

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

Patrolmen's Benevolent Association of the City of New
York, Inc.,

Petitioner,

-against-

Bill de Blasio in his official capacity as Mayor of the City
of New York, City of New York, James P. O'Neill in his
official capacity as Commissioner of the New York City
Police Department, and New York City Police
Department,

Respondents.

Index No.: 150181/2018

**ORAL ARGUMENT
REQUESTED**

**PETITIONER'S MEMORANDUM OF LAW
IN SUPPORT OF ITS ARTICLE 78 PETITION**

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PRELIMINARY STATEMENT

This case challenges the ongoing illegal and politicized release of selective police officer body-worn camera (“BWC”) video footage by the Mayor, Bill de Blasio (the “Mayor”) and his police commissioner, James P. O’Neill (the “Commissioner”). These selective releases are clearly prohibited by statute and long-standing court precedent, and reflect a reckless disregard for very serious safety, privacy, due process, and other interests held not just by police officers, but equally by the individuals who are the subject of recorded video, their families, those responsible for investigating potential criminal conduct, and private citizens innocently caught-up in such highly intrusive video footage. No one should be comfortable with politicians unilaterally deciding without process or standards when and what recorded video footage to release and on what basis. And, in fact, the law prohibits them from doing so.

New York Civil Rights Law § 50-a prohibits Respondents from releasing “records used to evaluate [a police officer’s] performance toward continued employment or promotion,” unless they have secured a court order permitting them to do so. That statutorily mandated judicial process requires, among other things, that the court give all “interested parties the opportunity to be heard” concerning any release of such records, and address what restrictions, if any, should be imposed on such releases to protect the interests of all those involved. In addition, this process ensures that Respondents cannot selectively release footage to serve their own political or other objectives irrespective of the harm it might cause others, including potential prejudice to those accused of wrongdoing or to the investigation or prosecution of such potential wrongdoing, the traumatizing impact on family members and others exposed to potentially graphic or disturbing footage, and the substantial risk to the privacy of others who might be captured on such footage.

Respondents have admitted that the original raw body-worn camera footage is prohibited from release under Civil Rights Law (“CRL”) § 50-a, and this is certainly the case under the clear language of the statute, long-standing judicial decisions, and the stated purposes for the BWC program. Despite this, Respondents have unilaterally been releasing body-worn camera footage without judicial permission, without any formal notice, without providing an opportunity to be heard to the various potentially interested parties, and without any standards other than their apparent political interest in doing so.

For example, on September 14, 2017, Respondents posted 34 minutes of footage from four police officer’s body-worn cameras on the internet and distributed the footage to journalists at a hastily called press conference that same day. The footage showed a tense and protracted standoff from eight days earlier between the police and a person holding a real knife and what turned out to be a fake gun. The police officers fatally shot the subject of the video after he aimed the gun with what appeared to be a laser sight at one of the police officers. Respondents posted this footage on the internet over the objections of the Bronx District Attorney tasked with investigating the incident, the police officers involved in the incident, and Petitioner. Neither the Mayor nor the Commissioner offered any explanation for why they believed they could release BWC footage unilaterally. Nor did anyone from the City of New York (the “City”) or the New York City Police Department (“NYPD”) explain how the particular footage had been selected. Since that time, Respondents have continued to publically release BWC footage without following the required process.

The NYPD has retroactively attempted to defend their illegal release of this protected footage by claiming that the NYPD only “utilize[d] the [protected] raw BWC footage in order to create a *new record* that contains redactions . . . [that] will be separate from the raw BWC

footage and will be created for the sole purpose of disclosing to the public a depiction of the relevant events leading up to and including the critical incident.” The NYPD argues that while “[t]he original record . . . remains exempt under §50-a(1); . . . the new record is not a personnel record and therefore, not subject to §50-a(1).” This is beyond nonsensical. Were it true, CRL § 50-a could always be circumvented by simply releasing a selective but incomplete collection of an officer’s personnel records, repackaging copies of those records, or summarizing their contents. Under such an Orwellian construction, CRL § 50-a would effectively cease to exist. Moreover, Respondents’ approach is in direct conflict with recent First Department precedent confirming that “releasing a summary of protected records would serve to defeat the legislative intent of [CRL § 50-a] in exempting those records from disclosure.” (*Luongo v Records Access Officer, Civilian Complaint Review Bd.*, 150 AD3d 13, 23 [1st Dept 2017].)

This is not only an indefensible construction of the statute, it invites a cascade of highly problematic issues and unintended consequences. For example, if CRL § 50-a is so easily circumvented by Respondents, it can just as easily be circumvented by others using FOIL to secure access to any and all BWC footage of police interaction with the public, including footage from inside people’s residences and from ultimately innocent interactions. This would amount to an unprecedented and unintended invasion of privacy for New York residents. If CRL § 50-a did not already prohibit such potential abuse, a statute would surely be passed to do so. But CRL § 50-a does preclude such abuses as well as those by the Mayor and Commissioner detailed herein, and The Patrolmen’s Benevolent Association of the City of New York, Inc. (“PBA” or “Petitioner”) brings this lawsuit to force the Mayor and Commissioner to comply with that law.

FACTUAL BACKGROUND

A. The Applicable Regulatory Scheme

New York Civil Rights Law § 50-a governs the treatment of, among other things, “personnel records of police officers.” It states:

All personnel records used to evaluate performance toward 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.

(Civil Rights Law § 50-a.) The Court of Appeals has explained that whether a document qualifies as a personnel record “depends upon its nature” and “not its physical location.” (*Matter of Prisoners’ Legal Servs. of N.Y. v N.Y. State Dept of Corr. Servs.*, 73 NY2d 26, 32 [1988].) As the Court of Appeals clarified 30 years ago, a document is a personnel record if it can be “used to evaluate performance toward continued employment or promotion,” including documents that are “relied upon in evaluating [an] employee’s performance.” *Id.* Since then, New York courts have consistently applied a broad definition to what constitutes a personnel record. (*See, e.g., Luongo*, 150 AD3d 13 [personnel records include documents “of significance to a superior in considering continued employment or promotion”].)

Along the same lines, New York Public Officers Law § 87(2)(f) states that the NYPD or any other agency should “deny access to records or portions thereof that . . . if disclosed could endanger the life or safety of any person.” (Public Officers Law § 87.)

In addition, the City Administrative Procedure Act (“CAPA”) requires agencies such as the NYPD follow certain procedures in connection with the implementation of rules of general applicability that implement or apply law or policy. (New York City Charter §§ 1041-47.) One

of the central tenets of CAPA is that the public must be given notice and an opportunity to comment about agency rules. (New York City Charter § 1044.)

