UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Uniformed Fire Officers Association, et al.,

Petitioners/Plaintiffs,

-against-

Bill de Blasio, in his official capacity as Mayor of the City of New York, et al.,

Respondents/Defendants

-against-

Communities United for Police Reform,

Intervenor-Respondent/Defendant.

Case No. 1:20-cv-05441-KPF

MEMORANDUM OF LAW OF INTERVENOR-DEFENDANT COMMUNITIES UNITED FOR POLICE REFORM IN SUPPORT OF ITS MOTION TO DISMISS

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I. PRELIMINARY STATEMENT

Pursuant to Federal Rule of Civil Procedure 12(b)(6) and to this Court's August 28, 2020 Order, ECF No. 214, Intervenor-Respondent/Defendant Communities United for Police Reform ("CPR") hereby submits its Memorandum of Law in support of its Motion to Dismiss the Complaint in this action.[1]

For decades, records of police, fire, and corrections officer misconduct and discipline in New York have been shrouded in secrecy, obfuscated from disclosure by N.Y. C.R.L. § 50-a (repealed) ("§ 50-a"). Advocates have long sought reform and lobbied for the repeal of § 50-a. Officers' unions have used their power to stonewall those efforts. In June 2020, the New York State Legislature (the "Legislature") ended the secrecy of law enforcement disciplinary and misconduct records when it repealed § 50-a. The Legislature enacted a full repeal of the statute, considering but rejecting Plaintiffs' many arguments during the legislative hearings.

Plaintiffs ask this Court to circumvent the Legislature's clear intent in repealing § 50-a, asserting sweeping legal claims and broad-based privacy interests that would permanently bar release of the vast majority of the records the Legislature just made public. For the reasons stated in the City Defendants' Motion to Dismiss the Complaint, ECF No. 220, —which CPR joins—and the independent reasons stated herein, Plaintiffs' legal theories fail as a matter of law and the Complaint should be dismissed in its entirety.

II. FACTUAL AND PROCEDURAL BACKGROUND

Enacted in 1976, N.Y. C.R.L. § 50-a generally excluded from disclosure officer "records used to evaluate performance toward continued employment or promotion." Over time, the provision "expanded . . . to allow police departments to withhold from the public virtually any

[1] This Memorandum supplements the arguments already raised by the City Defendants in in their September 4, 2020 Memorandum of Law, ECF No. 220, which CPR incorporates herein by reference.

record that contains any information that could conceivably be used to evaluate the performance of a police officer."[2]

The statute and its broad interpretation wrought extraordinary injustice. It destroyed community trust and blocked victims of officer misconduct from obtaining information about those responsible, thus accountability for officer misconduct was often illusory. Yet, repeal proved difficult. The officers' unions stonewalled reform efforts. They used their considerable sway among lawmakers in Albany to block calls for repeal from the communities that bore the highest impact of § 50-a's secrecy.[3]

Finally, in Fall 2019, the New York State Senate held two hearings to consider repeal of § 50-a. State legislators heard testimony from a range of stakeholders concerning § 50-a's impact.[4] Law enforcement unions were resistant to reform efforts and they advanced the same arguments they do here, citing their members' privacy, safety and reputation. The hearings and debates during the Assembly and Senate votes expressly addressed the categories of records at issue in this case—at a June 9, 2020 Floor Debate, for example, several senators emphasized that repeal of § 50-a would presumptively make public officer records pertaining to "unsubstantiated" and "unfounded" claims public. N.Y. Senate, Floor Debate, at 1808-09, 1812-13, https://bit.ly/2FmWHkN (June 9, 2020) (exchange between Senators Ashkar and Bailey); *id.* at 1836 (Sen. Borrello); *id.* at 1850 (Sen. Gallivan); *id.* at 1857 (Sen. Sepulveda).

In June 2020, the New York State Legislature voted to repeal § 50-a. On June 12, 2020,

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[2] State of New York, Department of State Committee on Open Government, ANNUAL REPORT TO THE GOVERNOR AND STATE LEGISLATURE, 1, 3 (Dec. 2014), https://on.ny.gov/3fbCxGO.

[3] Ashley Southall, *4 Years After Eric Garner's Death, Secrecy Law on Police Discipline Remains Unchanged*, N.Y. TIMES (Jun. 3, 2018), https://nyti.ms/2DPr6YF.

[4] *See* Testimony for Oct. 17, 2019 Hr'g, N.Y. Senate Standing Committee on Codes, https://bit.ly/2DPhTzA; Testimony for Oct. 24, 2019 Hr'g, N.Y. Senate Standing Committee on Codes, https://bit.ly/2E099X0.

Governor Cuomo signed the bill into law. A week later, City Defendants pledged to release records that had for decades been shielded from public view. Tr. of June 17, 2020 Press Conference of Mayor Bill de Blasio, City of New York, https://on.nyc.gov/2DFqghb.

