50-a resolution, the "Discipline Matrix" study, the "Disciplinary Action Report," and the provision of personnel files to District Attorneys—are specifically addressed below.

The Council's Abbreviated Process

In the absence of any showing that the passage of these bills is necessitated by the existence of any identified problem, and in the face of what the City characterizes as record low crime numbers and an unprecedented degree of positive police-community engagement, one is left to conclude that the Council is motivated by politics rather than public safety. This is further underscored by the fact that the alleged "support of the community" cited by Council members and anti-police activists consists of a number of individual complaints and comes without any support from police community councils, community boards, or any other community group with legitimate standing to speak to the public safety issues implicated by these and other actions.

Council members have pushed these bills through outside of the standard review process, offering the majority of them as "pre-considered" bills that the Committees on Justice System and Public Safety will hear and vote on prior to the Council's formal referral to Committee. Legislation that purportedly implicates the safety of the City and its residents and which affects the ability of police officers to effectively perform their duties should be introduced in the ordinary course, permitting thorough consideration and open discussion in the light of day.

Resolution Calling on New York State Legislature to Repeal Civil Rights Law § 50-a

The Council's political grandstanding and rush to judgment is best illustrated by its misguided resolution to support **the repeal of Civil Rights Law § 50-a**—a statute that for more than four decades has protected not only New York City police officers and their families, but also firefighters, correction officers, paramedics, parole officers, and probation officers (the "Resolution"). In its rush to strip the civil rights of tens of thousands of New York State union members and appease anti-police activists, it is abundantly clear that the Council has failed to adequately consider the lives and livelihoods it is trying to place at risk. By contrast, two independent analyses issued this week by those who *have* spent a considerable amount of time considering these issues—including a New York City law professor and the NYPD's "Independent Panel"—suggest that the repeal of CRL § 50-a is unwise.[2]

[2] Although the Report of the "Independent Panel" is deeply flawed for numerous reasons beyond the scope of this statement, the Panel spent many months studying CRL § 50-a and ultimately recommended a limited ***amendment*** of the statute to allow for the publication of "final, substantiated disciplinary matters." "Independent Report" at 44. There is no legitimate basis and certainly no developed record that would support the Council going far beyond the Panel's recommended amendment and instead recommending a complete repeal of CRL § 50-a.

The Vast Majority of States Protect Police Disciplinary Records

As a preliminary matter, it is telling that the movement to repeal CRL § 50-a is premised on blatant misrepresentations. According to the advocates supporting repeal, "New York is now one of only two states that still blocks access to police disciplinary records."[3] But this is simply and demonstrably false. Even worse, the advocates know it is false, but they persist in making the claim anyway.[4] The Council should ask itself why those seeking to repeal CRL § 50-a have been forced to resort to peddling inaccuracies in support of their position.[5]

In reality, an independent study conducted by WNYC found that there are "23 states plus the District of Columbia where police disciplinary records are pretty much always confidential" and in a further 15 states police personnel records have "limited availability."[6] New York is therefore one of the vast majority of states that have made the reasoned decision to limit access to police personnel records. Moreover, even in the very small minority of states—such as Utah—where police records are generally public, "many of these states still make records of unsubstantiated complaints or active investigations confidential."[7] Thus, the Resolution would support New York becoming dead last—50th out of 50 states—in protecting the safety and privacy of police officers and their families.

The Council Has Completely Ignored the Threats to Police Officer Safety

The confidentiality protections afforded by CRL § 50-a are absolutely vital to protect the safety of the nearly 24,000 New York City police officers and their families. It is well-documented that when criminals and others have been able to access police officer information, they have used it to harm, harass, and threaten. For example:

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[3] Jillian Jorgensen *et al.*, *Go away 50-a! Pols hope new democrat-led Albany will repeal roadblock to NYPD transparency*, N.Y. Daily News (Nov. 11, 2018).

[4] Supporters of repeal also falsely claim that California law no longer "blocks access to disciplinary records." In fact, California recently ***amended*** its law to provide public access to a very narrow subset of records such as substantiated claims of dishonesty. It did not "repeal" the entire law or provide access to the entirety of police personnel records (including false allegations), as the Resolution calls on the New York State Legislature to do.

