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COURT OF APPEALS
STATE OF NEW YORK

MATTER OF NYP HOLDINGS,

Respondent,

-against-

NYPD,

Appellant.

NO. 12

20 Eagle Street
Albany, New York
January 9, 2025

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE WILSON: Next case on the calendar is
2 Matter of NYP Holdings v. New York Police Department.

3 MR. DALY: May it please the court. My name is
4 Matthew Daly for the PBA of the City of New York. May I
5 please reserve four minutes for rebuttal?

6 CHIEF JUDGE WILSON: Yes.

7 MR. DALY: We're asking the court to hold that
8 the repeal of Civil Rights Law, Section 50-a, was not
9 retroactive. The key mistake that the First Department
10 made was it swept away more than four decades of pre-
11 existing statutory rights by labeling the repeal as
12 remedial. The remedial label does not fit in this case
13 where the legislature made a complete 180-degree policy
14 reversal by reversing Section 50-a after more than forty
15 years.

16 JUDGE CANNATARO: Who did - - - who did the - - -

17 JUDGE HALLIGAN: May I ask you - - -

18 JUDGE CANNATARO: Sorry.

19 JUDGE HALLIGAN: After you.

20 JUDGE CANNATARO: Who did the rights belong to?
21 That's my question.

22 MR. DALY: The rights belong to the police
23 officers - - - or the covered employees, police officers,
24 firefighters, corrections officers. That's actually what
25 the First Department held in this case in allowing the PBA

1 to have standing to make the Section 50-a argument. That's
2 the law of the case. It hasn't been - - - that aspect of
3 the holding hasn't been repealed or hasn't been appealed.
4 But we are also very solid on the law on that point, that
5 this right belonged to the officers.

6 JUDGE HALLIGAN: Can I ask you to start not with
7 the application of the retroactivity analysis, but whether
8 or not there is something retroactive? And maybe you can
9 explain how this is - - - why this isn't controlled by
10 Acevedo and Forti

11 MR. DALY: Yes. That - - - so this is the
12 alternative argument that the respondent makes, that
13 there's no retroactivity analysis required. And as your -
14 - - the court knows, the Second and Fourth Departments
15 accepted that argument. We submit it's wrong for several
16 reasons. Number one, and you don't really need to go any
17 farther than this, General Construction Law, Section 93,
18 Second Department didn't address this. Fourth Department
19 didn't address this at all. What that statute says is it
20 creates a presumption that the repeal of a statute does not
21 affect rights that already accrued. And those rights may
22 be enjoyed and enforced to the same extent as if such
23 repeal had not been affected.

24 JUDGE HALLIGAN: So if we think, though, that
25 that doesn't control, how do you address those cases?

1 MR. DALY: I would disagree that it doesn't
2 control, but - - -

3 JUDGE HALLIGAN: I appreciate that.

4 MR. DALY: - - - but we're still within a
5 retroactivity analysis under the common law, Your Honor.
6 So I'll distinguish Acevedo and Forti in just a moment.
7 But I think the starting point is, even putting aside the
8 General Construction Law, and I don't think - - - I don't
9 even think it's disputed by the respondent that the General
10 Construction Law applies here. There's no argument why it
11 wouldn't apply to a statutory repeal like this. But - - -
12 so what's the standard under the common law for retroactive
13 effect? The court set this fourth in Regina Metropolitan
14 and even just last November in the Jeter v. Poole case,
15 whether the change in the law would impair rights a party
16 possessed when he acted, increase the party's liability for
17 past conduct, or impose new duties with respect to
18 transactions already completed. We - - - this case falls
19 within the first bucket of that test, impair rights a party
20 possessed when he acted. So by - - - at the - - - what
21 Section 50-a said is, at the moment a police or covered
22 employee personnel record was created, it shall be
23 confidential and shall not - - - and was exempt from
24 production in all contexts, not just FOIL. The right
25 attached as soon as the record was created. So it's not

1 like a situation where the officer had to commence some
2 sort of proceeding in order to get the benefit of section
3 50-a.

4 JUDGE HALLIGAN: But how come? I take it this is
5 your vested right argument, yes?

6 MR. DALY: Well, that's correct, Your Honor.
7 This is a vested right.

8 JUDGE HALLIGAN: And so how come it's a vested
9 right as opposed to an expectation that was created by the
10 statute? I think we've distinguished between them.