In response to § 50-a's repeal and the Mayor's pledge to release all records, Plaintiffs brought this suit, seeking to bar the release of a vague and broad category of records in misconduct disciplinary cases that are "non-final, unsubstantiated, unfounded, exonerated, or resulted in a finding of not guilty . . . and [those subject to] confidential settlement agreements." ECF No. 10-2 at 2.

Plaintiffs advance a laundry list of legal theories in support of their extraordinary requests for relief. They claim release is barred by their Collective Bargaining Agreements ("CBAs"); the Due Process and Equal Protection Clauses of the United States and New York State Constitutions; and past settlement agreements. ECF No. 10-2 at 2. They allege that actions taken by City Defendants to effectuate the § 50-a repeal are "erroneous" and "arbitrary and capricious." *Id.* at 20.

Plaintiffs sought both preliminary and permanent injunctive relief against disclosure of any record "that implicate[s] the privacy and safety concerns of officers." *Id.* at 26-33.

But, after reviewing briefing on the issues and hearing argument, on August 21, 2020, the Court denied—with one limited exception—Plaintiffs' request for a preliminary injunction. ECF No. 197.

Now, the City Defendants and CPR move to dismiss. As explained in the City's brief, ECF No. 220, and further elaborated here, all of Plaintiffs' claims are meritless.

III. ARGUMENT

A. SUMMARY OF ARGUMENT

Where a complaint consists merely of "threadbare recitals of a cause of action's elements, supported by mere conclusory statements," this Court must not accept the Complaint's allegations as true. *Rosado-Acha v. Red Bull Gmbh*, No. 15 CIV. 7620 (KPF), 2016 WL 3636672, at *11 (S.D.N.Y. June 29, 2016) (citing *Ashcroft v. Iqbal*, 556 U.S.662, 663 (2009)). Plaintiffs' claims lack the legally required specificity. Rather, Plaintiffs' Complaint is replete with generalities and vague allegations. They posit that they will suffer harms—but generally present only a parade of hypothetical horribles that are far from plausible.

And even to the extent the Complaint alleges any legally protectable interest, nothing in the Complaint establishes that disclosure will result in plausible harm to Plaintiffs' interests. *See In re Elevator Antitrust Litig.*, 502 F.3d 47, 50 (2d Cir. 2007) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S., 544, 570 (2007)). ("While *Twombly* does not require heightened fact pleading of specifics, it does require enough facts to 'nudge [a plaintiff's] claims across the line from conceivable to plausible.'").

As to Plaintiffs' stigma plus claims, those are barred by New York Civil Rights Law § 74 ("§ 74"), which provides immunity against claims based upon the fair and accurate reporting of official proceedings, and by New York common law immunizing government officials from statements made in the course of their official duties.

Plaintiff's claims under New York Civil Practice Law and Rule § 7803(3) ("Article 78 clams") are entirely conclusory and thus lack legal merit—they are premised on the faulty idea that because City Defendants reasoned differently than Plaintiffs would have liked, and reached a conclusion with which Plaintiffs are dissatisfied, City Defendants acted erroneously, arbitrarily and capriciously.

Although Plaintiffs frame all their claims as seeking to preserve the pre-repeal status quo, this ignores the undisputed seismic change that occurred when the legislature repealed § 50-a. Plaintiffs' contract claims are based on the remarkable notion that private parties can simply contract around public laws they find inconvenient (here, New York's Freedom of Information Law ["FOIL"]). This cannot be. *Infra* at 15. And based on the language of the contracts themselves—or on Plaintiffs' failure to clearly specify what contractual language provides the protection they seek—the contract claims also fail on their face. *Infra* at 15-21.

Plaintiffs' claims are wholly meritless, and the Complaint should be dismissed in its entirety, with prejudice.

B. PLAINTIFFS FAIL TO STATE A CLAIM UNDER THE FOURTEENTH AMENDMENT

Plaintiffs' due process and equal protection claims fail for the reasons stated by the City in its Memorandum. ECF No. 220 at 3-13.[5] Plaintiffs' due process claims also fail for the additional independent and sufficient reasons explained below.

In support of their due process claims, Plaintiffs allege that reputational harm resulting from the release of misconduct records constitutes the deprivation of a liberty interest. Put aside the claims' myriad failings—such as its speculative and purely hypothetical nature; there is no adequate explanation as to what specific damage would be causally tied to this general "reputational harm"; and the other failings already identified by CPR and the City. It must also fail because it is barred by New York Civil statutory and common law.

[5] For the reasons noted by the City in its brief, Plaintiffs' New York State Constitution claims also fail. ECF No. 220; *Dava v. City of New York*, No. 1:15-CV-08575 (ALC), 2016 WL 4532203, at *10 (S.D.N.Y. Aug. 29, 2016) (concluding that because § 1983 provides a remedy for equal protection claims, New York law does not provide a private equal protection cause of action); *Mena v. City of New York*, No. 15-CV-3707 (ALC), 2019 WL 1900334, at *5 (S.D.N.Y. Apr. 29, 2019) (concluding that plaintiff's Article 1, Section 6 claim—due process under the NY constitution—fails as a matter of law because it is "redundant" of his § 1983 claims).

