

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

In the matter of the application of
CONSTANCE MALCOLM, FRANCLLOT
GRAHAM, COMMUNITIES UNITED FOR
POLICE REFORM, and THE JUSTICE
COMMITTEE,

Petitioners-Plaintiffs,

-against-

The NEW YORK CITY POLICE
DEPARTMENT, and JAMES P. O'NEILL,
NYPD COMMISSIONER, in his official
capacity,

Respondents-Defendants.

Index No. 100466/2017

Part 13 (Mendez, J.)

Motion Seq. No. ____

BRIEF OF *AMICI CURIAE*
THE PROGRESSIVE CAUCUS OF THE
NEW YORK CITY COUNCIL

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INTEREST OF *AMICI CURIAE*

Amici curiae are 19 members of the New York City Council that make up the Progressive Caucus. As City Council members, representing the voice of the public in City government, and being charged with monitoring the NYPD,¹ the Progressive Caucus offers the Court a distinct perspective on the public policy implications of this case.

The Progressive Caucus is focused, among other things, on issues of police accountability and transparency, and building stronger relationships between the police and the communities that they serve. The Progressive Caucus thus has a substantial interest in the issues presented by this Article 78 proceeding to compel the New York Police Department (“NYPD”) to turn over records concerning the February 2, 2012 killing of 18-year-old Ramarley Graham in his home by Officer Richard Haste.

Established in 2009, the Progressive Caucus is “dedicated to creating a more just and equal New York City, combating all forms of discrimination, and advancing public policies that offer genuine opportunity to all New Yorkers, especially those who have been left out of our society’s prosperity.”² In particular, the Progressive Caucus seeks to promote criminal justice policies that emphasize prevention, alternatives-to-incarceration, partnership with communities, and police accountability in order to insure public safety and justice.

As an example of the Progressive Caucus’s continuing efforts to increase transparency and accountability of the NYPD, the City Council passed legislation on August 3, 2016 to collect and record information on the use of force by police.³ The Progressive Caucus

¹ New York City Council, *What we do*, <https://council.nyc.gov/about/> (“Together, we . . . Monitor City agencies such as the Department of Education and the NYPD to make sure they’re effectively serving New Yorkers.”).

² Progressive Caucus of the New York City Council, *About Us*, <https://nycprogressives.com/about/>

³ As another example that is pertinent to this case, the Progressive Caucus sent a letter to the mayor and police commissioner several weeks ago urging that the NYPD schedule departmental trial dates for Sergeant Scott Morris and Officer John McLoughlin on their 2012 administrative charges related to the killing of Mr. Graham without

has also previously filed friend-of-the-court briefs as part of their mission to promote police accountability and reform. *See, e.g., Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013). Here, the Progressive Caucus similarly believes that its perspective on issues of vital importance in advancing police reform will be helpful to the Court in deciding this case.

For the reasons explained below, the Progressive Caucus urges the Court to reject the NYPD's various attempts in this case to radically expand the Freedom of Information Law ("FOIL") exceptions upon which it purported to rely in denying substantially all of Petitioners' FOIL request for records regarding the killing of Mr. Graham. These are issues of the upmost importance, not just for this case—which is the subject of intense public interest—but for the future of ongoing efforts to rebuild public trust in the NYPD as well.

further delay. *See* Progressive Caucus of the New York City Council, *NYC Council Progressive Caucus Urges de Blasio Administration & NYPD to Take Action against Remaining Officers Involved in Ramarley Graham Killing* (Jun. 22, 2017), <https://nycprogressives.com/2017/06/22/nyc-council-progressive-caucus-urges-de-blasio-administration-nypd-to-take-action-against-remaining-officers-involved-in-ramarley-graham-killing/> ("We request immediate action from your administration to hold the remaining officers responsible for Ramarley Graham's killing and its related misconduct accountable in a transparent manner.").

PRELIMINARY STATEMENT

On February 2, 2012, NYPD Officer Haste burst into the home of unarmed teenager Ramarley Graham and fatally shot him. While a grand jury subsequently declined to indict Officer Haste, and the NYPD settled a civil lawsuit brought by Mr. Graham's family, given the tragic facts of this case and its relation to subsequent incidents of police violence and brutality, the public interest has only become more acute with each passing year that the NYPD has continued to fail to provide the public with answers as to how this tragedy happened.

On September 29, 2016, Petitioners submitted a FOIL request to the NYPD seeking records relating to this incident in hopes of shedding some light on the hidden facts. *See* Brief for Petitioner at 2, *Malcolm v. N.Y. City Police Dep't*, Index No. 100466/17 (N.Y.S. 2017) ("Pet. Br."). Among other things, the FOIL request sought: statements made to the NYPD, or by the NYPD to the media and/or prosecutors in the immediate aftermath of the shooting; records regarding investigations undertaken or contemplated regarding the shooting and related events; relevant NYPD procedures and practices; and communications between the NYPD and City Hall and other agencies about Mr. Graham's shooting or related investigations. *See id.* at 2-3. The NYPD has refused to provide these records. Accordingly, Petitioners filed this Article 78 proceeding. *See id.* at 3.