B. The Background of the Body-Worn Camera Program

In January 2008, the Center of Constitutional Rights filed a class action lawsuit against the City to challenge the NYPD's purported practices of racial profiling and unconstitutional stop and frisks of New York City residents. (*Floyd v City of New York*, 959 F Supp 2d 540 [SDNY. 2013].) On August 12, 2013, Judge Shira Scheindlin found, by a preponderance of evidence, that the City engaged in a years-long practice of unconstitutional and racially discriminatory stop and frisks (the "Liability Opinion"). (*Id.*) Judge Scheindlin also issued an opinion appointing an independent monitor and directing the development and implementation of a series of reforms (the "Remedy Opinion"). (*Floyd v City of New York*, 959 F Supp 2d 668 [SDNY 2013]; *see also* Affirmation of Alexander B. Simkin in Support of Verified Petition ["Simkin Aff."] Ex. A.) Under the Mayor's administration, the City agreed to drop its appeal and begin the remedial process ordered by the court. (Petitioner's Verified Petition ["Pet."] ¶ 35.)

One of the remedies ordered was the use of body-worn cameras on a pilot program basis. (Simkin Aff. Ex. A.) Judge Scheindlin explained that the use of body-worn cameras would alleviate some of the difficulty of "judging in hindsight what happened during an encounter between a civilian and the police." (*Id.*) Judge Scheindlin also explained that "the NYPD's duty to monitor stop and frisk activity is . . . hamstrung by supervisors' inability to review an objective representation of what occurred" and that the use of body-worn cameras could alleviate that concern. (*Id.*) Judge Scheindlin specifically tasked the independent monitor with "establish[ing] procedures for the review of stop and frisk recordings by supervisors and, as appropriate, more senior managers." (*Id.*)

Thereafter, the City desired to expand the scope of the BWC program to cover the department's entire patrol force. (Pet. ¶ 41.) In or around April 2017, the City and the NYPD implemented "Operations Order 21" codifying a police officer's obligations with respect to body-worn cameras. (Simkin Aff. Ex. C.) Operations Order 21 explains that the BWC program "will serve to provide a contemporaneous, objective record of encounters, facilitate review by supervisors, foster accountability, and encourage lawful and respectful interactions between the public and the police." (*Id.*) It makes clear that "[t]he BWC and related hardware/software, as well as video, audio and data captured by the BWC, irrespective of the content, are at all times the property of the [New York City Police] Department." (*Id.*) It also explains that, in the event of a firearms discharge, a police officer is required to provide his body-worn camera to the "Force Investigation Division, Internal Affairs Bureau, or other supervisor in charge of the investigation." (*Id.*) The Operations Order further requires supervisors to review body-worn camera video "in conformance with the self-inspection program" and to "[p]eriodically review video in addition to the self-inspection program, as appropriate, to provide positive feedback and address any performance deficiencies observed." (*Id.*) In short, the primary reason a police officer has to wear a camera is so that his direct supervisor(s) and other superiors can evaluate his performance in doing his job.

C. The NYPD, the City, the State, and the State Legislature All Understand that Body-Worn Camera Footage is Subject to Civil Rights Law § 50-a

From the start, there has been a consensus that Civil Rights Law § 50-a applies to BWC videos. For example, in April 2015, a reporter for Time Warner Cable News NY1 filed a Freedom of Information Law ("FOIL") request seeking access to BWC videos taken during five week-long periods. (*Matter of Time Warner Cable News NY1 v N.Y.C. Police Dept.*, 53 Misc 3d 657 [Sup Ct NY Cty 2016], *on reargument*, [Sup Ct NY Cty Apr. 7, 2017].) The NYPD

objected to producing the requested footage on several grounds, including CRL § 50-a. (*Id.* at 658.) In court, the NYPD, represented by the City, argued for the applicability of CRL § 50-a to the BWC videos. (Simkin Aff. Ex. B.) The NYPD argued that “Civil Rights Law § 50-a governs the right of privacy as it relates to the personnel records of police officers.” (*Id.*) The NYPD explained that “[c]ourts have interpreted the phrase personnel records in Civil Rights Law § 50-a broadly to include various categories of police records, including documents relating to the investigation of charges of harassment or use of force by police officers.” (*Id.*) Thus, the NYPD concluded that, “where the requested footage will be used or is being used in a CCRB or other disciplinary proceeding against a police officer, Civil Rights Law § 50-a(1) explicitly establishes the confidentiality of such records, and prohibits disclosure without the written consent of the police officer or when mandated by lawful court order.” (*Id.*)

Members of the legislature similarly appear to hold the view that Civil Rights Law § 50-a applies to BWC footage. For example, on August 7, 2015, State Senator Squadron introduced Senate Bill 6030-A to amend Civil Rights Law § 50-a to exclude “recordings made by body cameras worn by an officer.” (Simkin Aff. Ex. M.) The associated memorandum explains that the purpose of the bill is to “[e]xclude[] video camera recordings and raw data generated from such recordings generated from cameras worn or used by police from being included as personnel records.” (Simkin Aff. Ex. M.) Assemblymember Quart introduced a substantially identical bill on August 24, 2015 (Assembly Bill 8368). (Simkin Aff. Ex. N.) Senate Bill 6030-A and Assembly Bill 8368 failed to advance. (Simkin Aff. Exs. M, N.) Both bills were reintroduced in 2017 and neither has become law. (Simkin Aff. Exs. O, P.)

In addition, on January 17, 2017, State Senator Parker introduced Senate Bill 2850, which proposes to amend CRL § 50-a so that it applies only to personnel records “created and

used *solely* to evaluate performance.” (Simkin Aff. Ex. Q.) The accompanying memorandum explains that the purpose of the bill is to “narrow the exception preventing access to police . . . officer records to allow public scrutiny of all public employees.” (Simkin Aff. Ex. Q.) The memo explains that “[u]nder the current law all footage captured by ‘bodycams’ could be used for evaluating the performance of [police officers]. Therefore the 50-a exemption could be used to prevent any footage from being released to the public.” (*Id.*) Senate Bill 2850 also has not passed. (Simkin Aff. Ex. Q.)