1. New York Civil Rights Law 74 Immunizes the City Defendants from Liability for Publishing Accurate Reports of Allegations and Investigations

Plaintiff's "stigma plus" claims are barred by § 74 of the New York C.R.L., which provides that "[a] civil action cannot be maintained against any person, firm or corporation, for the publication of a fair and true report of any judicial proceeding, legislative proceeding or other official proceeding." N.Y. C.R.L § 74 (McKinney).

Reports of official proceedings. There can be no dispute that the records at issue pertain to "official proceedings." For the purposes of § 74, that term is broadly construed. *See Test Masters Educ. Servs., Inc. v. NYP Holdings, Inc.*, 603 F. Supp. 2d 584, 588 (S.D.N.Y. 2009) ("New York courts have broadly construed the meaning of an official proceeding as used in Section 74. *Easton v. Public Citizens, Inc.*, No. 91 Civ 1639 (JSM), 1991 WL 280688, at *1 (S.D.N.Y. Dec. 26, 1991), *aff'd* 969 F.2d 1043 (2d Cir.1992). The test 'is whether the report concerns actions taken by a person officially empowered to do so.' *Freeze Right Refrigeration & Air Conditioning Services, Inc. v. City of New York*, 475 N.Y.S.2d 383 (App. Div. 1984). New York Courts have found that 'an administrative agency investigation into activities within its purview is an official proceeding.' *Simpson v. The Village Voice, Inc.*, No. 0118713/2006, 2007 WL 2815376, at *12 (Sup. Ct. Aug. 7, 2007)."). Section 74 has been held to protect reports of, *inter alia*, an internal governmental investigation. *Test Masters*, 603 F. Supp. 2d at 588-99 ("Given the range of investigatory proceedings that have been held to be official proceedings for purposes of Section 74, there can be no doubt that the investigation of a consumer protection agency into consumer complaints constitutes an official proceeding." (internal citations omitted)). Investigations and hearings by professional conduct boards—similar to the proceedings at issue here—fall within this broad construction of "official proceedings" under § 74. *See Bloom v. Fox News of Los Angeles*, 528 F. Supp. 2d 69, 76 (E.D.N.Y. 2007)

(proceedings of the State Board for Professional Medical Conduct have been interpreted as official proceedings for the purposes of § 74).

That some records at issue in this case may pertain to internal, nonpublic proceedings does not matter. The plain language of the statute suggests no requirement that proceedings be public for reporting of such activities to be protected. *See Komarov v. Advance Magazine Publishers, Inc.*, 691 N.Y.S.2d 298, 300–01 (Sup. Ct. 1999) ("[P]laintiff argues that the FBI report was prepared for internal FBI use only, and that since it was not prepared for public consumption, it '. . . should not be awarded the protections of [Civil Rights Law] Section 74.' However, this argument is unavailing. . . .'[T]he activities of the agency need not be public for the statutory privilege to apply. The report is protected as long as it concerns activities which are within the prescribed duties of a public body. The test is whether the report concerns 'action taken by a person officially empowered to do so.'" (internal citations omitted)).

Applying these principles, the records at issue in this case fall squarely within the scope of official proceedings whose reports are protected by § 74.

It also does not matter that some of the records at issue in this case pertain to proceedings that have not yet reached their final disposition. Again, under the statute's plain language, the official proceeding at issue need not be complete before it can be fairly and accurately reported upon with immunity. As another judge of this Court recently noted, "New York courts have consistently held that 'even the announcement of an investigation by a public agency, made before the formal investigation has begun, is protected as a report of an official proceeding within the contemplation of the statute, as the report is of an ongoing investigation.'" *Cummings v. City of New York*, No. 19-CV-7723 (CM)(OTW), 2020 WL 882335, at *16 (S.D.N.Y. Feb. 24, 2020) (citing *Freeze Right*, 475 N.Y.S.2d at 388 (N. Y. App. Div. 1984)).

And the disclosure of the allegations or complaints that led to an official investigative proceeding is also protected. *Id.* at *16 (quoting *SentosaCare LLC v. Lehman*, No. 2016-504407, 2018 WL 692568, at *7 (N.Y. Sup. Ct. Jan 25, 2018), appeal docketed, No. 2018-03473 (N.Y. App. Div. Nov. 20, 2018) ("'reports on allegations that lead to a government investigation are fully protected.'")); *see also Bertuglia v. City of New York*, 133 F. Supp. 3d 608, 648–49 (S.D.N.Y. 2015), *aff'd sub nom.*, *Bertuglia v. Schaffler*, 672 F. App'x 96 (2d Cir. 2016) (Plaintiff could not sustain stigma plus claims against New York City's assistant district attorneys in connection with press release reporting on Plaintiff's arraignment because "the ADA defendants simply reported what had been previously stated during the arraignment, and this type of fair reporting is not actionable").