11 MR. DALY: So the definition of a vested right
12 that we would ask the court to accept and this is also set
13 forth in the - - - let's see - - - in the Frontier
14 Insurance case, they had a good discussion of this. It's a
15 Court of Claims case, but it was affirmed in relevant part
16 by the Third Department and then affirmed by this court.
17 But the reason that this is a vested right is it's not a
18 right that exists solely because no statute prohibits it.
19 What we have here is an independent statute. It's actually
20 the Civil Rights Law of New York State. The title of the
21 provision is right to privacy.

22 JUDGE HALLIGAN: But why couldn't it be thought
23 of instead as a statutory privilege or an exemption. I
24 think that distinction lies in our cases.

25 MR. DALY: It's not a statute - - - so what we're

1 - - - again, what we're dealing with here is an affirmative
2 right granted by statute. And the - - - the - - - second
3 reason why - - -

4 JUDGE HALLIGAN: But that's we're debating, I
5 think.

6 MR. DALY: Well, I think there's two parts to the
7 vested right. Number one, I think it's an affirmative
8 grant of a right. And then number two, did anything else
9 have to happen for this right to attach, which is the
10 traditional notion of vested. Had it vested yet? And for
11 purposes of Section 50-a, the right of the police officer
12 vested, as I was saying, the moment that the record was
13 created. So when you look at the Forti case and the
14 Acevedo case, and I would submit other cases where the
15 court has applied this, what I call the future transactions
16 doctrine, what those cases deal with are things like
17 somebody - - - when somebody is applying for an employment
18 position, when somebody is applying for a license or a
19 restriction on future employment, in those cases the court
20 say, okay, it's okay to look in the past. So the Acevedo
21 case, people that had their licenses revoked for drunk
22 driving, the commissioner has discretion whether to give
23 them their licenses back. They reapply for their licenses.
24 Of course, the commissioner can look back at their
25 histories, and that's not a retroactive effect. What those

1 cases don't involve is a statute that grants affirmative
2 statutory rights. Those cases also do not involve General
3 Construction Law, Section 93. The other thing - - -

4 CHIEF JUDGE WILSON: General Construction Law,
5 93, is just an aid to construing statutes. Do you agree
6 with that?

7 MR. DALY: That's correct. And so that's why
8 it's relevant to the question of whether or not there's a
9 retroactivity analysis required at all. We're not saying
10 that General Construction Law can never be overcome, but
11 it's the trigger - - -

12 CHIEF JUDGE WILSON: But you're not saying that
13 it provides any substantive rights either or anything like
14 that. It's a - - - it's just an aid to construing
15 statutes.

16 MR. DALY: Well, it - - - it triggers a
17 presumption that the pre-existing rights continue. So it
18 triggers a retroactivity analysis.

19 JUDGE HALLIGAN: Wait.

20 MR. DALY: I don't see how you could - - - yeah.

21 JUDGE HALLIGAN: I thought, though, it was really
22 a canon of statutory construction that's codified. I - - -
23 are you suggesting that it - - - it creates some - - - when
24 you say a presumption, a presumption that is akin to a
25 right or simply a presumption in terms of how we would

1 properly read the words of a statute?

2 MR. DALY: I think it gives the court - - - it's
3 a statute. It's - - - it's a - - - it's - - - it's just
4 like FOIL is a statute that sets forth the policies of the
5 state, the General Construction Law is a statute.

6 JUDGE HALLIGAN: Well, there - - - there are - -
7 -

8 MR. DALY: And it gives the court guidance. I
9 don't think the court could say, well, I'm not going to
10 even consider General Construction Law or I'm not going to
11 follow it.

12 JUDGE HALLIGAN: Yeah. I didn't mean to suggest
13 that. Let me try to ask the question more clearly. It - -
14 - it seems to me, as I read the provision, that it is a
15 statute for sure that provides guidance in how we
16 understand the words in some other statute, but that's very
17 different than a statute that would give rise to something
18 enforceable. It's to help us understand how to read the
19 words that the legislature has written in other statutes
20 and therefore decipher what their intent is.