In its brief filed in this case on June 14, 2017 (the "NYPD Br."), the NYPD raises a number of arguments attempting to justify withholding the documents from public disclosure. The Progressive Caucus fully supports, and will not duplicate, the Petitioners' arguments as to why these various exceptions do not apply and the records should be disclosed. Instead, the Progressive Caucus wishes to draw the Court's attention to three particular arguments made in the NYPD's brief, which individually and together, if accepted, would radically diminish the

public's access to information about the NYPD. If accepted by the Court, these arguments would frustrate the Progressive Caucus's and others' efforts to further important police reform initiatives:

First, the NYPD's argument that disclosure of records compiled by the Internal Affairs Bureau ("IAB") after the shooting would "interfere" with the yet-to-be scheduled departmental disciplinary proceedings of two of the officers involved is not only speculative but, through delay and obfuscation, would allow the NYPD the ability to shield *all* police records regarding this incident from public view for *as long as it wants*. This Court should not give the NYPD, whose officers wield enormous power over the public, such unchecked authority to withhold information into how it operates. Not only is there no basis for believing production of the requested information would interfere with a departmental disciplinary proceeding, but it has been over five years since Mr. Graham was fatally shot, and yet no administrative trial date has even been scheduled.

Second, the NYPD argues that Section 50-a of the Civil Rights Law—which provides that police "personnel records used to evaluate performance toward continued employment or promotion" are considered confidential—broadly shields the requested documents from disclosure, despite the fact that many of these documents have nothing to do with "personnel records." Comments to the press, communications with City Hall, and policies and procedures simply are not "personnel records" covered by Section 50-a. The NYPD's focus on the phrase "used to evaluate performance," suggesting that anything that could be so used is confidential under Section 50-a, misses a crucial point: If it is not a personnel record, it is not covered by Section 50-a regardless of whether it is "used to evaluate [the] performance" of a police officer. Section 50-a does not provide a blanket FOIL exemption for any information the

NYPD subjectively believes it may use to evaluate officer performance, nor should it be expanded to do so, particularly as it will come at the expense of the public and the City Council's essential right to exercise effective oversight of the NYPD.

Third, the NYPD argues that it properly withheld evidence disclosed at the departmental trial of Officer Haste from Petitioners' FOIL request because such evidence falls within one of these FOIL exceptions just discussed. Even if the NYPD were right about that (it is not), the fact that the documents were used in an open proceeding means whatever confidentiality they had before has been waived. The strong public policy, including under the First Amendment, of making judicial records available for public inspection, such as evidence from a public trial, applies equally to quasi-judicial proceedings like the NYPD's departmental trials. The Court should reject the NYPD's arguments to the contrary.

The importance of these issues cannot be understated. Police transparency is a necessary preliminary step to asserting the community's power to prevent police misconduct and abuse. The public's trust in the police depends on such transparency. By contrast, when the public is kept in the dark about police practices, its ability to understand what is happening and request specific changes to ensure police accountability is compromised. The result is a vicious cycle of deteriorating trust between the police and the communities they serve, which in turn jeopardizes the safety of both the public and the police.

Elected officials, such as the Progressive Caucus, play a key role in preventing this from happening, including by making sure that the police remain accountable to the public. But in order to fulfill this role, when a tragedy such as Mr. Graham's death does occur, the Progressive Caucus and the public need to know the facts. Among other things, the public needs

to know information of the type sought by Petitioners here in order to draw informed conclusions about how this tragedy happened, and how it can be prevented from happening again.

The NYPD's lack of transparency regarding the facts surrounding the shooting of Mr. Graham is destructive of its legitimacy in the eyes of the public. Sound public policy overwhelmingly counsels in favor of making these records available to the public. If they are released, as they should be, the requested documents will provide a basis for the citizens of New York City, and their elected representatives, to engage in an educated dialogue about police accountability for the use of excessive force.

The Progressive Caucus thus respectfully submits that this Court should reject the NYPD's baseless requests to expand the various FOIL exemptions on which it relies.

ARGUMENT

I. THE PUBLIC IS ENTITLED TO THE INFORMATION PETITIONERS SEEK

A. The NYPD's Bare Allegation That Records May Relate To Officers Whose Administrative Trials The NYPD Has Yet To Schedule Does Not Shield Those Records From Disclosure

The NYPD relies on Public Officers Law § 87(2)(e)(i) (providing an exemption from FOIL for records that are "compiled for law enforcement purposes and which, if disclosed, would . . . interfere with law enforcement investigations or judicial proceedings"), and the fact that the NYPD departmental disciplinary trials have yet to be scheduled to argue that the requested documents should not be made public. *See* NYPD Br. at 6-10 (refusing to disclose NYPD officials' statements to the press, a wide range of policy documents, the identities of officers other than Morris and McLoughlin involved in aspects of the incident, or other categories of documents).