Fair and accurate report. Plaintiffs do not contest that the records that City Defendants intend to release are indeed fair and accurate reports of the City Defendant agencies' official proceedings or of the allegations underpinning those proceedings. Aug. 21, 2020 Order at 29:16-17 (ruling that Plaintiffs have made no showing that the release of records would inaccurately reflect the disciplinary or investigative process). As this Court has already noted, "the records at issue are not false." *Id.* at 28:7; 29:9-12 ("this is not a case, for example, where the defendants are uncritically publishing the allegations of misconduct made against officers as if these allegations were true"). All Plaintiffs argue is that the underlying allegations that spurred each proceeding may be untrue. *See* ECF No. 10-2 at ¶¶ 1; 3; 60; *see also* Aug. 21, 2020 Order at 28:17-21 ("Plaintiffs are eliding the distinction between the underlying allegation, which may be about conduct that never happened, and the actual record being released, which record states the outcome of an investigation into that complaint."). But as this Court noted, accurately reporting on *the fact that an allegation was made* as well as subsequent proceedings is not actionable.

Aug. 21, 2020 Order at 29:4-5; *see also Cummings*, 2020 WL 882335, at *16 ("Crucially, § 74 protects reporting on charges and allegations made in proceedings regardless of whether the underlying allegations are in fact true."); *see also id.* at *19 ("Even if the allegations are 'erroneous[ ],' . . . § 74's privilege is purposely designed to immunize reporting on the allegations made in proceedings regardless of the veracity of those underlying allegations. . . .'The question is not whether or not the statement is 'true.' The question is whether it is a substantially accurate description of the . . . proceeding. . . .'").[6]

At most, what the records at issue in this case will report are that a complainant levied allegations, that there was a particular investigation outcome, and, if applicable, that there was a disciplinary disposition—all squarely covered by § 74 immunity. And even when the complaints or proceedings reported on are later found unsubstantiated or exonerated, that does not erase the privilege that attaches to reporting on those complaints and proceedings in the first place, or undermine the accuracy of the reporting when made. *See Phillips v. Murchison*, 252 F. Supp. 513, 522–23 (S.D.N.Y. 1966), *aff'd in part, rev'd in part on unrelated grounds*, 383 F.2d 370 (2d Cir. 1967) ("The report here was co-extensive with the judicial proceeding—only the complaints were then in existence and that is what was reported. It was as complete as could be and that is when the privilege attached, not years later; it was not destroyed because the charges ultimately were not sustained. Dismissal of the charges did not render the charges in the complaint non-existent as a record in a judicial proceeding. . . . There is no principle of law which so eradicates the privilege which has attached because of subsequent events."); *see also Cordell-Reeh v. Nannies of St. James, Inc.*, 13 A.D.3d 140, 141 (2004) ("It does not avail

[6] As this Court noted in its preliminary injunction ruling in this case, "[a]ccurate descriptions of allegations and personnel actions or decisions that are made pubic are not actionable." Aug. 21, 2020 Order at 29:4-7 (quoting *Wiese v. Kelly*, No. 08-CV-6348 (CS), 2009 WL 2902513 (S.D.N.Y. Sept. 10, 2009)).

defendant to argue that plaintiff will be ultimately precluded from proving such of the complaint's allegations as are based on documents that were obtained in violation of her social worker privilege under CPLR 4508. Any such preclusion would 'not render the charges in the complaint non-existent as a record in a judicial proceeding.'").

Because Plaintiffs have failed to allege that any of the records at issue would be anything other than a fair and accurate report of the allegations made and the official investigatory and adjudicatory proceedings resulting from those allegations, Plaintiffs' stigma plus claims are barred by § 74.

2. New York Common Law Immunizes City Defendants from Liability for Statements Made in Their Official Capacity

Independent of the statutory protections of § 74, New York common law has long recognized that government officials and bodies are protected from civil suit arising from non-malicious statements made in carrying out official duties. *See Follendorf v. Brei*, 273 N.Y.S.2d 128, 131–32 (Sup. Ct. 1966) ("The release of [intra-department] reports by a municipal official to the press after they have become duly made is within the scope of the absolute privilege against defamation actions."); *see also Sheffield v. Roslyn Union Free Sch. Dist.*, No. 13-CV-5214 SJF AKT, 2014 WL 4774133, at *3 (E.D.N.Y. Sept. 23, 2014) (School board's public statements were subject to immunity because "[t]he subject matter of the Board Statement—a public explanation of the termination of the District's Claims Auditor in an attempt to 'be fully transparent' . . . is within the competence and purview of the Board of Education and the District . . . The forum in which the Board Statement was made-on the District's own website . . . further supports the conclusion that defendants were acting within the scope of their official capacity

when they published the Board Statement.").[7]

Because disclosure of the records at issue is protected by both § 74 and by the common law privilege for official statements made within official authority, Plaintiffs' stigma plus claims are barred.

C. PLAINTIFFS' ARTICLE 78 CLAIMS FAIL FOR A CLEAR MISINTERPRETATION OF THE LAW

Plaintiffs' Article 78 claims fail for the reasons stated by the City, ECF No. 220 at 14-21, and for the additional reasons explained below; Plaintiff cannot show a decision "affected by error of law" or one that is "arbitrary and capricious" as Article 78 requires.