[5] As yet another example of the activists' misrepresentations, an op-ed published just this morning links to the New York State Education Department website and claims that advocates for repeal merely want police officers to "have the same level of privacy protection that other public employees, like teachers," expect. However, that website makes clear that "accusations of misconduct" that "do not result in disciplinary action are confidential." http://www.op.nysed.gov/opd/opdfaq.htm. By contrast, advocates for repealing CRL § 50-a demand that all false and frivolous allegations against police officers be made public.

[6] Robert Lewis *et al.*, *Is Police Misconduct a Secret in Your State?*, WNYC News (Oct. 15, 2015).

[7] *Id.*

- According to the Department of Justice, an alleged murderer recently attempted to send a mail bomb to the New York City police officers who arrested him. He had methodically "conducted internet searches and made telephone calls to determine the locations of the officers' residences." The bomb, however, was sent to the wrong address and the civilian who received the package was murdered when the bomb detonated.[8]

- According to Police Commissioner James O'Neill's testimony in a previous hearing held by the Council's Committee on Public Safety, an arrested individual was recently able to locate the home address and telephone number of a New York City police officer and left the following threatening voicemail:

  *Hey, [officer's name], highway cop motherf**ker. Hope all is well. I'll be seeing you very shortly. I hope you and your family on [address of officer's family] are doing very well. I'll see you soon.*

- According to the NYPD's Deputy Commissioner for Intelligence and Counterterrorism, threats against New York City police officers are so prevalent that the Department has had to create a special unit—the Threat Assessment and Protection Unit ("TAPU")—to handle them. Since 2016, TAPU has received over 1,000 threats, including a person who recently filed a CCRB complaint and then stated that a detective who died in the line of duty "got what he deserved" and that another police officer "was next."[9]

- In California, the identity of an officer involved in a shooting incident was recently leaked. Activists were able to track him down using a wedding website, and stormed his wedding celebration yelling "murderer." In the wake of the incident, the organizer said that "I think [police officers] need to be approached in spaces where they're a little more vulnerable."

- As the recently installed Department of Investigation Commissioner Margaret Garnett has previously noted, CRL § 50-a is meant to protect officers from retaliation, as "some officers have required around-the-clock protection at their homes after being accused of misconduct."[10]

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[8] Press Release, *Brooklyn Man Arrested for Using a Weapon of Mass Destruction*, United States Department of Justice (Feb. 28, 2018).

[9] Affidavit of John J. Miller, dated September 14, 2018. The Miller affidavit details numerous other threats and assaults that occurred following the release of police officer information, including (1) a retired police captain who was "violently assaulted" by an individual claiming to know "where the retired captain lived" and "that the captain had a new baby at home"; (2) a precinct commander whose "family received death threats by telephone" after his personal information was revealed; and (3) a police captain who received threats that she would be assaulted when she arrived at her home after protesters chanted her home address.

[10] Jeff Coltin, *Records standoff between NYPD and Vance continues*, City & State (July 17, 2018).

If Civil Rights Law 50-a is repealed, the safety of New York City police officers and their families will be placed in jeopardy and a valuable weapon will be provided to those who would seek to do harm to members of law enforcement.[11] Those who doubt that the repeal of CRL § 50-a would increase the risks to police officers need only look at the actions of the unhinged killer with a grudge who travelled from Maryland to New York City and murdered Police Officers Liu and Ramos simply because of the uniform they wore. Revealing the names, circumstances of incidents, and allegations involving police officers would serve to increase the risks to police officers, and simply dismissing these risks will not make them go away. Nevertheless, the Resolution does not contain anything that would suggest that the Council has even considered the impact that repeal will have on the safety of police officers, their families, and other public servants, and in the event that a police officer or other public sector employee or his or her family is harmed as a result of this ill-considered Resolution, New Yorkers will look critically at the shortcomings in the process and recommendation of the Council.

The Council Disregards the Fact that Repeal Would Allow False Allegations to Ruin Careers

In addition to ignoring the safety risks, the Resolution ignores the reputational harm that will be inflicted on police officers in the event that CRL § 50-a is repealed. It has long been the public policy of New York State to keep unfounded and unsubstantiated allegations of misconduct confidential. This public policy reflects an awareness of the unavoidable and irreparable harm to one's reputation resulting from the publication of unfounded accusations. Nevertheless, the Resolution would inexplicably allow for the publication of false allegations against police officers, which will not only unfairly tarnish their careers and reputations, but also see them being treated worse than a host of other professionals (none of which deals with the same dangers as police officers).