On January 27, 2017, Assemblymember O’Donnell introduced Assembly Bill 0333 seeking to repeal CRL § 50-a in its entirety. (Simkin Aff. Ex. R.) The accompanying memorandum states that CRL § 50-a “has been expanded in the courts to allow police departments to withhold from the public virtually any record that contains any information that could conceivably be used to evaluate the performance of a police officer.” (*Id.*) Prior to this bill, Assemblymember O’Donnell had introduced many prior bills to amend or repeal CRL § 50-a. (Pet. ¶ 72.) For example, on May 20, 2015, he proposed Assembly Bill 07611 and the accompanying memorandum states that the justification for the bill is that “there has been recent discussion of having police officers use ‘body-cams,’ video cameras that capture events involving law enforcement officers. Under the current law, an agency could argue that all footage captured by ‘bodycams’ could be used for evaluating the performance of these individuals. Therefore the 50-a exemption could be used to prevent any footage from being released to the public” (Simkin Aff. Ex. S.) According to press reports, the Mayor sent staff members to work directly with Assemblymember O’Donnell on his bills to either repeal or modify New York Civil Rights Law § 50-a. (Pet. ¶ 74.) But there was no support for the bills in

the State Senate, a body in which, according to Assemblymember O'Donnell, the Mayor has “no juice.” (Pet. ¶ 75.)

The City likewise understood and argued that CRL § 50-a applies to BWC footage. For example, in October 2016, the City acknowledged on its official website that “[s]everal appellate court decisions have held that personnel records, including summaries of disciplinary actions taken against law enforcement and other uniformed personnel, cannot be disclosed because of the confidentiality protections under Civil Rights Law Section 50-a.” (Pet. ¶ 78.) Mayor de Blasio himself was quoted as saying that he believed amendments to Civil Rights Law § 50-a were necessary to allow the City to disclose disciplinary records of police officers, stating that “[w]ithout significant changes to this statute, the City remains barred from providing New Yorkers with the transparency we deserve.” (Pet. ¶ 79.) Commissioner O'Neill was quoted in the same press release as stating “[i]t is my hope we can work with the State legislature and the Governor on the proposed 50-a amendment.” (Pet. ¶ 80.) Likewise, the State's Committee on Open Government confirmed as far back as May 2015 that CRL § 50-a “would likely serve as the basis to deny access to police body camera video in its entirety.” (Simkin Aff. Ex. K.)

D. Respondents' Arbitrary and Capricious Decision to Release Body-Worn Camera Footage in Violation of Applicable Law

Despite the fact that all understood that CRL § 50-a prohibited the release of BWC footage absent a court order or statutory amendment, beginning in September 2017, the Mayor and Commissioner unilaterally began releasing such footage when it suited them without any court order, statutory amendment, or even any purportedly internal regulation, process, or standard. On September 6, 2017, a man named Miguel Antonio Richards (“Richards”) was shot and killed by police officers in the Bronx. (Pet. ¶ 83.) Officers from the 47th Precinct were sent to Richards' home when his landlord told police Richards was acting erratically. (Pet. ¶ 84.)

Upon arriving, Richards threatened the police officers with a real knife and what turned out to be a fake gun. (Pet. ¶ 85.) After a tense and protracted standoff, Richards was fatally shot after he aimed the gun with what appeared to be a laser sight at one of the police officers. (Pet. ¶ 86.) This was the first death caught by a NYPD body-worn camera. (Pet. ¶ 87.)

The Mayor, the City and the NYPD were under intense political pressure to release the footage of the shooting. The Mayor was questioned about the incident at a press conference the very next day and he stated that he had already spoken with the Commissioner several times since it happened. (Pet. ¶ 89.) At the press conference, the Mayor acknowledged that the Bronx District Attorney needed to be consulted before the City could determine how to handle the BWC footage of the incident. (Pet. ¶ 90.)

Shortly after the shooting, the Commissioner consulted with Bronx District Attorney Clark concerning a possible release of the BWC footage of the shooting. (Pet. ¶ 91.) District Attorney Clark objected to the release of the BWC footage prior to the completion of her investigation. (Pet. ¶ 92.) She explained that “[r]eleasing videos to the public during the early stages of an investigation may resolve some questions about the incident, but it may compromise the integrity of the investigation.” (*Id.*)

Ignoring the wishes of District Attorney Clark, the fact that no amendment of Civil Rights Law § 50-a had passed, the objections of the PBA, the objections of the individual police officers, and the risk of danger to police officers and others, Commissioner O’Neill nevertheless, at the direction of the Mayor and others at the City, decided to immediately release the BWC footage of the Richards shooting. (Pet. ¶ 93.) Commissioner O’Neill explained that his goal was to release the footage as quickly as possible. (Pet. ¶ 94.) In an effort to release the footage as quickly as possible, the Commissioner ignored the required process set forth in CRL § 50-a.

(Pet. ¶ 95.) The Commissioner did not get a court order authorizing the release of the BWC footage as required by CRL § 50-a. (Pet. ¶ 96.) He also did not obtain the permission the police officers whose body-worn cameras captured the shooting. (*Id.*) The NYPD and the City offered no explanation for their about-face and no rationale for why BWC footage of an officer engaged in a shooting was suddenly not protected by CRL § 50-a. (Pet. ¶ 97.) By ignoring the requirement to go to court, the Commissioner denied all interested parties an opportunity to be heard concerning the possible release of the BWC footage. (Pet. ¶ 98.) The Commissioner was likely directed to release the BWC footage as quickly as possible by the Mayor or others working for the Mayor based on the belief that doing so would benefit the Mayor politically. (Pet. ¶ 99.)

On September 14, 2017, Commissioner O'Neill wrote a letter addressed "[t]o the men and women of the New York City Police Department" (that was published in the press) purporting to explain his illegal decision to release the BWC footage. (Simkin Aff. Ex. F.) He stated that the footage would be posted on the internet and would also be distributed to unidentified "media" at a press conference "scheduled for 1400 hours today." (*Id.*) The Commissioner explained that his decision to publically release the BWC footage without any public process "is clearly precedent-setting." (*Id.*) He stated that "[r]eleasing footage from critical incidents like this will help firmly establish your restraint in the use of force, and will plainly exhibit to the public your reasonable and judicious use of force when that force becomes necessary." (*Id.*) In other words, Commissioner O'Neill confirmed that his decision to release BWC footage is designed to, at least in part, allow people to evaluate and monitor an individual police officer's performance of his or her duties. (Pet. ¶ 99.)

Respondents released a total of 34 minutes of footage from four officers' cameras (16 minutes and 24 seconds from one officer, 15 minutes and 26 seconds from a second officer, 1

minute and 49 seconds from a third officer, 1 minute and 1 second from a fourth officer, plus an additional “compilation” video and two additional “slow motion” videos). (Simkin Aff. Ex. T.) Respondents did not explain how they selected which footage to release and what footage to withhold. (Pet. ¶ 116.) Respondents did not explain who was involved in the decision as to what footage to release (other than the Commissioner). (Pet. ¶ 118.) Respondents did not explain what factors they considered in evaluating what footage to release and what footage to withhold. (Pet. ¶ 119.)