1. Plaintiffs Cannot Use Their Error of Law Claim to Force a Determination Contradictory to the Repeal of § 50-a and the Presumption of Disclosure.

An agency decision is affected by an error of law under Article 78 only when it misinterprets governing, non-discretionary law. *Endara-Caicedo v. New York State Dep't of Motor Vehicles*, 74 N.Y.S.3d 839, 842 (N.Y. Sup. Ct. 2018), *aff'd*, 115 N.Y.S.3d 880 (2020), *leave to appeal granted*, 2020 WL 5414769.

To begin with, perhaps the most telling problem with Plaintiffs' theory is that they cannot clearly articulate what law they are claiming City Defendants misinterpreted. At times, they appear to claim it is City Defendants' "erroneous" interpretation of the repeal of § 50-a. ECF No. 10-2 ¶¶ 67, 120-24. There is no such thing as an erroneous interpretation of a repeal of a statute. To show an error of law, Plaintiffs need to point to an affirmative, non-discretionary legal obligation and demonstrate how City Defendants misapplied it.

[7] Particularly as it pertains to the individual officials named as defendants, the claims should be dismissed because "public officials are entitled to qualified immunity if (1) their conduct does not violate clearly established constitutional rights, or (2) it was objectively reasonable for them to believe their acts did not violate those rights." *Weyant v. Okst*, 101 F.3d 845, 857 (2d Cir. 1996).

Otherwise, Plaintiffs rely on a 1979 case regarding confidentiality of police personnel records (*See* ECF No. 10-2 ¶ 69); a case involving the privacy interests of surviving relatives of September 11th 911 callers (*id*.); and the Committee on Open Government's advisory opinions, including those pre-dating the repeal of § 50-a (*id*. at ¶70). Plaintiffs do not argue that these sources of law *require* non-disclosure, nor could they. They simply argue, without any factual basis, that City Defendants "failed to consider" these authorities. But they do not establish that these stray bits of authority are somehow required legal principles that City Defendants "failed to consider." And there is no plausible allegation that City Defendants failed to apply ordinary FOIL considerations when making such decisions, foreclosing Plaintiffs' claim. *Jackson v. New York State Urban Dev. Corp.*, 67 N.Y.2d 400, 416 (1986) (a court's role is limited to ensuring an agency's procedural and substantive compliance with statutory *requirements*, not "weigh the desirability of any action or choose among alternatives"). This is especially true because FOIL exemptions are generally permissive rather than mandatory. *See* ECF No. 220 at 17; *see also In re Thomas v. N.Y.C. Dep't of Educ.*, 103 A.D.3d 495, 498 (App. Div. 2013) (noting that non-binding advisory opinions of Committee on Open Government did not create a blanket exemption under FOIL).

Finally, Plaintiffs allege upon information and belief that "[Defendants] have not evaluated, and do not intend to evaluate, the individual police records before they are released." ECF No. 10-2 ¶ 122. This appears to be based on allegations that the CCRB (in one circumstance) evaluated certain types of officer histories that all disclose the same types of basic information in the same way and disclosed them together. *Id*. ¶ 124. But Plaintiffs allege no plausible basis for treating any particular record at issue differently under the law. Nor do they point to any legal bar on treating like records alike. .

2. Plaintiffs Fail to Allege Arbitrary and Capricious Action by City Defendants

Plaintiffs also fail to show that any decision made by City Defendants is arbitrary and capricious. An agency decision is arbitrary and capricious only if the decision lacks "sound basis in reason and is generally taken without regard to the facts." *Pell v. Bd. of Ed. of Union Free Sch. Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester Cty.*, 34 N.Y.2d 222, 231 (1974) (a rational decision is not arbitrary and capricious). In an Article 78 proceeding, it is the plaintiff who bears the burden of proving that there is no rational basis for the challenged determination. *Jamaica Recycling Corp. v. City of New York*, 816 N.Y.S.2d 282, 289 (Sup. Ct. 2006), *aff'd*, 38 A.D.3d 398, 832 N.Y.S.2d 40 (2007). Plaintiffs have not met this burden.

Plaintiffs ignore the deference due to agency decision-making, instead claiming that City Defendants' decision was a "sudden turnabout in policy[,]" and that reliance on the repeal of § 50-a is mere "pretext." ECF No. 10-2 ¶¶ 8, 76. But what Plaintiffs fail to allege is how City Defendants decision to comport with the repeal of § 50-a and the public disclosure presumption could be arbitrary or capricious. And they cannot. *Caruci v. Dulan*, 246 N.Y.S.2d 727, 730 (Sup. Ct. 1964), *rev'd on other grounds*, 261 N.Y.S.2d 677 (1965) (The test for arbitrary and capricious is not what the court thinks the agency should have done, but rather whether there is a "plausible" basis for the decision.).