As Councilmember Richards recently stated:

> Many of our NYPD officers have believed that they would not get a fair shake, only to find that they were exonerated by a thorough [CCRB] investigation. . . . [T]hat happens in a lot of cases. In fact, the large majority of CCRB complaints are not substantiated. . . . I have to acknowledge that many times being a police officer involves making difficult decisions and walking a fine line. And while an individual might not like the way they were treated, there are times when something upsetting doesn't rise to the level of misconduct.[12]

[11] In addition, there is ample evidence that in the current climate, police officers are increasingly targeted by the public simply for being police officers—even without reliance on such confidential information. For example, in 2017, Police Officer Miosotis Familia was murdered by a man who had previously made statements hostile to police officers. In recent months, numerous videos have surfaced showing emboldened members of the public threatening and physically assaulting police officers. This strongly reaffirms the purpose of CRL § 50-a. Increasing public access to confidential personnel files will only exacerbate the situation.

[12] January 22, 2019 Committee on Public Safety Hearing.

It would be patently unfair for a police officer to have allegations that are ultimately found to be unsubstantiated nevertheless published on the internet for the world to see. And that unfairness is further compounded by the fact that individuals regularly lodge false misconduct claims against police officers in the hope of financial gain, or to simply retaliate against police officers doing their jobs. For example, a recent video captured a man bragging about assaulting police officers and then filing lawsuits against the City, stating that the cops "get hurt and I get paid. I got three lawsuits, working on number four."[13]

Moreover, numerous City workers are protected against the reputational damage associated with the publication of unsubstantiated allegations. For example, the New York State Committee on Open Government recently issued an Advisory Opinion that concluded that New York law prevents "unsubstantiated charges from being used unfairly against or in relation to a tenured teacher" and it was therefore "proper" to keep them confidential.[14] There is no legitimate reason for police officers—who are regularly threatened and assaulted just for doing their job—to receive less protection than other professionals.

The Council Seeks Preferential Treatment For Councilmembers

The Council's call for the release of all police personnel records—no matter how fraudulent or frivolous the allegations—while at the same time insisting that investigations into Councilmember misconduct be kept confidential is particularly troubling. According to the Daily News, the Council has a long history of conducting private investigations into disciplinary charges brought against its members, despite the fact that "nothing in the Council rules requires investigations to be done in secret."[15] Other media reports have noted that the Council keeps "the press and public excluded" from its disciplinary proceedings.[16] Nevertheless, members of the Committee on Standards and Ethics—which along with the Council keeps such investigations from being transparent—have strongly supported repealing CRL § 50-a as a means to increase transparency.

In light of this Resolution, is the Council prepared to make all false allegations against its members public? Will it stop conducting its disciplinary investigations in secret? Will it stop claiming it is transparent because it leaks select allegations made against disfavored Council members? Will it explain why Councilmembers should receive better treatment than New York City's first responders?

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[13] *See* Rocco Parascandola *et al.*, *SEE IT: Man beaten by cops with batons in Washington Heights bragged about suing the NYPD BEFORE controversial clash*, N.Y. Daily News (Jan. 9, 2019).

[14] Advisory Opinion, New York State Committee on Open Government, Jan. 20, 2015, *available at* https://docs.dos.ny.gov/coog/ftext/2015/f19239.htm.

[15] *See* Erin Durkin *et al.*, *City Council ethics committee opens misconduct probe against unnamed member*, N.Y. Daily News (July 16, 2018).

[16] *See* William Neumann, *Lawmaker Scolded by City Council Over Harass Claim*, N.Y. Times (Feb. 12, 2018).

The Council Would Have Police Officers Treated Less Favorably than those Convicted of Crimes

To further illustrate the inequity of the Resolution, the Council and the anti-police advocates pressing for repeal of CRL § 50-a seek to have police officers treated worse than those accused and even convicted of crimes. Specifically, under New York law those who receive favorable results in criminal cases automatically have their records sealed, and many records of criminal convictions may now also be kept confidential. By contrast, absent CRL § 50-a, police officers acquitted of misconduct will still have all unfounded allegations—including false claims—made public.

