

**The New York State Senate
Standing Committee on Codes
Hearing on Potential Legislative Changes to Section 50-a of the Civil Rights Law
October 17, 2019**

The Bronx Defenders (“BxD”) respectfully submits the following testimony regarding proposed legislation to change Section 50-a of the Civil Rights Law. BxD is a community-based and nationally recognized holistic public defender office dedicated to serving the people of the Bronx. BxD provides innovative, holistic, client-centered criminal defense, family defense, immigration representation, civil legal services, social work support, and other advocacy to indigent people of the Bronx. Our staff of over 300 represents approximately 22,000 individuals each year. In the Bronx and beyond, BxD promotes criminal justice reform to dismantle the culture of mass incarceration.

BxD expresses our strong support for S.3695 (Bailey) / A. 2513 (O’Donnell) to fully repeal New York Civil Right Law Section 50-a. Section 50-a maintains a shroud of secrecy over the disciplinary records of police officers, depriving New Yorkers from getting crucial information about law enforcement officials who engage in misconduct and abuse the public trust. Repealing 50-a is a critical step towards police accountability and protecting the civil rights and liberties of New Yorkers, particularly people of color.

Police misconduct is a lived reality for many of our clients. Our clients are pushed and shoved, their faces scraped on walls and on the floors, their arms broken and their heads intentionally banged against cars and walls — even after they are handcuffed. Police misconduct can also be psychologically scarring even when it is not physically. Such was the case for a client of ours, who, strolling down the street towards his bus stop, was stopped by two undercover officers — guns brandished — who proceeded to throw him to the ground and later strip search him at the precinct. By the time our client’s case ended — with a dismissal — he had undergone months of therapy to address the trauma he had suffered from that encounter.

Transparency in police accountability and discipline, and the proper documentation and disclosure of police misconduct, are critical to both the effective representation of our clients in criminal court and to our clients’ ability to receive some form of closure and justice in their cases. For some of our clients, access to these records could be the difference between a conviction or a dismissal. We recently represented a client who, like many of our clients, was stopped, frisked, and charged with possession of controlled substance, in a blatant application of the racist stop-and-frisk practices that continue to harm our clients and their communities. The arresting officer’s misconduct records indicated a clear pattern of similar behavior. These records

helped obtain a dismissal in that case, which was the first step in our client's path to find justice and closure.

Use of officer misconduct records in litigation is central to our criminal process and necessary to provide some measure of accountability for officer unlawful behavior. This is especially true when other accountability systems, such as the IAB or the CCRB, fail to do more than give an anemic slap to the wrist of the offending officer. For many of our clients who often face the harsh consequences of a criminal conviction and loss of liberty, access to these records is especially urgent.

The Role of Police Disciplinary Records in Litigation and the Need to Repeal 50-a

Transparent police misconduct records are vital for the fair and just functioning of the criminal justice system. These records often contain information that demonstrate an officer's bias, deceit, escalation of encounters, use of force, or other types of information that undermines the credibility of the officer's conduct. Such information can shed light on whether the officer acted lawfully in the case being litigated. At times, the information in these records is so detrimental to an officer's credibility that it can serve as *de facto* exculpatory evidence by demonstrating that the officer simply cannot be trusted to tell the truth on the stand. Therefore, police misconduct records are of vital importance in conducting a fair trial and in upholding the right to access exculpatory information.

Because of Section 50-a, however, these important records are not accessible to defense attorneys until the eve of trial, if at all. Prosecutors and judges serve as the gatekeepers to these records. Without a judge's order, or a prosecutor's good will, defense counsel may not even know that misconduct records exist in the first place, much less view them or use them at trial. Indeed, at times, prosecutors are not even aware of the existence of misconduct records until alerted by attorneys with prior knowledge about the officer involved.

Faced with this reality, BxD has relied heavily on the misconduct records database created by the Legal Aid Society. This database includes some misconduct records for some officers. However, the database is extremely limited: it includes only those records that prosecutors or the courts choose to hand over to defense attorneys, which defense attorneys remembered to upload to the system. In other words, the database reflects only a fraction of the misconduct records that exist.

Thus Section 50-a serves to minimize police accountability, hurt the most vulnerable communities in our State, and block the administration of justice from those who have been unlawfully injured by the State. We join the call to the State Legislature and the Governor to repeal Section 50-a of the New York Civil Rights Law, the section that protects these records from the public eye. Repeal of this section would make misconduct records more accessible to lawyers and the public, and would result in more accountability and protection against the abuse of power by law enforcement.