Plaintiffs' arbitrary and capricious claim is based on an alleged change of "longstanding" policy and practice at the "expense of the long-settled reliance" under the pretext of § 50-a's repeal. ECF No. 10-2 ¶¶ 1, 73. But the policy change argument lacks merit. As Plaintiffs concede, the City Defendants "are free to change policies." ECF No. 10-2 ¶ 73. And, a change in policy of precedent is only arbitrary and capricious if the change is without reason. *Conversions for Real Estate, LLC v. Zoning Bd. of Appeals of Inc. Vill. of Roslyn*, 818 N.Y.S.2d

298, 299 (App. Div. 2006). But where the agency explains its reasoning for changing an alleged policy, such change is not arbitrary and capricious, even if the changed practice was "longstanding." *Unif. Firefighters of Cohoes, Local 2562, IAFF, AFL-CIO v. Cuevas*, 714 N.Y.S.2d 802, 804 (App. Div. 2000) ("Where a change in policy is openly acknowledged and the decision to implement a new approach is cogently explained, a determination which declines to follow agency precedent will not be disturbed unless it is irrational."). New York law expressly recognizes that a statutory change is a sound reason for an agency's change in policy. *See Inc. Vill. of Ocean Beach v. Dep't of Health Servs., Cty. Of Suffolk*, 715 N.Y.S.2d 902, 903 (App. Div. 2000) (agency's decision was not arbitrary and capricious, because although the factual predicates were identical, a 1998 amendment to New York's Sanitary Code justified a different determination than in previous instances).

Although City Defendants previously withheld officer misconduct and disciplinary records, the repeal of § 50-a not only provides sound reasoning to adopt practices in support of broad disclosure and transparency, it *requires* such practices. Understanding the New York Legislature's goal of broad disclosure of officer disciplinary records, City Defendants responded accordingly. Because the agencies conformed their decision-making to the Legislature's stated intent, Plaintiffs fail to allege that City Defendants' reliance on the repeal was in any way irrational. What Plaintiffs really argue is not that City Defendants made an *irrational* policy change, but that City Defendants did not make the decision Plaintiffs *desired*. It seems Plaintiffs would deem *any* decision resulting in the broad release of misconduct and disciplinary records to be arbitrary and capricious. This, however, is not the law and does not support an Article 78 claim. Plaintiffs arbitrary and capricious claim must be dismissed.

D. PLAINTIFF'S CONTRACT CLAIMS ARE MERITLESS

Under New York law, to state a claim for breach of contract, Plaintiffs must allege (a) the existence of a contract, (b) performance of the contract by the plaintiff, (c) breach by the defendant, and (d) damages suffered as a result of the breach. *See Eternity Glob. Master Fund Ltd. V. Morgan Guar. Trust Co. of New York*, 375 F.3d 168, 177 (2d Cir. 2004); *see also Johnson v. Nextel Commc'ns. Inc.*, 660 F.3d 131, 142 (2d Cir. 2011). For reasons explained in City Defendants' motion and below, both varieties of contract claims at issue in this case—those brought under the Unions CBAs and those brought under settlement agreements—fail to meet these requirements, and fail for additional reasons as well.

1. Plaintiffs Fail to Plead a Breach of Their Collective Bargaining Agreements

City Defendants appear to seek dismissal of the CBA-based breach-of-contract claims only on the ground that Plaintiffs have not fully arbitrated the claims pursuant to the arbitration clauses in the CBAs. ECF No. 220 at 21-22. But insofar as those claims are also asserted against CPR and will prejudice CPR's legal rights in public access to records under FOIL, they should be decided on their merits and dismissed with prejudice. At a minimum, even if the Court permits the arbitrator to rule first on the substance of the dispute as between Plaintiffs and City Defendants—the parties to the CBA—it should reject, as a matter of law, Plaintiffs' CBA-based claim for injunctive relief that would bar disclosure of records under FOIL.

The merits of the CBA claims are properly before this Court on CPR's Rule 12(b)(6) motion. Although Plaintiffs and City Defendants have elected to decide their dispute under the CBAs in arbitration, CPR is not a party to the CBAs or to any such bilateral arbitration.[8] But

[8] Notably, the CCRB itself is not a party to the CBAs either and thus is not in contractual privity with the provisions upon which Plaintiffs rely.

CPR is a defendant in this action, and the CBA-based claims Plaintiffs maintain in this action unquestionably threaten CPR's legal rights—in particular its right to inspect and copy the misconduct and disciplinary records Plaintiffs seek to enjoin the City from making publicly available. N.Y. Pub. Off. Law § 87. That legal right is not before the arbitrator, nor does the arbitrator have any power to restrict it. Meanwhile, neither party has sought to stay litigation of these claims pending arbitration in any way, nor has any party objected to or sought to limit CPR's request to move to dismiss those claims for failure to state a claim under Rule 12(b)(6). The full merits of these claims are therefore before this Court on CPR's motion to dismiss. They should be fully rejected for two independent reasons.