E. Respondents Reaffirm Their Practice of Illegally Releasing Body-Worn Camera Footage a Second Time

Following Respondents’ September 14 “precedent-setting” release of BWC footage, Respondents have continued to ignore applicable law by releasing BWC footage on an arbitrary basis when the Mayor and/or Commissioner decides it suits them to do so. On October 22, 2017 a man named Paris Cummings (“Cummings”) was shot and wounded by a police officer in Hamilton Heights. (Pet. ¶ 123.) Two police officers responded to a call for a man who was attempting suicide. (Pet. ¶ 124.) After they knocked on his door, Cummings charged at the police officers with two knives. (Pet. ¶ 125.) The officers backed into the hallway and told Cummings several times to drop the knife. (Pet. ¶ 126.) When Cummings failed to heed their warnings, one of the officers fired a single shot that struck Cummings in the leg. (*Id.*) Cummings had already stabbed himself before he was shot. (Pet. ¶ 127.) Afterward, the police officers performed first aid and called for an ambulance. (Pet. ¶ 128.) Cummings sustained a non-life threatening injury. (*Id.*)

By the very next day, the Commissioner had already decided to release the BWC footage, stating to the press that “[w]e’ll definitely release it.” (Pet. ¶ 129.) Respondents then, in fact, released 33 seconds of BWC footage of the Cummings shooting on November 27, 2017.

(Simkin Aff. Ex. U.) Respondents did not receive a court order authorizing the release of the BWC footage of the Cummings shooting. (Pet. ¶ 134.) Respondents also did not receive the consent of the police officer whose body-worn cameras captured the footage (who specifically objected in writing to such release). (Pet. ¶ 135.) At the time Respondents released the Cummings BWC footage, the NYPD's Force Investigation Division still had the matter under review and had yet to decide if the shooting was justified. (Pet. ¶ 136.)

Respondents continued to refuse to explain basic facts about its process and procedure, such as how it selected which footage to release, who was involved in that decision, or what factors he or she or they considered. (Pet. ¶¶ 137-139.)

F. Respondents Illegally Release Body-Worn Camera Footage a Third Time

On November 13, 2017, Cornell Lockhart was fatally shot by the police in a Bronx home for the mentally ill. (Pet. ¶ 142.) Two police officers were responding to a report of two women stabbed at the Hughes House in Tremont. (Pet. ¶ 143.) The police officers arrived to find Lockhart in the lobby and soon realized he had stabbed the two female security guards. (Pet. ¶ 144.) The police officers ordered Lockhart to drop a 4-inch steak knife. (Pet. ¶ 145.) The police officers repeated these commands more than 20 times. (Pet. ¶ 146.) Lockhart refused to drop the knife and stepped towards the police officers with the knife displayed in his right hand. (Pet. ¶ 147.) Both officers opened fire, hitting Lockhart. (Pet. ¶ 148.)

On November 29, 2017, Respondents released two BWC videos, one 46 seconds and the other 43 seconds, of the Lockhart shooting. (Simkin Aff. Ex. V.) Respondents did not receive a court order authorizing the release of the BWC footage of the Lockhart shooting. (Pet. ¶ 154.) Respondents also did not receive the consent of the police officers whose body-worn cameras captured the footage (each of whom specifically objected to the release in writing). (Pet. ¶ 155.) At the time Respondents released the Lockhart BWC footage, the NYPD's Force Investigation

Division still had the matter under review and had yet to decide if the shooting was justified.

(Pet. ¶ 156.) The shooting was also being investigated by the Bronx District Attorney. (Pet. ¶ 157.)

Respondents continued to keep secret how they selected which footage to release, who was involved in that decision, and what factors he or she or they considered. (Pet. ¶¶ 158-160.)

G. The NYPD's Post-Release Attempt to Justify Its Illegal Conduct

In a letter dated December 5, 2017, the NYPD finally responded to letters from counsel for the police officers involved in the Richards, Cummings, and Lockhart shootings, each of whom objected to the release of his or her body-worn camera footage. (Simkin Aff. Exs. D, G, H, I.) The NYPD's December 5 letter acknowledged that "[c]ourts have taken a very broad view on what constitutes a 'personal record.'" (*Id.*) The NYPD articulated its position that it is using "raw BWC footage in order to create a *new record* that . . . will be separate from the raw BWC footage and will be created for the sole purpose of disclosing to the public a depiction of the relevant events leading up to and including the critical incident." (*Id.*) The NYPD conceded that "[t]he original record, in relevant circumstances, remains exempt under §50-a(1); however the new record is not a personnel record and, therefore, not subject to §50-a(1)." (*Id.*) In other words, the NYPD's position appears to be that it can take a copy of a confidential record and make some unspecified alterations to it in order to transform it into a "new" non-confidential record. (Pet. ¶ 167.) The NYPD's December 5 letter also offered the alternative argument that CRL § 50-a does not apply to the records at issue because they consist of information that is "neutral and [does] not contain any invidious implications capable facially of harassment or degradation of the officer[.]" (Simkin Aff. Ex. I.) In a letter dated December 19, 2017 (and received December 27, 2017), the NYPD's Deputy Commissioner of Legal Matters, Lawrence Byrne, responded to Petitioner's September 14, 2017 letter objecting to Respondents' release of

BWC footage without following the procedures set forth in CRL § 50-a. (Simkin Aff. Ex. J.)

Mr. Byrne reiterated both of the Commissioner's baseless after-the-fact arguments for why the NYPD's conduct was legal. (*Id.*)

Not surprisingly, Respondents have never publically articulated these questionable justifications for their conduct.

H. Respondents Intend to Continue Their Illegal and Arbitrary Release of BWC Footage

Following the release of footage from police officers' body-worn cameras in connection with the Richards, Cummings, and Lockhart shootings and in light of its December 5 and December 19 letters, it is now clear that Respondents intend to continue to illegally and prematurely release BWC footage in violation of CRL § 50-a and other applicable law. Judicial relief is necessary and appropriate in order to protect the rights of the PBA's members and the general public, all of whom are harmed by Respondents' illegal and arbitrary conduct.

ARGUMENT

I. Respondents' Release of BWC Footage is in Violation of Law Because it Violates Civil Rights Law § 50-a

There is no dispute that Respondents did not follow the procedures set forth in Civil Rights Law § 50-a in connection with their release of BWC footage. Accordingly, if the Court agrees that the released body-worn camera footage constitutes a "personnel record" as that term is used in CRL § 50-a then Respondents' conduct was, by definition, made in violation of lawful procedure. (*See* CPLR 7803 (court should reverse an agency determination "made in violation of lawful procedure"); *see also* *Burke v Sugarman*, 35 NY2d 39, 45 [1974] [agency decisions that are "contrary to law" should be reversed].)