The NYPD's unsupported argument that disclosure of records compiled by the

IAB would “interfere” with the departmental disciplinary proceedings of Morris and McLoughlin is insufficient to meet its burden. The NYPD asserts in a conclusory fashion that such disclosure would “prejudice[e] NYPD’s ability to conduct fair, impartial, and objective disciplinary trials by revealing NYPD’s prosecutorial strategies and inciting public opinion against these individuals.” *Id.* at 9. This is plainly obfuscation. The NYPD fails to explain which, if any, of the requested documents would reflect prosecutorial strategies (nor do the categories of requested documents suggest any would), nor why public opinion would have any bearing on a departmental proceeding before an administrative judge. In fact, to the extent the public’s opinion of the facts at issue is of any relevance to the proceeding, it is of even greater importance that the documents are disclosed so that public can come to an *informed* opinion.

Not “every document in a law enforcement agency’s criminal case file is automatically exempt from disclosure simply because kept there.” *Matter of Leshner v. Hynes*, 19 N.Y.3d 57, 67 (2012). Rather, the NYPD “must still fulfill its burden under Public Officers Law § 89(4)(b) to articulate a factual basis for the exemption.” *Id.* The NYPD, however, makes no effort to identify, even at a basic level, what various types of documents are associated with the risks it identified, much less how those documents could possibly cause such risks. *See id.* (“The agency must identify the generic kinds of documents for which the exemption is claimed, and the generic risks posed by disclosure of these *categories of documents*.”) (emphasis added); *see also Matter of Law Officers of Adam D. Perlmutter, P.C. v. N.Y. City Police Dep’t.*, 123 A.D.3d 500, 501 (1st Dep’t. 2014) (same).

Apart from being conclusory, these assertions do not remotely justify withholding straightforward factual materials, such as policy memos or media statements, as opposed to prosecutorial memos and the like, particularly where there is no jury that will be “tainted” by bad

press. New York courts have determined that “[v]ague allegations and/or attorney affirmations alone, will not suffice since, ‘evidentiary support is needed.’ ” *Matter of New York Times Co. v. N.Y. State Exec. Chamber*, No. 00383-2017, 2017 WL 3078657 (Albany Cty. July 6, 2017) (noting that the *Leshner* court “sustained the investigation exemption, but only because the District Attorney was able to articulate a series of concrete factual statements relating to specific document categories and then describe the relevant harm disclosure might create.”).⁴ The NYPD is unable to carry its burden. It failed to submit any factual affidavits or even discuss the various categories of documents requested, and the NYPD’s brief is bereft of any explanation of how pretrial publicity could cause problems with the disciplinary trial.

The Progressive Caucus is concerned that a ruling crediting unsupported allegations by the NYPD about the interference with its own administrative hearings, which it has the sole discretion to bring when (or if) it wants, would give the NYPD too much unchecked power to withhold pertinent and necessary requested documents that otherwise should be made public pursuant to a proper FOIL request. *See Cynthia H. Conti-Cook, Defending the Public: Police Accountability in the Courtroom*, 46 SETON HALL L. REV. 1063, 1085 (2016) (Police record secrecy undermines constitutional rights to confront officers but also courts’ constitutional duties as a “separate power to serve our democracy by checking executive power.”). Section 87(2)(e)(i) is not a blanket exemption allowing the NYPD unreviewable authority to withhold information required for the public to learn about how it operates.

⁴ *See also Matter of Dilworth v. Westchester Cty. Dep’t. of Correction*, 93 A.D.3d 722, 724 (2d Dep’t 2012); *Newsday LLC v. Nassau County Police Dep’t.*, 42 Misc. 3d 1215[A] (Nassau Cty. Jan. 16, 2014); *Matter of Washington Post Co. v. N.Y. State Ins. Co.*, 61 N.Y.2d 557, 567 (1984); *Matter of Madera v. Elmont Public Library*, 101 A.D.3d 726, 727 (2d Dep’t. 2012); *Matter of Loevy & Loevy v. N.Y. City Police Dep’t.*, 38 Misc. 3d 950, 954-55 (N.Y. Cty. 2013); *Windham v. City of N.Y. Police Dep’t.*, No. 100200/13, 2013 WL 5636306 (N.Y. Cty. Oct. 7, 2013).

B. Section 50-a Does Not Shield Non-Personnel Records from Disclosure

The NYPD argues that Section 50-a of the New York Civil Rights Law, which bars disclosure of police officer personnel records, applies to a wide swath of the records requested here. The NYPD, however, does not address the threshold fact that these are not personnel records at all. Among the records the NYPD seeks to exclude are:

- Crime Scene Unit and other records depicting evidence from inside or outside Ms. Malcolm's apartment related to the shooting on February 2-5, 2012, including photographs, video, or other records depicting Mr. Graham, Haste's firearm, marijuana allegedly recovered from within the apartment, blood splatter, Mr. Graham's clothes, and any other evidence;
- a Firearm Discharge/Assault Report;
- all communications with the press by the NYPD and statements to the press made by the NYPD regarding Mr. Graham, Mr. Graham's shooting, and any related events, including, but not limited to, any related investigations, disciplinary actions, or prosecutions; documents reflecting NYPD policies in 2012;
- and the "Firearms Discharge Manual, A Guide to the Preparation of a Shooting Incident Report."⁵

The NYPD claims that *anything* that could be used to evaluate personnel decisions is exempt under Section 50-a, relying on language from the First Department's decision in *Luongo v. Records Access Officer, Civilian Complaint Review Bd.*, 150 A.D.3d 13 (1st Dep't 2017). However, that is not what the statute says nor is it what the First Department

⁵ See Defs.' Verified Answer to Plf.'s Verified Pet. and Compl. ¶ 194.

held in *Luongo*, nor is such an expansion consistent with the purpose of the law or the public's right to information.