First, Plaintiffs' CBA claims are contravened by the foundational rule that a government agency cannot contract around what FOIL requires—an agency simply "cannot bargain away the public's right to access public records." *LaRocca v. Bd. of Educ. of Jericho Union Free School Dist.*, 220 A.D.2d 424, 427 (App. Div. 1995); *accord City of Newark v. Law Dep't of City of New York*, 305 A.D.2d 28, 32-33 (App. Div. 2003); *see Washington Post Co. v. N.Y.S. State Ins. Dep't*, 61 N.Y.2d 557, 566-67 (1984) (agency cannot avoid disclosure with a mere "label of confidentiality"); *accord Washington Post Co. v. U.S. Dep't of Health and Human Servs.*, 690 F.2d 252, 263 (D.C. Cir. 1982). But that is precisely what Plaintiffs are arguing the CBAs did. So even if Plaintiffs' contention on the meaning of the CBAs were right as a matter of the parties' expressed intent, such a promise would be unlawful.

Second, in any event, Plaintiffs' reading of the plain language of the relevant contractual provisions is wrong as a matter of law. Contract interpretation is generally a question of law that is suitable for disposition on a motion to dismiss. *Medtech Prods. Inc. v. Ranir, LLC*, 596 F. Supp. 2d 778, 807 (S.D.N.Y.2008). Whether a contract is unambiguous is a question of law for

the court to decide. *Continental Ins. Co. v. Atl. Cas. Ins. Co.*, 603 F.3d 169, 180 (2d Cir. 2010). If unambiguous, a contract's meaning is also a question of law for the court to decide. *Napster, LLC v. Rounder Records Corp.*, 761 F. Supp. 2d 200, 206 (S.D.N.Y. 2011). Where, as here, the "contract is unambiguous, that is, only susceptible to one reasonable interpretation, the court must 'give effect to the contract as written.'" *Madeleine L.L.C. v. Street*, 757 F. Supp. 2d 403, 405 (S.D.N.Y.2010).

Section 7(c). Section 7(c) provides for removal of "exonerated" or "unfounded" investigative reports from an officer's personnel folder, upon written request. *See, e.g.*, ECF No. 10-42 Ex. 2 at 16. Notably, Section 7(c) requires removal of the investigative reports from *one place only*: that officer's "Personnel Folder." This provision is silent regarding public disclosure of these records and does not require NYPD or CCRB to delete the documents from anywhere they may exist. As this Court explained, "the provision gives the officer the right to request that an investigative report be removed from a personnel file. It does not give the officer the right to have the investigative report removed from the public record." Aug. 21, 2020 Order at 20:1-5. The unambiguous language of the CBA forecloses Plaintiffs' argument that Section 7(c) provides broad relief and such interpretation has been explicitly rejected by this Court, "I completely disagree with plaintiffs' broad interpretation of this provision, and in no way do I believe that it can stretch so far as to prevent the disclosure of this information." *Id.* at 19:22-25. The words "remove from the Personnel Folder" mean exactly that and Plaintiffs cannot claim that disclosure will breach a right Plaintiffs do not contractually even have. Thus, on its face, Plaintiffs' breach of contract claims fails. Moreover, because "officers can and will be able to exercise their rights under this provision to have specified investigative reports removed from their personnel or personal folder" (*id.* at 20: 5-8), any limited right Plaintiff enjoy has not been

undermined. Based on the unambiguous language contained within Section 7(c), Plaintiffs cannot claim breach.

Section 8. Section 8 of the CBAs provides that "where an employee has been charged with a 'Schedule A' violation . . . and such case is heard in the Trial Room and [the] disposition of the charge . . . is other than 'guilty,' the employee concerned may, after 2 years from such disposition, petition the Police Commissioner for a review for the purpose of expunging the record of the case." *See, e.g.*, ECF No. 10-4 Ex. 2 at 16. This also does not provide that the details of those cases may never be disclosed. The right to petition for expungement the official records of a case years after the fact has no bearing on how that record will be treated during the pendency of that case and in the years immediately following. No language in the CBA provides that the record of the case will be sealed in the interim, and there is no basis to infer such language *sub silentio*.

The language of the CBAs is clear: Officers may seek the expungement of their disciplinary records *from their personnel files* or from the *record of the case*. But nothing in language granting right to seek expungement implies a right to prevent disclosure of what is currently contained in a personnel file, let alone a right against disclosure of records held *elsewhere*. And the disclosure of records to the public would not frustrate the rights granted in either Section 7(c) or Section 8 the CBAs. Even after public disclosure of records, Plaintiffs can still exercise their rights under the collective bargaining agreements to have investigative reports removed from their Personnel File. That is the only right granted, and it is not frustrated by City Defendants' intended release. Accordingly, based upon the plain language of the CBAs, Plaintiffs have failed to allege any breach. Plaintiff's breach of contract claims related to these agreements should be dismissed for failure to state a claim.