A. A Police Officer's Body-worn Camera Footage Is a Personnel Record

The issue of what constitutes a “personnel record” as that term is used in New York Civil Rights Law § 50-a has been extensively addressed by the courts. The plain text of the statute says that a “personnel record” is one that could be “used to evaluate performance toward continued employment or promotion.” (Civil Rights Law § 50-a.) In 1988, the Court of Appeals explained that there is no “other language explaining or qualifying what is covered by the term ‘personnel records’ except that such records must be under the control of the particular agency or department and be used to evaluate performance toward continued employment or promotion.” (*Matter of Prisoners' Legal Servs. of N.Y. v N.Y. State Dept of Corr. Servs.*, 73 NY2d 26, 31 [1988].) The Court explained that “whether a document qualifies as a personnel record under Civil Rights Law § 50-a depends upon its nature and its use in evaluating an officer's performance – not its physical location or its particular custodian.” (*Id.* at 32.) In that case, the Court of Appeals held that grievances against correction officers and the administrative decisions relating thereto constitute “personnel records, used to evaluate performance toward continued employment or promotion.” (*Id.* at 35.) The Court explained that such records “are clearly relied upon in evaluating the employee's performance” and are “of significance to a superior in considering continued employment or promotion.” (*Id.* at 31-32.)

In 1999, the Court of Appeals addressed the issue again in *Matter of Daily Gazette Co. v City of Schenectady* (93 NY2d 145 [1999]) wherein it held that CRL § 50-a applied to records regarding disciplinary action against 18 police officers arising from an incident where the police officers, celebrating a bachelor party, became involved in a confrontation with two civilians in an automobile. The Court of Appeals reaffirmed that CRL § 50-a “unambiguously defines the records that are immune from indiscriminate disclosure.” (*Id.* at 154.) The Court explained that “[t]he Legislature did not choose to include news gathering organizations within the statutorily

exempted class entitled to automatic access, despite their important role in fulfilling the public interest in open government.” (*Id.*; *see also id.* at 155 [“The legislative history . . . amply demonstrates awareness that Civil Rights Law § 50-a . . . would have the effect of insulating the kind of disciplinary records sought here from disclosure upon mere request.”].) The Court made clear that CRL § 50-a “sets up a legal process” that needs to be followed “whereby the confidentiality of the records may be lifted by a court, but only after an in camera inspection and affording affected parties notice and an opportunity to be heard.” (*Id.* at 145.) It is undisputed that Respondents did not follow this process in this case.

As recently as March 2017, the First Department had the opportunity to address whether a summary of information pertaining to CCRB-substantiated complaints against a police officer constituted “personnel records.” (*Luongo v Records Access Officer, Civilian Complaint Review Bd.*, 150 AD3d 13 [1st Dept 2017].) The First Department, citing to *Matter of Prisoners’ Legal Servs.* (73 NY2d 26), reaffirmed that the only relevant question is whether the records are “under the control of the particular agency or department” and whether they are of the type that are “used to evaluate performance towards continued employment or promotion.” (*Luongo* at 19.) The *Luongo* Court found that the requested information constituted a “personnel record” and noted that since CRL § 50-a’s enactment, “each Judicial Department has had the occasion to address the issue of whether civilian complaints constitute ‘personnel records’ within the meaning of Civil Rights Law § 50-a, and each has held that information similar to that sought here falls squarely within the statutory exemption.” (*Id.* at 20.)

Indeed, the NYPD itself has admitted that “[c]ourts have interpreted the phrase personnel records in Civil Rights Law § 50-a broadly to include various categories of police records, including documents relating to the investigation of charges of harassment or use of force by

police officers.” (Simkin Aff. Ex. B.); *see also* (Simkin Aff. Ex. J.) (“[S]ince the creation of § 50-a in 1976, the Courts have taken a very broad view on what constitutes a ‘personnel record.’”)

1. The Purpose of the BWC Program Is To Monitor Police Officers’ Performance, Making BWC Footage, By Definition, a Personnel Record

As the Court of Appeals has held, “whether a document qualifies as a personnel record under Civil Rights Law § 50-a depends upon its nature and its use in evaluating an officer’s performance – not its physical location or its particular custodian.” (*Prisoners’ Legal Servs.* at 32.) “Proof that information was generated for the purpose of assessing an employee’s alleged misconduct brings that information within the protection of Civil Rights Law § 50-a(1).” (*Hughes Hubbard & Reed LLP v Civilian Complaint Review Bd.*, 53 Misc 3d 947, 958 [Sup Ct Kings Cty 2016]; *see also Luongo*, 150 AD3d at 21.) The purpose of requiring police officers to wear cameras is to allow their supervisors and other superiors to evaluate their performance. This makes them “personnel records” regardless of where they are physically stored or who is in charge of processing them.

The NYPD’s body-worn camera program arises out of the August 2013 orders of Judge Shira Scheindlin in the case captioned *Floyd v City of New York*, which involved a challenge to the NYPD’s stop and frisk program. The order in that case explained that requiring police officers to wear body-worn cameras would alleviate some of the difficulty of “judging in hindsight what happened during an encounter between a civilian and the police.” (*Floyd v City of New York*, 959 F Supp 2d 668, 685 [SDNY 2013]; *see also* Simkin Aff. Ex. A.) The order stated that “the NYPD’s duty to monitor stop and frisk activity is similarly hamstrung by supervisors’ inability to review an objective representation of what occurred” and specifically tasked the independent monitor with “establish[ing] procedures for the review of stop and frisk recordings by supervisors and, as appropriate, more senior managers.” (*Id.*)

The NYPD has since expanded the body-worn camera program beyond that required by the *Floyd* order and the Operations Order governing the BWC program confirms that the purpose of the BWC program is to “provide a contemporaneous objective review of encounters, *facilitate review by supervisors, foster accountability*, and encourage lawful and respectful interactions between the public and the police.” (Simkin Aff. Ex. C.) (Emphasis added.)