Luongo was focused specifically on CCRB findings and recommendations. It held that “CCRB findings and recommendations are clearly of significance to superiors in evaluating police officers’ performance. As noted, all complaints filed with the CCRB, regardless of the outcome, are filed with and remain in an officer’s CCRB history, which is part of his or her personnel record maintained by the NYPD . . . [and] fall squarely within a statutory exemption of the statute.” *Luongo*, 150 A.D.3d at 22-23. Importantly, however, it was not sufficient that the CCRB records were “of significance to superiors in evaluating police officers’ performance,” but it was also necessary that those CCRB records were part of the officers’ *personnel records*, i.e., the files an employer keeps on its employees. None of the cases cited in *Luongo* supports the expansive definition the NYPD seeks here, that the latter element of Section 50-a can be ignored in favor of the former. Rather, they all involve records that, like the court found of the CCRB records in *Luongo*, satisfy both elements of the exemption.⁶

Moreover, in claiming exclusion of such a wide array of documents—including NYPD policies and communications with the press—as personnel records and flatly refusing to produce any of these materials, the NYPD inappropriately attempts to expand the statute to allow for a blanket exemption for anything the NYPD may have that is related to a pending or future

⁶ See *Prisoners’ Legal Servs. of N.Y. v. N.Y. State Dep’t of Corr. Servs.*, 73 N.Y.2d 26, 31 (1988) (documents pertaining to misconduct or rules violations by correction officers); *Matter of Gannett Co. v. James*, 86 A.D.2d 744, 745 (4th Dep’t 1982) (conducting an item-by-item analysis and determining that internal affairs complaints were protected personnel records); *Matter of Daily Gazette Co. v. City of Schenectady*, 93 N.Y.2d 145, 159 (1999) (disciplinary records); *Matter of Hearst Corp. v. N.Y. State Police*, 132 A.D.3d 1128, 1129 (3d Dep’t 2015) (information created or collected pursuant to a misconduct investigation); *Matter of Columbia-Greene Beauty School, Inc. v. City of Albany*, 121 A.D.3d 1369 (3d Dep’t 2014) (police department records regarding investigator’s resignation from police department, complaints submitted to city regarding his professional conduct while working as a police officer, and disciplinary measures that were taken thereon); *Matter of McGee v. Johnson*, 86 A.D.3d 647, 647 (2d Dep’t 2011) (“final determination of a complaint made against police officers”).

disciplinary determination. See *Matter of Gould v. N.Y. City Police Dep't.*, 89 N.Y.2d 267, 275 (1996) (“blanket exemptions . . . are inimical to FOIL’s policy of open government”); *Matter of N.Y. State Defs. Ass’n v. N.Y. State Police*, 87 A.D.3d 193, 197 (3d Dep’t 2011) (concluding that it was unreasonable for respondents to issue a blanket denial of petitioner’s document request). This is a dangerous expansion that would undermine the purpose of FOIL by allowing the police to prevent disclosure of virtually anything—and certainly anything that does not put the police in the best light—to the public. This runs contrary to the law, and the public and City Council’s need for such information for proper oversight and understanding of the actions of the officers they interact with on a daily basis.

C. Records Discussed At The Public Departmental Trial Of Officer Haste Should Be Disclosed, Even If They Would Otherwise Be Exempt From Disclosure

Petitioners argued in their opening brief that all records that were used as evidence or otherwise discussed in “open court” during the NYPD’s departmental trial of Officer Haste, which was open to the public, should be disclosed under a line of cases including *Matter of Moore v. Santucci*, 151 A.D.2d 677 (2d Dep’t 1989). See Pet. Br. at 10-11. In its response, the NYPD does not dispute that the hearing was open to the public, nor that evidence responsive to Petitioners’ FOIL request was discussed at that hearing.⁷ The NYPD also does not claim it took any steps during the hearing to “close the courtroom” or otherwise shield any particular evidence from public view. Rather, the NYPD argues simply that *Moore* “does not apply here” because the evidence discussed at its own public hearing is separately exempt from disclosure

⁷ Contemporaneous news accounts confirm these points. See, e.g., Associated Press, *Disciplinary trial ends for NYC officer who killed Ramarley Graham, but public may never know outcome* (Jan. 24, 2017, 9:36 AM), <http://pix11.com/2017/01/24/disciplinary-trial-ends-for-nyc-officer-who-killed-ramarley-graham-but-public-may-never-know-outcome/> (“At a public proceeding beginning last week at NYPD headquarters, an administrative judge heard evidence that included testimony from Haste.”); Anthony M. DeStefano, *Attorney: Cop in NYPD trial for fatal shooting a scapegoat*, NEWSDAY (Jan. 23, 2017, 8:45 PM), <http://www.newsday.com/news/new-york/attorney-cop-in-nypd-trial-for-fatal-shooting-a-scapegoat-1.13003606> (“Haste’s trial has shown that police procedures governing the precinct drug unit appear to have been routinely ignored, including the requirement that cops get training in street narcotics operations. Haste received no such training.”).

under the two FOIL exceptions discussed above. *See* NYPD Br. at 9-10.