Recognizing this incongruity, Professor Kate Levine has concluded that it is "safe to say that attempting to force the transparency of police disciplinary records is a step in the wrong direction for those who wish to see our criminal justice system bend toward humanity."[17] In particular, Professor Levine acknowledges what she believes are several important factors that should be considered:

- **Privacy rights are understandably important to police officers because they are under tremendous scrutiny.** Police officers are constantly being used as the scapegoat for systemic issues created by superior officers and lawmakers. Moreover, given the innumerable rules and regulations that govern police officers and the incredible amount of oversight, there are countless ways that even the most competent police officer can find herself facing discipline.[18]

- **The publication of police disciplinary records may adversely impact the most vulnerable police officers.** Specifically, Professor Levine argues that police discipline is inherently arbitrary, with superior officers having wide latitude over which police officers they choose to discipline. "An officer's disciplinary file may have as much to do with his supervisor's attitude and biases as it does with his adherence to the [rules]." As Professor Levine argues, publishing personnel files "may scapegoat officers based on racial or other biases far more often than officers who pose a risk to the communities they serve."[19] It is therefore the NYC PBA's membership—which is 55% people of color and 20% female—that will unfairly bear the brunt of a CRL § 50-a repeal.

- **If you support confidentiality for criminal records, you should be against the repeal of CRL § 50-a**. Professor Levine contends that if New York is "serious about protecting those with convictions from a permanent stigma of a criminal record, [it] should also take police concerns about their individual privacy seriously." The arguments made by activists in support of confidential criminal records are equally applicable to confidential police records—for example, the outsized reputational harm

[17] Kate Levine, *Discipline and Policing*, 68 Duke L.J. 839 (2019).

[18] *See, e.g., id.* at 858, 867.

[19] *See, e.g., id.* at 866, 873.

that comes from a permanent and public record; the inability of the general public to understand the import of various misconduct charges; and the arbitrariness of enforcement.[20]

- **Repeal CRL § 50-a advocates and others are unable to show that the release of personnel records would prevent misconduct**. Professor Levine notes that what is often missing from the advocates' argument "is the mechanism by which transparency would lead to accountability."[21]

Even the Fundamentally Flawed "Blue Ribbon Panel" Report Rejects Calls for Repeal

Finally, even the deeply flawed "Report of the Independent Panel on the Disciplinary System of the New York City Police Department" (the "Independent Report")—which inexplicably fails to seriously address any of the above concerns—specifically ***rejects*** the notion that CRL § 50-a should be repealed. Rather, it suggests CRL § 50-a "should be ***amended*** to allow public access to information on ***final, substantiated*** disciplinary matters."[22] Moreover, it specifically identifies portions of the statute that should "survive any reform."[23] And with respect to unsubstantiated allegations, it states that "concern for officers' privacy might tip the balance in favor of non-disclosure. Policing is a difficult and dangerous job, and keeping records of unsubstantiated allegations out of the public domain might be the preferable course."[24] Even if the Council is inclined to disregard, *inter alia*, the physical safety and reputational concerns of police officers, and the negative impact that ignoring police privacy rights would have on criminal justice reform, what is its rationale to call for changes to CRL § 50-a that go far beyond those suggested by the "Independent Report," which was issued by a Panel that has spent far more time considering these issues?

In light of all of the foregoing, the NYC PBA strongly opposes the Resolution and urges the Council to reject this legislation.

Local Law Calling for Council to Receive Disciplinary Action Reports

This proposal calls for the Council to have access to police personnel records that are protected by CRL § 50-a. The draft bill simply assumes that the Council is permitted to access these confidential materials. However, to the NYC PBA's knowledge the Council has never explained or provided any support for the assumption that CRL § 50-a allows the Council to review such documents.

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[20] *See, e.g., id.* at 847, 849.

[21] *See, e.g., id.* at 872.

[22] "Independent Report" at 44 (emphasis added).

[23] *Id.* at 45.

[24] *Id.*

CRL § 50-a allows numerous government entities to access police personnel records. For example, these confidential materials can be accessed by any "district attorney." They can be accessed by "the attorney general." They can be accessed by "corporation counsel." And they can be accessed by "a grand jury." A "City Council" is not one of the government entities that the statute specifically grants the power to review police personnel files.

CRL § 50-a further allows for an "agency of government" to receive the records, but only if two standards are met: first, the agency must "require" the personnel files—in other words, it is not enough that the agency "would like to see," "wants to review," or "thinks it would be helpful to access" these confidential materials; second, the agency must require the records "in the furtherance of their official functions." Here, it is unclear whether the Council can satisfy either prong.