There can thus be no dispute that the reason BWC footage exists is so that it can be “used to evaluate [a police officer’s] performance toward continued employment or promotion.” (Civil Rights Law § 50-a.) Under the law, there is no requirement that the record “actually [be] relied on in a decision-making process related to the relevant officer’s continued employment or promotion.” (*Matter of Hearst Corp. v N.Y. State Police*, 132 AD3d 1128, 1129 [3d Dept 2015].) Indeed, in *Matter of Time Warner Cable News NY1 v N.Y.C. Police Dept.*, the NYPD, represented by the City, specifically argued for the applicability of Civil Rights Law § 50-a to body-worn cameras. (Simkin Aff. Ex. B.) The NYPD argued that CRL § 50-a applies to BWC footage because it “may capture incidents that are the subject of a Civilian Complaint Review Board (‘CCRB’) complaint, or some other disciplinary proceeding.” (*Id.*) Accordingly, it is clear that a police officer’s body-worn camera footage constitutes a “personnel record.”

2. A Police Officer’s Body-worn Camera Footage is Actually Used To Evaluate His or Her Performance

“[S]o long as a document was used—at any time during the officer’s employment—to evaluate the officer for promotion or continued employment, it is exempt from disclosure as a personnel record.” (*Matter of Hearst Corp. v N.Y. State Police*, 109 AD3d 32, 35 [3d Dept 2013]; *see also Hughes Hubbard & Reed LLP*, 53 Misc 3d at 958 [same].) BWC footage is, as a matter of undisputed fact, actually used to evaluate a police officer’s continued employment or promotion.

The Operations Order governing the NYPD's body-worn camera program requires supervisors to review body-worn camera video generally "in conformance with the self-inspection program" and to "[p]eriodically review video in addition to the self-inspection program, as appropriate, to provide positive feedback and address any performance deficiencies observed." (Simkin Aff. Ex. C.) Under the self-inspection program, police sergeants are required to "view a total five (5) videos recorded by their assigned Police Officers in their entirety" on a monthly basis. (*Id.*) For each video, the police sergeant is required to answer a series of questions concerning the police officer's performance such as whether "the officer appropriately appl[ied] the law and Department procedures, including but not limited to the law and Department procedures for arrests, summonses, stops, frisks and searches." (*Id.*) The police sergeant's reports are then further reviewed by the Platoon Commander or Special Operations Lieutenant, as appropriate. (*Id.*) Furthermore, in the event of a firearms discharge (which all of the BWC footage released to date involve), a police officer is required to provide his body-worn camera to "Force Investigation Division, Internal Affairs Bureau, or other supervisor in charge of the investigation." (*Id.*)

B. The Particular BWC Footage Released Is Indisputably Being Used To Evaluate The Performance of the Relevant Police Officers

Even if the Court does not agree that footage from a police officer's body-worn camera constitutes part of his or her "personnel record" generally, there can be no dispute that the particular BWC footage at issue is being used to evaluate each of the implicated police officer's performance toward continued employment or promotion. Bronx District Attorney Darcel Clark confirmed that her investigation of the police officers who shot Richards was still ongoing at the time their body-worn camera footage was released to the public. There can be no dispute that the BWC footage of the Richards shootings was and will be used by the supervisors and superiors of

the relevant police officers to evaluate their continued employment or promotion. Likewise, the NYPD's Force Investigation Division still had both the Cummings and Lockhart shootings under review and had yet to decide if the shootings were justified at the time that the Cummings and Lockhart BWC footage was released. The specific footage that was released was, without a doubt, being used to evaluate the continued employment of the police officers involved in the shootings at the very time it was being distributed on the internet by Respondents.

In *Matter of Prisoners' Legal Servs.* (73 NY2d 26, 31 [1988]), the Court of Appeals held that “[d]ocuments pertaining to misconduct or rules violations by correction officers—which could well be used in various ways against the officers—are the very sort of record which, the legislative history reveals, was intended to be kept confidential.” It is thus particularly improper to release footage from a police officer’s body-worn camera while that officer is being investigated as to whether their conduct *depicted in that very same video* amounts to misconduct or some other form of rules violation. Courts have routinely held that personnel records include documents relating to “potential misconduct or rule violations by police officers.” (*Matter of Columbia-Greene Beauty Sch., Inc. v City of Albany*, 121 AD3d 1369, 1370 [3d Dept 2014]; *see also Luongo*, 150 AD3d at 21 [compiling cases holding that documents relating to potential police misconduct constitute “personnel records” under Civil Rights Law § 50-a.]) There is no reason for this Court to depart from this established precedent.

C. The Commissioner’s Purported Justification For Releasing the Body-worn Camera Footage Is Improper

In a December 5, 2017 letter to the lawyers for the police officers involved in the Richards, Cummings, and Lockhart shootings (each of whom specifically objected to the release of his or her body-worn camera footage), the NYPD made two arguments to attempt to justify its misconduct. First, it argued that it had not released the original raw footage from the body-worn

cameras but had instead released a copy of the footage with alterations, which it contended constituted a “new record . . . not subject to §50-a(1).” (Simkin Aff. Ex. I.) Second, the NYPD argued that Civil Rights Law § 50-a does not apply to records that consist of information that is “neutral and [does] not contain any invidious implications capable facially of harassment or degradation of the officer.” The NYPD reiterated these arguments in a December 19 letter to Petitioner. (Simkin Aff. Ex. I.) Neither of the NYPD’s after-the-fact justifications is credible.

1. The Commissioner Cannot Circumvent Civil Rights Law § 50-a By Releasing a Copy of a Personnel Record and Calling it a “New Record”

The Commissioner’s argument that he can release a copy of a police officer’s raw BWC footage because the copy constitutes a “new record” has no support in the law. Indeed, the Commissioner’s argument has already been effectively rejected by multiple courts. For example, in *Luongo* (150 AD3d 13) the First Department rejected an argument that a “summary” of a personnel record was not protected by Civil Rights Law § 50-a. The *Luongo* court found that “CRL § 50-a makes no distinction between a summary of the records sought and the records themselves.” (*Id.* at 23.) The *Luongo* court explained that “[r]eleasing a summary of protected records would serve to defeat the legislative intent of the statute in exempting those records from disclosure.” (*Id.*) The *Luongo* court went on to say that “[i]t is hard to imagine that in a situation like this, where the legislative intent is so clear, the simple expedient of releasing a summary of protected records concerning substantiated complaints against an identified police officer can be used to circumvent the statute’s prohibitions on disclosure.” (*Id.*) Indeed, “[s]uch a facile means of totally undermining the statutory protection of section 50-a could not have been intended by the legislature.” (*Id.*, quoting *Daily Gazette*, 93 NY2d at 158.)

Likewise, in *Ohnmacht v State* (23 Misc 3d 1134(A) [Ct Cl 2009]) the court rejected an argument that “data” contained within personnel records could be released even if “the actual

documents themselves” are protected. The *Ohnmacht* court, like the *Luongo* court, found that “it would defeat the purpose of Civil Rights Law § 50-a to conclude that the statute protects the personnel documents themselves but not the information contained therein.” (*Id.*) The same is true here. Civil Rights Law § 50-a would be rendered completely meaningless if the Commissioner could simply make a copy of whatever personnel record he sought to disclose, designate his copy a “new record” and then release the same information that is contained in the confidential personnel record.