2. Plaintiffs Fail to Plead With Sufficient Particularity Any Breach of the Settlement Agreements

Plaintiffs broadly alleged that "any settlement agreement entered into before June 2020 . . . necessarily incorporated § 50-a's protection against disclosure" because §50-a was the law in force at the time of those agreements. ECF No. 10-2 ¶¶ 7, 65. But Plaintiffs fail to plead with any particularity what any of these settlement agreements contain, making it impossible to evaluate the plausibility of this contention. As this Court noted, Plaintiffs "have only provided . . . the most cursory explanations of these purported settlement agreements" and have not provided a "single example" of those agreements or any witness or declarant testimony regarding those agreements. Aug. 21 2020 Order at 25:24-26:6. Plaintiffs' claims based on these purported settlement agreements are based on conclusory assumption, and must be dismissed for that reason.[9]

And even were this not the case, Plaintiffs' conclusory claim—that the settlement agreements did somehow incorporate § 50-a, without reference to specific language doing so—simply do not permit the court to determine the existence of any contractual right implicated by City Defendants' actions. *See Sirohi v. Tr. of Columbia Univ.*, No. 97-7912, 1998 WL 642463, at *2 (2d Cir. Apr. 16, 1998) (quoting *Sud v. Sud*, 211 A.D.2d 423, 424 (App. Div. 1995)) ("[Plaintiff] failed to successfully plead a breach of contract claim because he did not allege the essential terms of the parties' purported contract 'in nonconclusory language,' including the specific provisions of the contract upon which liability is predicated.").

This court has found that "a plaintiff does not meet the *Twombly-Iqbal* standard and must

[9] The settlement claims fail for the same threshold reasons the CBA-based claims do: An agency cannot contract around FOIL. That logic applies just as fully here, as the Court held in its preliminary injunction ruling. *See* Aug. 21, 2020 Order at 24:11-15 ("[P]laintiffs are essentially arguing that a state legislature can never change the law, that, while not even referenced in the parties' agreement, might possibly impact a party's contractual rights. I do not believe this to be the case.").

be dismissed when 'the Complaint does not specify which clause of the Agreement City Defendants are alleged to have breached'" *Negrete v. Citibank, N.A.*, 187 F. Supp. 3d 454, 468 (S.D.N.Y. 2016), *aff'd*, 759 F. App'x 42 (2d Cir. 2019) (citing *Swan Media Group, Inc. v. Staub*, 841 F.Supp.2d 804, 807 (S.D.N.Y.2002) and *Spinelli v. Nat'l Football League*, 96 F.Supp.3d 81, 131 (S.D.N.Y.2015)).

Here, Plaintiffs have not identified any specific provision they allege will be breached by the release of records. They have not quoted or even paraphrased any language from the settlement agreements. They have not attached a single settlement as an exhibit to any of their numerous filings in this case, providing no context at all for consideration of the parties' intent. They have simply made the broad, conclusory allegation that the settlements incorporated § 50-a—apparently forever and independent of § 50-a remaining on the books. This merits dismissal. *See Negrete*, 187 F. Supp. 3d at 468 ("'A breach of contract claim will be dismissed. . . as being too vague and indefinite, where the plaintiff fails to allege, in nonconclusory fashion, the essential terms of the parties' purported contract, including the specific provisions of the contract upon which liability is predicated.' *Highlands Ins. Co. v. PRG Brokerage, Inc.*, No. 01 Civ. 2272, 2004 WL 35439, at *8 (S.D.N.Y. Jan. 6, 2004) (quoting *Sud, v. Sud*, 211 A.D.2d at 424)").

3. <u>The Unmistakability Doctrine Also Bars Plaintiffs' Contract Claims</u>

The doctrine of unmistakability similarly underscores why Plaintiffs have failed to sufficiently allege that the contracts at issue were intended to circumvent the requirements of FOIL. Under the unmistakability doctrine, "sovereign power . . . will remain intact unless surrendered in unmistakable terms." *Doe v. Pataki*, 481 F.3d 69, 79 (2d Cir. 2007) (quoting *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 (1982)); *see also United States v. Winstar Corp*. 518 U.S. 839 (1996). Indeed, the Second Circuit has found that the State "cannot be held to have surrendered in [an agreement] its authority to amend its statutes unless the [agreement]

clearly indicates that intention." *Doe*, 481 F.3d at 79. Moreover, where the agreement fails to make such an indication, the "recitation of existing statutory provisions is properly construed to do no more than serve as notice of what the state law then provided." *Id.*, at 79 (vacating the District Court's order enjoining the State from implementing its amendments to a statute).[10] The same is true for settlement agreements, such as those at issue here. *See Red Ball Interior Demolition Corp. v. Palmadessa*, 173 F.3d 481, 484 (2d Cir. 1999).

IV. CONCLUSION

For the reasons stated above and in the City Defendants' brief, ECF No. 220, the Complaint should be dismissed in its entirety.

Dated: New York, New York
September 11, 2020

Respectfully submitted,

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[10] While *Doe* involved a consent decree rather than a CBA or settlement agreement, its precedent remains an applicable because a consent decrees "reflect a contract between the parties[,]" and the ordinary rules of contract interpretation are applicable to such a decree. *Id.*, at 75 (*citing United States v. ITT Cont'l Baking Co.*, 420 U.S. 223, 236-37 (1975)).