First, there is no indication that the Council has an actual "need" to review the personnel files of police officers. While it may be politically expedient to call for the review of confidential police records in the current climate, that is plainly not enough to satisfy the language of CRL § 50-a. Second, there is no dispute that police discipline falls within the "official function" of the Police Commissioner. Pursuant to the New York City Chapter and the New York City Administrative Code, the Police Commissioner has complete authority over Departmental discipline. *See* NYC Charter § 434(a) ("The commissioner shall have cognizance and control of the government, administration, disposition and discipline of the department."); NYC Admin. Code 14-115. The proposed bill does not provide any support for an assertion that police discipline is nevertheless the "official function" of the Council.

Finally, the proposed bill states that the "Disciplinary Action Report" ("DAR") should be redacted to remove "all information identifying the name of an officer." We understand that to mean that the report will redact ***all*** information that might identify the relevant police officer, not just information related to her name. If the DAR called for in the bill would include other identifying information, the bill would suffer from an additional infirmity.

Local Law Calling for District Attorneys to have Access to Law Enforcement Records

To the extent that anti-police activists are creating or operating under the misimpression that CRL § 50-a blocks district attorneys from accessing police personnel records, that is simply not true. As discussed above, the plain language of CRL § 50-a expressly permits "any district attorney or his assistants" to access these confidential files "in the furtherance of their official function." Indeed, Department of Investigation Commissioner Margaret Garnett recently confirmed that in her experience "50-a hasn't impeded any criminal investigations" because "it's not a shield for exposure to prosecutors."[25] There has been no showing of a necessity to support this action.

[25] Jeff Coltin, *Records standoff between NYPD and Vance continues*, City & State (July 17, 2018).

Int. No. 1309 - A Local Law Calling for a Study Regarding a "Discipline Matrix"

The NYC PBA opposes Int. No. 1309, a bill that would require the NYPD to study the implications and feasibility of instituting a "discipline matrix;" report the study results to the Mayor and City Council; and propose a plan for implementing such a matrix within 90 days from the enactment of the law. First, the Council lacks authority to pass such a bill as it plainly usurps the Police Commissioner's exclusive authority over police officer discipline. Second, use of discipline matrices is a new and developing concept and questions about the effectiveness of this system abound. The Council's bill is therefore a capricious overreach developed with politics in mind, not public safety.

The City Council is overstepping its authority. It is well-settled that the Police Commissioner alone is vested with authority over Department discipline. New York City Charter § 434(a) vests the Commissioner with "cognizance and control of the government, disposition and discipline of the department, and of the police force of the department." Further, New York Administrative Code § 14-115(a) provides that "the commissioner shall have the power in his or her discretion … to punish the offending [officers]." As the Legislature has decided to place the disciplining of police officers under the control of the Police Commissioner, the Council plainly lacks authority to enact this bill. In addition, just this week, Police Commissioner O'Neill announced his intention to study and consider adopting a disciplinary matrix.[26] Thus, this bill is not only a legislative overreach, but a redundant one at that.

The implementation of a discipline matrix in law enforcement departments is a fairly new and developing concept. Relatively few police departments in major U.S. cities currently employ discipline matrices, therefore the effectiveness of such systems is unknown. In fact, departments that have implemented a matrix have faced significant difficulties. For example, in 2014, the Baltimore Police Department decided that it would no longer rely on its discipline matrix after an outside auditor of the department's Internal Affairs Divisions found the matrix set "arbitrary standards [that] are a detriment to the agency and to individual officers."[27] Even if the Council did have authority to do so—which it does not—given the uncertainty surrounding the effectiveness of a discipline matrix there is no basis for the Council to require the Department to study how best to implement such a system.

[26] Press Release, New York Police Department, Commissioner O'Neill Announces Changes to NYPD Disciplinary System (February 1, 2019).

[27] Mark Puente, The Baltimore Sun, *Baltimore police should revamp misconduct probes, audit says* (Sept. 20, 2014). The auditor further found that the disciplinary matrix allows "inappropriate shortcuts and allows investigators, supervisors and commanders to avoid responsibility for making often difficult and unpopular decisions." Research suggests that Baltimore may have recently implemented a revised matrix. There is currently no evidence to support the effectiveness of this second attempt.