The NYPD has it backwards: Evidence discussed in open court should be available for public inspection *regardless of whether it would otherwise be subject to an exemption*. In *Moore*, for example, the court held that, notwithstanding that the records sought in that case “were generally exempt from disclosure under FOIL” (at issue were witness statements obtained by the District Attorney’s office in preparation for a criminal trial), “once the statements are used in open court, they have lost their cloak of confidentiality and are available for inspection by a member of the public.” *Matter of Moore*, 151 A.D.2d at 679. Other courts have held the same. *See, e.g., Matter of Williams v. Erie Cty. Dist. Att’y.*, 255 A.D.2d 863, 864 (4th Dep’t 1998) (“In the event the witness does not testify, FOIL exempts from disclosure both the witness’s statements . . . and record of convictions and pending criminal charges. . . . But, *once the material is handed over by the prosecutor and the witness testifies, [these records] no longer fall within the exception to the disclosure provisions of FOIL . . .*”) (emphasis added); *Matter of Laureano v. Grimes*, 179 A.D.2d 602, 604 (1st Dep’t 1992) (“Moreover, even if there had been any expectation of confidentiality at the time the statements were given, it has been lost, since these witnesses later testified against petitioner at trial.”).⁸

This rule flows from the broader principle of open government, a paramount concern of the Progressive Caucus. *See Mosallem v. Berenson*, 76 A.D.3d 345, 348 (1st Dep’t

⁸ The NYPD cites *Matter of Newsday, Inc. v. Sise*, 71 N.Y.2d 146 (1987), for the proposition that records may be exempt from FOIL “notwithstanding the fact that [they] had been made public” in a court proceeding. *See* NYPD Br. at 10. At the threshold, *Newsday* predates all of the cases cited above, and so cannot be said to have overruled them. Nor is *Newsday* inconsistent with those cases: In *Newsday*, the New York Court of Appeals held only that Judiciary Law § 509(a), by its terms, prohibited blanket disclosure of “records containing the names and addresses of jurors”—i.e., without a “proper showing” that such information should be made public. *Id.* at 152-53. Moreover, the court specifically noted that this kind of information had *not* been made public in prior court proceedings. *See id.* at 153 (“From the record, however, it clearly appears that, in voir dire, the home addresses of the jurors were not disclosed—only the general area where they lived[.]”). Finally, the court also noted that information in juror questionnaires, unlike evidence used in a public trial, is not a “judicial record” to which a common law or First Amendment right of access attaches. *See id.* at 153 n.4.

2010) (“Under New York law, there is a broad presumption that the public is entitled to access to judicial proceedings and court records.”). Indeed, public access to court records “is an essential feature of democratic control.” *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 119 (2d Cir. 2006) (citation omitted). It ensures “the actual and perceived fairness of the judicial system, as the . . . bright light cast upon the judicial process by public observation diminishes the possibilities for injustice, incompetence, perjury, and fraud.” *Mancheski v. Gabelli Grp. Capital Partners*, 39 A.D.3d 499, 501 (2d Dep’t 2007) (citations and quotations omitted). *See also Grosjean v. Am. Press Co.*, 297 U.S. 233, 250 (1936) (“[An] informed public opinion is the most potent of all restraints upon misgovernment[.]”). The public’s right to access court records is both “firmly grounded in the common law” and guaranteed by the First Amendment to the United States Constitution. *Mosallem*, 76 A.D.3d at 348-49. *See also Mancheski*, 39 A.D.3d at 501; *Lugosch*, 435 F.3d at 120.

Of course, there are limited exceptions to the presumption of public access to court records. For example, as this Court knows, parties to litigation in this Court may file records under seal if they can show “good cause.” *See* N.Y. COMP. CODES R. & REGS. tit. 22, §216.1(a) (2017). Moreover, if it is necessary for the parties to discuss sensitive evidence in the courtroom, the Court may (on an extraordinary showing) close the courtroom or take other measures to protect such party’s confidentiality interests. But, as *Moore* held, when a litigant chooses to present evidence in open court, in full view of the public, whatever confidentiality such evidence had before is lost, and that evidence should be available to the public for inspection. *See also Rainbow News 12 Co. v. Dist. Att’y of Suffolk Cty.*, No. 1487/92, 1992 WL 427579, at *2 (Suffolk Cty. June 8, 1992) (rejecting the D.A.’s argument that videotapes were exempt from disclosure because the D.A. had “placed [them] in the public domain when they

were played in open Court”). All of the reasons for public access to court proceedings generally also weigh in favor of public access to evidence discussed in open court specifically: Allowing the public to view such evidence ensures its ability to shine a “bright light” on judicial proceedings in order to “diminish[] the possibilities for injustice, incompetence, perjury, and fraud.” *Mancheski*, 39 A.D.3d 499, 501. If, by contrast, evidence presented in open court were withheld from public view, an important guarantor of the integrity of the proceedings would be lost, and the public’s confidence in such proceedings would suffer.