The Commissioner’s argument that the NYPD made unspecified “redactions” when making a copy is of no consequence. It is not clear what Respondents claim to have redacted from the footage they released but they certainly did not redact identifying information about the police officers. To the contrary, Respondents publically disclosed the identities of each police officer whose BWC footage was released. Moreover, in *Gannett Co. v Riley* (161 Misc 2d 321 [Sup Ct Monroe Cty 1994]) the court rejected an argument that a personnel record could be exempt under Civil Rights Law § 50-a if names or other identifying features are redacted. The *Gannett* court explained that “if the Legislature had intended that personnel records, otherwise exempt under Civil Rights Law § 50-a, could be obtained by simply redacting the names or other identifying features of the individuals, it would have so provided in the statute.” (*Id.* at 327.) Indeed, “[c]ommon sense indicates that simply redacting names might not be sufficient to protect the confidentiality of the records otherwise exempt under Civil Rights Law § 50-a.” (*Id.*)

The Court should thus reject Respondents’ argument that their release of BWC footage was proper because they released a “new record” rather than the raw footage.

2. BWC Footage of Police Shootings Is Not a Purely “Neutral” Record Incapable of Harassment

The Commissioner’s alternate argument that he can release the body-worn camera footage of the Richards, Cummings, and Lockhart shootings because such footage is “neutral” and incapable of leading to “harassment or degradation of the officer[s]” is similarly unavailing, in light of both the caselaw and as a matter of common sense. In *Matter of Daily Gazette Co. v City of Schenectady* (93 NY2d 145 [1999]), the Court of Appeals explained that the legislative intent of Civil Rights Law § 50-a “was to prevent release of sensitive personnel records that *could be used . . . for the purpose of harassing or embarrassing correction officers.*” (*Id.* at 157.) Accordingly, only “records having *remote or no such potential use . . . fall outside the scope of the statute.*” (*Id.* at 158.) There is no plausible argument that video footage of a police officer fatally shooting a civilian, even if entirely justified, is so neutral such that it cannot at least potentially be used to harass or degrade the relevant police officer (or other police officers).

Indeed, in *Luongo*, the court detailed how public dissemination of video of a police officer’s use of force against a citizen captured by a bystander (and thus not subject to CRL§ 50-a) led to a “death threat” to that police officer and required “around-the-clock police protection” for him and his family. (150 AD3D at 26.) As explained in more detail in Section II, below, addressing Public Officers Law § 87(2)(f), in addition to potentially harassing and embarrassing the police officers at issue, the release of BWC footage presents a very real and grave threat to their physical safety. The fact that this is not Respondents’ *purpose* in releasing the BWC footage is irrelevant. The law is clear that “[p]otential abusive exploitation of the damaging information in personnel records exists irrespective of how, at whose behest or for what purpose the information is released into the public domain.” (*Daily Gazette Co.*, 93 NY2d at 158.)

The Commissioner also cites to *Matter of Capital Newspapers Div. of Hearst Corp. v Burns* (109 AD2d 92, 94 [3d Dept 1985], *affd*, 67 NY2d 562 [1986]), but this case offers no support for Respondents. *Capital Newspapers* involved a reporter who was informed that members of the Albany police force were abusing their sick leave privileges and sought through FOIL tabulations of the number of days on which certain officers were absent from their scheduled employment. (109 AD2d 92.) First, the *Capital Newspapers* court held that such time records *did* constitute a personnel record. (*Id.*) While the court ultimately concluded that the time records were nevertheless subject to disclosure, the fact that a court order was obtained *prior to their release* only serves to highlight the impropriety of Respondents' conduct in this case. Second, the time records at issue in *Capital Newspapers* are plainly factually distinguishable from body-worn camera footage of a civilian being shot (in two of the three releases, fatally so). (See *Gannett Co.*, 161 Misc 2d at 327 [distinguishing records involving "an investigation of alleged misconduct by an officer against an inmate" from an "officer's time and leave records" because "[c]onsideration must . . . be given to the type of incident involved."].) Even where such use of force is justified (as it is here), it is still disturbing and could undoubtedly be used to harass a police officer.

D. Respondents Cannot Usurp The Legislature's Authority

Several members of the legislature have proposed multiple amendments to Civil Rights Law § 50-a to treat body-worn camera footage differently than other personnel records. For example, Assemblymember O'Donnell proposed Assembly Bill 07611 on May 20, 2015 to amend Civil Rights Law § 50-a. The bill's accompanying explanatory memorandum states that the justification for the bill is that

[T]here has been recent discussion of having police officers use 'body-cams,' video cameras that capture events involving law enforcement officers. Under the current law, an agency could

argue that all footage captured by ‘bodycams’ could be used for evaluating the performance of these individuals. Therefore the 50-a exemption could be used to prevent any footage from being released to the public.

(Simkin Aff. Ex. S.) Likewise, on August 7, 2015, State Senator Squadron introduced a bill (Senate Bill 6030-A) that would amend Civil Rights Law § 50-a to exclude “records made by body cameras worn by an officer.” (Simkin Aff. Ex. M.) The associated memorandum explains that the purpose of the bill is to “[e]xclude[] video camera recordings and raw data generated from such recordings generated from cameras worn or used by police from being included as personnel records.” (Simkin Aff. Ex. M.) A substantially identical bill (Assembly Bill 8368) was also introduced into the State Assembly by Assemblymember Quart on August 24, 2015. (Simkin Aff. Ex. N.) None of these bills were enacted into law. (Simkin Aff. Exs. M, N.) In 2017, a new round of bills were proposed by these same people and others to revise Civil Rights Law § 50-a. (Simkin Aff. Exs. O, P, Q, R.) None were enacted into law. (Pet. ¶¶ 65, 69, 76.)

Rather than wait for the legislative process to run its course, Respondents have decided to simply ignore a law they do not like. That is not the proper process. (*See* N.Y. Const. art. III, § 1 [“The legislative power of this state shall be vested in the senate and assembly.”]; *see also Under 21 v City of New York*, 65 NY2d 344, 356 [1985] [“[N]o matter how well-intentioned his actions may be, the Mayor may not unlawfully infringe upon . . . legislative powers . . .”]; *Bourquin v. Cuomo*, 85 NY2d 781, 793 [1995] [“Since such actions have not been adopted by the State Legislature, they violate the doctrine of separation of powers.”].)