The Role of Transparency in Effective Police Discipline

Transparency, in the form of accessible information, is a first and important step towards accountability. The issue of police discipline has increasingly come to the forefront of public discourse in recent years, after police violence, use of force and misconduct were exposed to the public's eye. Police discipline is a factor in minimizing these incidents in the future, and restoring some of the public's lost faith in law enforcement. Transparency is therefore an instrumental part of transforming the system and addressing the public outcry.

Transparency works on several separate tracks to improve accountability. First, transparency allows policy makers, such as this Committee, to understand the factors and context that give rise to these incidents. It is difficult to discuss the extent of police misconduct when our information comes from the media, which cannot report on the thousands of other misconduct incidents happening across the City and the State. It is similarly difficult to consider mechanisms for change and accountability without such information. Access to police misconduct records will bring transparency to the discussion, and allow this Committee and other bodies to have more informed, in-depth, and relevant discussions of the problem and the ways by which it can be fixed.

Second, transparency sends a clear signal to law enforcement personnel that they are being monitored and that they could be held accountable if they were to act in an unlawful or unethical way. Open access to misconduct records means that police will be questioned about their actions at hearings, trials, and in the court of public opinion. It means that before pulling out their firearms, beating, shoving and kicking residents of this State, officers will more likely consider how they will face the attention that their actions will garner, and the oversight that will follow. That pause for thought and reflection before action will lead to less misconduct and more community-oriented policing. Transparency will thus incentivize better behavior by forcing reflection and making it clear that police actions will be reviewed by all stakeholders.

Third, transparency improves imperfect forms of accountability by holding those mechanisms (and the people who oversee them) themselves accountable. For example, at times CCRB investigations result in recommendations to take action against the offenders officers, but the recommendations are ignored by those higher-ups who need to approve them. These decisions happen in the dark: few people outside of the CCRB and the police knowing anything about what transpired and what led to these decisions. Without transparency, those making these decisions are immune from public opinion and accountability, and can act with complete impunity. Repealing Section 50-a, and giving multiple stakeholders access to misconduct information, will bring accountability to these decision-makers, and thus improve these processes of accountability.

Finally, transparency is necessary for fair trials to take place in the face of criminal charges. Individuals charged with crimes are legally entitled to access officer misconduct records and to use these throughout the litigation of their case. In cases where the officer's credibility is at issue, misconduct records demonstrating a lack of credibility can amount to exculpatory evidence that is pertinent for the fair litigation of the case. But because of Section 50-a, these

records are often not immediately available to defense attorneys and the people they represent. Instead, these records are kept hidden until the eve of trial, and at times, until after the trial has started. Many times, records disclosed by the prosecutors are only those they thought to obtain and only those they deem relevant. In other words, too often defense attorneys receive late and selective, partial access.. Thus defense attorneys may learn about the problematic history of an officer after different investigation opportunities have already passed; after negotiating a plea offer that could have been more favorable had the misconduct record been out in the open; and after months of preparing a defense that does capitalize on the credibility issues illuminated by the misconduct record. The consequences is not only a less efficient justice system, delayed by these late disclosures, but one that is less fair and undermines the constitutional right for a fair trial. Repealing Section 50-a means that transparency will be a part and parcel of the criminal process from the start, making it fairer and more just.

Repeal of Section 50-a Aligns with the Aims of the New Discovery Laws

This spring, New York passed historic comprehensive discovery reform. BxD applauds the New York State Assembly, Senate, and the Governor for their commitment to get this piece of landmark legislation passed. The Discovery for Justice Reform Act (“DFJRA”) repealed one of the most regressive discovery laws in the country and replaced it with a system of open, early, and automatic discovery for all New Yorkers.

The DFJRA represents a sea change in the way information is shared in the criminal legal system, requiring prosecutors to engage in early, open, and automatic discovery in every case. The plain language of the statute makes clear that the aim of discovery reform was leveling the playing field and full transparency. Section 245.20(1) of the new law requires prosecutors to disclose “all items and information that relate to the subject matter of the case” in the possession of law enforcement within 15 days of criminal court arraignment. Section 245.20(7) also requires judges to apply a “presumption in favor of disclosure” when interpreting the statute. Together, these provisions create a framework for full transparency in criminal cases. Unfortunately, DFJRA does not mandate release of officer misconduct in general, much less for limited review and use by defense attorneys.

The commitment to full transparency in the criminal justice process that the DFJRA represents should serve to guide the Legislature to repeal Section 50-a. The People of New York State, along with the State Legislature, have codified our commitment to a new era of openness, access and transparency in the criminal justice system. The same principles of fairness, justice and accountability that underlie the DFJRA apply with equal force to misconduct records, which are exempted from this legislation. It is time to take the next, most logical step - bring full transparency and accountability to officer misconduct by repealing Section 50-a and permitting access to misconduct records.