The same principles of public access should apply equally to “quasi-judicial government administrative proceeding[s] normally open to the public,” such as NYPD departmental trials. *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 696 (6th Cir. 2002). In *Detroit Free Press*, the United States Court of Appeals for the Sixth Circuit squarely addressed the question of whether the United States Supreme Court’s seminal decision in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980)—a case recognizing the public’s right under the First Amendment to access judicial proceedings—also applied to deportation hearings, which are administrative rather than judicial proceedings (as they are conducted before immigration judges within the Department of Justice). *See Detroit Free Press*, 303 F.3d at 694. The court held that the rule of *Richmond Newspapers* and its progeny *does* apply to “quasi-judicial” administrative hearings, at least those that are “formal” and “adversarial,” and that therefore the public enjoys a First Amendment right to access such proceedings no less than it does for judicial proceedings. *See id.* at 695 (“[W]e reject the Government’s assertion that a line has been drawn between judicial and administrative proceedings, with the First Amendment guaranteeing access to the former but not the latter.”).

There can be no question that the NYPD’s departmental trials are formal and

adversarial—i.e., quasi-judicial—administrative proceedings like the deportation hearings at issue in *Detroit Free Press*. Both the NYPD and the officer accused of wrongdoing are separately represented by counsel in a proceeding that strongly resembles a formal trial—e.g., witnesses testify and counsel make arguments before a judge who decides the case. It follows that all of the principles of public access to judicial proceedings discussed above should also be applied to NYPD departmental trials, including that of Officer Haste here. Moreover, all of the same considerations are at stake: Public access to the evidence in Officer Haste’s departmental trial is necessary to shine a “bright light” on that proceeding in order to prevent the ills that denying access to judicial records generally creates. *See Mancheski*, 39 A.D.3d 499, 501 (discussing the public’s role in preventing “injustice, incompetence, perjury, and fraud”).

Notably, the NYPD does not argue that the *Moore* principle is inapplicable to administrative, as opposed to judicial, proceedings. Nor does the First Department’s recent decision upon which the NYPD relies so hold. *See* NYPD Br. at 10 (citing *Matter of N.Y. Civil Liberties Union v. N.Y. City Police Dep’t*, 148 A.D.3d 642 (1st Dep’t 2017)). That decision held only that the NYPD may withhold from disclosure under FOIL the final decisions of NYPD departmental trials, which are not announced in open court. 148 A.D.3d at 643. Indeed, the court’s decision in that case rested in large part on the distinction between the final decisions, which are not made public, and the hearings, which are open to the public. *See* 148 A.D.3d at 643 (“Whether the trials are public and whether the written disciplinary decisions arising therefrom are confidential *are distinct questions* governed by distinct statutes and regulations Further, the disciplinary decisions include the disposition of the charges against the officer as well as the punishment imposed, *neither of which is disclosed at the public trial.*”) (emphasis added). This Court should reject the NYPD’s invitation to radically expand the reasoning of

Matter of New York Civil Liberties Union v. NYPD to shield evidence from disclosure that, unlike the final decisions, was “placed in the public domain” by being discussed in open court. *Rainbow News 12 Co.*, 1992 WL 427579, at *2. There is no basis in existing law to adopt that reasoning, and the public policy reasons for granting the public access to such evidence strongly weigh against it.

In sum, the Progressive Caucus respectfully submits that the Court should vindicate the public’s “essential” right, *Lugosch*, 435 F.3d at 119, to access the evidence from Officer Haste’s departmental trial. This evidence should be ordered disclosed regardless of whether it would have been subject to one of the exemptions discussed above had it not been disclosed in open court. As discussed below, this evidence is of the utmost importance to the Progressive Caucus and the public it represents.

II. THIS INFORMATION IS OF CRITICAL IMPORTANCE TO THE PROGRESSIVE CAUCUS AND THE PUBLIC

A. The Public Interest in Police Transparency

It is well-established in social science literature that transparency is a necessary preliminary step to asserting the community’s power to check police misconduct and abuse. *See* Kami Chavis Simmons, *The Politics of Policing: Ensuring Stakeholder Collaboration in the Federal Reform of Local Law Enforcement Agencies*, 98 J. CRIM. L. & CRIMINOLOGY 489, 504 (2008) (improving transparency discourages police misconduct and leads to increased political accountability); Erik Luna, *Transparent Policing*, 85 IOWA L. REV. 1107, 1108 (2000) (discussing police accountability); Cynthia H. Conti-Cook, *Defending the Public: Police Accountability in the Courtroom*, 46 SETON HALL L. REV. 1063, 1085 (2016) (“Transparency in police records is a necessary step towards balancing the governing powers of the executive, deterring individual misconduct, and empowering communities to make informed assessments of

local police department's accountability system and to truly participate in a democratic process.").