II. Respondents’ Release of Body-Worn Camera Footage is in Violation of Law Because it Violates New York Public Officers Law § 87(2)(f)

Public Officers Law § 87(2)(f) exempts from disclosure any records that “if disclosed could endanger the life or safety of any person.” This exception applies when “a possibility of endangerment” has been demonstrated. (*Matter of Bellamy v N.Y.C. Police Dept.*, 87 AD3d 874,

875 [1st Dept 2011], *aff'd*, 20 NY3d 1028 [2013] [emphasis added]; *see also Luongo*, 150 AD3d 13 [“The respondent need not demonstrate the existence of a specific threat or intimidation, but rather a showing must be made of a ‘possibility of endangerment’ to invoke this exemption.”].) Respondents’ haphazard release of BWC footage from the Richards, Cummings, and Lockhart shootings immediately after each such incident puts the life and safety of several persons at risk.

First, Respondents’ release of BWC footage endangers the life and safety of the individual police officers whose body-worn camera footage was released. Friends and family of the individuals who were shot in the released footage can understandably have an emotional reaction to witnessing the last moments of their loved one’s life, even if the use of force was entirely justified (as it was in each incident here). Truly, anyone witnessing such videos can be impacted and, in such an emotional state, may improperly blame the specific police officer who happened to be present. Releasing BWC footage in the immediate aftermath of a shooting dramatically increases the likelihood of such an emotional reaction. In addition to possibly inflaming people, Respondents’ release of identifying information about each such police officer, including images of his face and any distinctive markings (such as tattoos), as well as the sound of his voice, makes it easier to identify him. This puts the relevant police officers at risk.

Second, Respondents’ release of BWC footage endangers the life and safety of police officers generally. It is a matter of public record that police officers have recently been intentionally targeted for violence, including murder, for nothing more than being police officers. This phenomenon has tragically resulted in the murders of several police officers in New York City by perpetrators inspired by sensationalized media characterizations of police officers, which are often fostered by groups with anti-law enforcement agendas. Respondents’ careless release

of the BWC footage at issue risks facilitating further sensationalized media characterizations and creates very real risks to the safety of all police officers.

Third, Respondents' release of BWC footage endangers the life and safety of other individuals captured on the BWC footage. For example, Cornell Lockhart stabbed two security guards prior to being shot by police. Had Lockhart survived being shot (as Cummings did), he could have found his life and safety at risk after being forced into the public spotlight by Respondents politically-motivated BWC footage release. The same could be true for others captured on film.

Accordingly, Respondents' release of BWC footage of the Richards, Cummings, and Lockhart shootings should have been prohibited under Public Officers Law § 87(2)(f). Respondents' failure to do so was arbitrary and capricious.

III. Respondents' Conduct is Either Arbitrary and Capricious or Violates CAPA

In addition to prohibiting an agency officer from making a decision that is in violation of law (discussed above), CPLR 7803 also does not allow an agency officer to make decisions that are "arbitrary and capricious" even if it is within the power of the agency to make such a decision. (CPLR 7803 (3).) "A determination of a body or officer is arbitrary and capricious if it neither adheres to its own prior precedent nor indicates its reason for reaching a different result on essentially the same facts." (6 NY Jur 2d Article 78 § 56.) Here, there appears to be no rhyme or reason to the Commissioner's decisions as to when to release a video, what portion(s) of the video to release, and how long to wait to make the release. With respect to the Richards shooting, Respondents released 34 minutes of footage from four different police officers eight days after the (fatal) shooting (plus a compilation video and two "slow motion" videos). (Simkin Aff. Ex. T.) With respect to the Cummings shooting, Respondents released 33 second of footage from one police officer 37 days after the (non-fatal) shooting. (Simkin Aff. Ex. U.) With respect

to the Lockhart shooting, Respondents released 89 seconds of footage from two police officers 17 days after the (fatal) shooting. (Simkin Aff. Ex. V.) The Commissioner claimed that determinations as to each release is being done on a “strict case-by-case” basis but Respondents have articulated *no reasons* for why the Richards, Cummings, and Lockhart shootings appear to be treated materially differently from each other (let alone from other incidents where no video was released). Respondents cannot immunize themselves from providing rational explanations for their decisions by simply saying they are making decisions on a “case-by-case basis.”

On the other hand, if Respondents have some secret rule-based reason for why 34 minutes of footage from one incident was released and 33 seconds from another, they are still acting improperly. The City Administrative Procedure Act applies to the NYPD. (New York City Charter § 1044.) It requires applicable city agencies (such as the NYPD) to make rules in public after a notice and comment period. (New York City Charter § 1043.) Here, the NYPD has publically explained no rule (or procedure or protocol or anything) articulating how it is making its decisions with respect to the potential release of BWC footage (or even who is involved in making the decisions). This “rulemaking process is mandated when an agency establishes precepts that remove its discretion by dictating specific results in particular circumstances.” (*DeJesus v Roberts*, 296 AD2d 307, 310 [1st Dept 2002].) It has plainly not been followed here.

IV. Allowing the City and the NYPD to Have Dictatorial Control Over The Release of BWC Footage Is Bad Public Policy

In addition to the myriad reasons why Respondents’ conduct is unlawful, it is also imprudent. Allowing the Mayor and Commissioner to release whatever BWC footage they want whenever it suits them without any checks and balances is terrible public policy.

For example, Respondents' decision to release body-worn camera footage of the Richards shooting mere days after it happened risked interfering with the then-ongoing criminal investigation. It is for this reason that the release of the Richards BWC footage was specifically opposed by the Bronx District Attorney. (Pet. ¶¶ 3, 5, 92.) The public release of BWC footage of an incident can interfere with a criminal investigation because it can allow witnesses to change their story in response to the video (or cause non-witnesses to pretend to have seen things they did not see). These concerns are particularly heightened when the City and the NYPD are allowed not only to make decisions as to *whether* to release video but also to make edits to the video and release selected portions based on their unilateral preferences.

This is, of course, not just bad for police officers but also for numerous other people. CRL § 50-a provides for a mechanism for all "interested parties" to have a say. Under the dictatorial approach advanced by Respondents, nobody other than the Mayor and the Commissioner are entitled to any input. That is not the law and is not good policy. The legislature is free to modify Civil Rights Law § 50-a so that a different procedure applies to body-worn cameras but, in the meantime, the law should be applied as written. Respondents are not above the law and the Court should not allow them to ignore it.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Court annul the determinations of Respondents to publically release BWC footage and prohibit Respondents' further release of BWC footage absent compliance with New York Civil Rights Law § 50-a.

Dated: New York, New York
January 8, 2018

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