"Building and maintaining community trust is the cornerstone of successful policing and law enforcement." *See Building Trust Between the Police and the People They Serve, An Internal Affairs Promising Practices Guide for Local Law Enforcement*, INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE 3, <http://www.theiacp.org/portals/0/pdfs/BuildingTrust.pdf>. In turn, trust in the police "begins with willingness to share information." Luna, *supra* at 1162-63; *see also id.* at 1193 (noting the role of trust and communication in improving transparency in policing). In fact, the NYPD's new Commissioner, James O'Neill, has acknowledged the importance of police-community relations to police effectiveness. O'Neill recently stated: "Fighting crime is what we get paid to do," and "we can't do that unless we have the backing of the community. Unless we have that connectivity, it's not going to work." Al Baker & J. David Goodman, *James O'Neill, Officer Since 1983, Will Step into Police Dept. 's Top Job*, NEW YORK TIMES (Aug. 2, 2016), <http://www.nytimes.com/2016/08/03/nyregion/james-oneill-nypd-commissioner.html>.

Asymmetries in information about police disciplinary practices—exemplified by the NYPD's denial of Petitioner's FOIL Request—undermine the public's ability to understand what is happening and request specific changes to ensure police accountability going forward. Large-scale protests in New York City and throughout this nation attest to civilians' concern and frustration with the withholding of information about police-involved civilian deaths. A recent report from the International Association of Chiefs of Police emphasizes how important information sharing is to improving police-community relations, particularly during sensitive times:

Strong communication is critical to building relationships with the community. Transparency in all areas is key. Open, accessible reporting of statistics, arrest information, and any other law enforcement data is expected, even when the information provided does not paint the best picture. Internally, education and training should consistently promote community inclusion at all levels and ranks. Open communication tells the community that there is nothing to hide. In times of crisis or critical incident, communication must happen quickly, frequently, and honestly.⁹

Instead of shutting the public out of the dialogue on police discipline,

“[p]roviding open data makes a statement about the acceptance of accountability on the part of the agency and its willingness to be transparent.” *See Five Things You Need to Know About Open Data in Policing*, THE POLICE FOUNDATION, https://www.policefoundation.org/wpcontent/uploads/2015/06/PF_FiveThings_OpenDataInPolicing_Handout_RGB.pdf.

(discussing aspects of open data movement and ways that “community analysis of open data could yield important insights into policing”); *see* Luna, *supra* at 1167-68 (noting that law enforcement openly discussing guidelines for use of force allows for public debate and “empowers the citizenry through sharing information and collaborating on appropriate policing principles”).¹⁰

“[E]lected officials”—such as the Progressive Caucus—“play a key role in building trust between police and the communities they serve.”¹¹ But in order to do so, the Progressive Caucus and the public need to know the facts. Among other things, public access to the requested documents will allow for evaluation of the IAB’s investigative work, which is

⁹*See IACP National Policy Summit on Community Police Relations*, THE POLICE FOUNDATION INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, 15 (Jan. 2015), http://www.theiacp.org/Portals/0/documents/pdfs/CommunityPoliceRelationsSummitReport_web.pdf.

¹⁰ The Citizens Police Data Project is a national model of transparency and accountability created in collaboration with the University of Chicago Law School’s Mandel Legal Aid Clinic). *See Citizens Police Data Project*, INVISIBLE INSTITUTE (Nov. 10, 2015), <http://invisible.institute/police-data/>.

¹¹ *See City Officials Guide to Policing in the 21st Century*, NATIONAL LEAGUE OF CITIES (2016), 1 <http://www.nlc.org/sites/default/files/2016-12/NLC%20Community%20Policing%20Guide%20updated%2071516.pdf>

central to the citywide conversation about NYPD reform stemming from this incident. *See* Rachel Moran, *Ending the Internal Affairs Farce*, 64 BUFF. L. REV. 837, 852-53 (2016) (“These [internal affairs] units fall woefully short of fulfilling their duties to investigate, punish, and deter misconduct. . . . The ability of officers to commit violent acts with impunity is due in no small part to internal review systems that routinely turn their backs to police misconduct.”). *Id.* at 853 n.70 (citing Officer Haste’s promotion and pay increases in the four years following Ramarley Graham’s death).

B. The Erosion of Public Trust in the Police Is a Public Safety Issue

The NYPD’s adherence to principles of nondisclosure and secrecy erodes the public’s trust in the NYPD. *See* Keith Reed, *I Don’t Trust the Police Because I Can’t*, EBONY (Sept. 18, 2013), <http://www.ebony.com/news-views/i-dont-trust-the-police-because-i-cant-304#axzz3gXMPq6eE> (“For Black men anywhere, it’s like learning how to walk: you don’t remember when it happens, but you know [cop anxiety is] necessary. Being anxious around police is a coping mechanism for dealing with the mortal threat they pose.”) (cited in Rachel Moran, *Ending the Internal Affairs Farce*, 64 BUFF. L. REV. 837, 837 n.2 (2016)); *see also* Jonathan M. Smith, *Closing the Gap Between What is Lawful and What is Right in Police Use of Force Jurisprudence by Making Police Departments More Democratic Institutions*, 21 MICH. J. RACE & L. 315, 334-35 (2016) (discussing how “media coverage has validated the daily experience of people in communities of color that have largely been ignored”); Jonathan Oberman & Kendea Johnson, *Broken Windows: Restoring Social Order or Damaging and Depleting New York’s Poor Communities of Color?*, 37 CARDOZO L. REV. 931, 940 (2016) (“Poor communities of color in New York City experience police presence that feels to much like an occupying army and too little like a police force committed to preserving peace, reducing

fear, and maintaining order by protecting the lives of all citizens, regardless of the neighborhood in which they live, by treating them with ‘courtesy, professionalism, and respect’.”)

The Progressive Caucus is concerned that the refusal to disclose critical documents stymies elected officials’ ability to encourage concrete changes to disciplinary systems, training and tactical protocols, and other policies relating to the use of force that may perpetuate police misconduct and abuses.¹² The Progressive Caucus plays a role in improving public safety, including as it relates to community members’ right to be free from police violence.¹³ The NYPD’s failure to release the requested documents undermines the Progressive Caucus’s ability to carry out this mission ultimately endangers both the public and the police.

C. The Requested Records Are Needed in Order for the Progressive Caucus and the Public to Engage in an Informed Debate About Police Reform

Incidents, such as this one involving Mr. Graham’s death at the hands of the police, cast a large shadow over the effectiveness of the NYPD’s disciplinary system and other means of ensuring its officers do not use excessive force. Yet, without public access to the requested documents related to the killing of Ramarley Graham, systemic abuses that may have contributed to his death remain hidden and the Progressive Caucus’s constituents lose a vital avenue for monitoring police conduct. If released to the public, as they should be, the requested documents will provide a basis for the citizens of New York City, and their elected

¹² For example, Officer Haste was apparently never provided the required training for street-narcotics officers.

¹³ Several members of the Progressive Caucus serve on the New York City Council’s Committee on Public Safety, which has oversight of the NYPD. See New York City Council, *Committee on Public Safety*, <https://council.nyc.gov/committees/public-safety/> (listing Council Members Ritchie Torres, Julissa Ferreras-Copeland, and Jumaane D. Williams). Council Member Ritchie Torres also serves on the Black Latino and Asian Caucus and is the signatory of a letter from that caucus expressing public safety concerns relating to the NYPD’s failure to pursue its investigation of Ramarley’s death. See Christopher Mathias, *NYPD Commissioner Bratton Is A ‘Bald-Faced Liar,’ Says Ramarley Graham’s Mother*, HUFFPOST (Mar. 10, 2016), https://www.google.com/amp/m.huffpost.com/us/entry/us_56e18716e4b065e2e3d4e81e/amp (“An investigation by the NYPD is necessary and critical to maintain the integrity of our legal system, to ensure that New Yorkers remain confident that their lives are protected and valued by the NYPD, and to set the example within the Department that police misconduct will not be tolerated.”).

representatives, to engage in a dialogue about police accountability for use of excessive force, particularly in communities of color. *See* Smith, *supra* at 336 (recognizing the need to “democratize the institution of policing through meaningful community participation in the governance of police departments and in the transparency of police practices”); *see also* Kami Chavis Simmons, *New Governance and the “New Paradigm” of Police Accountability: A Democratic Approach to Police Reform*, 59 CATH. U. L. REV. 373, 411-16 (2010) (emphasizing the need for increased transparency and citizens’ active deliberation as part of any police-reform efforts).

The public’s interest thus extends beyond the disciplinary charges against the NYPD officers involved in Ramarley’s death to concerns about how police accountability systems might be implicated in his death. This particular incident has focused the public’s attention, and the debate on where we go from here is already underway. Indeed, the requested documents may reveal “systemic features of the police organization [that] permit, sanction, or even encourage the officers’ violent behavior.” *See* Barbara Armacost, *Organizational Culture and Police Misconduct*, 72-453 GEO. WASH. L. REV. 455, 455-56 (2004); Luna, *supra* at 1111 (discussing institutional problems in policing). With access to the requested documents, the Progressive Caucus and the public will be able to scrutinize the overlapping policies and factual data relating to the incident, which is a critical component to envisioning and effectuating police accountability reforms that can end police-involved killings. *see* Luna, *supra* at 1164-67 (“[T]ransparency is the ability of the citizenry to observe and scrutinize policy choices and to have a direct say in the formation and reformulation of these decisions.”).

Thus, the Progressive Caucus respectfully asks this Court to annul the NYPD’s determination denying Petitioners’ FOIL Request in view of the considerable public interests

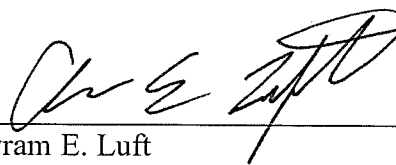
involved in achieving safer neighborhoods and real NYPD reform. The requested documents will provide the Progressive Caucus and the public the information necessary to effect systemic change that can reverse the erosion of our constituents' trust in the NYPD.

CONCLUSION

For the foregoing reasons, the Progressive Caucus respectfully urges the Court to order the NYPD to produce the records sought in the Petition.

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Respectfully submitted,



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