21 MR. DALY: I think it's a little bit stronger
22 than that, Your Honor. The - - - what the statute says is,
23 the repeal of a statute or parts thereof shall not affect,
24 and then it goes on. That's what I read that as mandatory
25 language on the courts. And - - - and - - -

1 JUDGE HALLIGAN: But - - - but didn't - - -
2 sorry, go ahead.

3 JUDGE RIVERA: No. No. The - - -

4 MR. DALY: My only point - - -

5 JUDGE RIVERA: The preface to that is it's a
6 presumption. So is it your position it's an irrebuttable
7 presumption?

8 MR. DALY: Not at all, Your Honors. I'm solely
9 addressing the question about whether or not we need a
10 retroactivity analysis. When that presumption applies,
11 then the next step is, has the presumption been overcome?
12 And that's when you get into the question of, is there a
13 clear expression of legislative intent - - -

14 JUDGE HALLIGAN: So - - -

15 MR. DALY: - - - to overcome the presumption?

16 JUDGE HALLIGAN: So we said, I think, in Roper,
17 which is almost a hundred years ago, that it's a principle
18 of construction to be applied in determining the scope of
19 legislation. And so you look to whether there's, you know,
20 some evidence of contrary intent. But I think we said in
21 Roper explicitly that it's a principle of statutory
22 construction.

23 MR. DALY: Your Honor, I'm not - - - I mean, we
24 might be on the same page. I'm not sure we're saying
25 something different.

1 JUDGE HALLIGAN: Maybe it's a question of
2 semantics.

3 JUDGE CANNATARO: Counsel, I think the problem
4 is, you said that 93 creates the right or something along
5 those lines, and that's not what 93 says. 93 says that any
6 right that existed at the time that the amendment went into
7 effect won't be affected by the amendment, which is - - -
8 you know, it's not creating a new right. It's protecting a
9 right that existed. And by the way, I happen to agree that
10 - - - that in this context, because it appears in the
11 General Construction Law, it's just a guide to judges and
12 other people who are interested on how to interpret these
13 kinds of enactments.

14 MR. DALY: I agree with what - - - the first part
15 that you said that it's not the source of the right. The
16 source of the right is Civil Rights Law, Section 50-a, but
17 - - - but that combined with the General Construction Law,
18 I think, disposes of my friend's argument that, well, now
19 that Section 50-a has been repealed, there's no longer an
20 exemption under FOIL. Records have to be produced. That
21 argument doesn't fly because the General Construction Law
22 and the common law says those preexisting - - -

23 CHIEF JUDGE WILSON: Kelly - - - Kelly v. State
24 sort of cuts against that. It involves - - - it's our
25 affirmance of the Appellate Division on the decision below

1 in a case involving - - - it used to be that inmates could
2 not sue while they were incarcerated, and they had a two-
3 year window to sue afterwards. And an inmate who was
4 released, sued within two years of release, but while he
5 was incarcerated, the law had changed allowing inmates to
6 sue. And he claimed that he had a right to sue within two
7 years of his release. And we acknowledged General
8 Construction Law, what the Appellate Division did, 93, and
9 said, nevertheless, this does not establish a right.

10 MR. DALY: Was that case in the briefing, Your
11 Honor?

12 CHIEF JUDGE WILSON: I don't believe so.

13 MR. DALY: Okay.

14 CHIEF JUDGE WILSON: But it's in the - - -

15 MR. DALY: The body of law?

16 CHIEF JUDGE WILSON: Yes.

17 MR. DALY: The - - - the case - - -

18 CHIEF JUDGE WILSON: New York law courts.

19 MR. DALY: The case I'll - - - I'll direct Your
20 Honors to that we cited in our reply on this point is 850
21 Co. v. Schwartz, 15 N.Y.2d 899, from 1965. The court
22 hadn't had occasion to address Section 93 of the General
23 Construction Law too often. But in that case, the court
24 enforced a statute after the statute had expired. And the
25 court relied on General Construction Law to do that. But I

1 want to get to - - - I think - - - I don't - - - we don't
2 need the General Construction Law to win our argument here
3 because, again, the common law doctrine of retroactivity
4 also supports this. And what I didn't get to get to that
5 distinguishes this case from the cases cited by my friend
6 here is that the reliance interest on this independent
7 right. We're not just talking about some abstract right
8 here. This is a right that affected behavior. The - - -
9 these disciplinary proceedings would have been different if
10 Civil Rights Law, Section 50-a, had not been affected.

11 JUDGE RIVERA: Where in the record would we find
12 that?

13 MR. DALY: Yeah. So - - -

14 JUDGE RIVERA: Other than just argumentation,
15 where - - -

16 MR. DALY: No. It's - - - it's in our sworn - -
17 - it's in our sworn pleading. It's in the record at page
18 322. This is a - - - a sworn answer that made the point
19 that I just made. And what we said is, reliance on the
20 rights to confidentiality certainly impacted police officer
21 decision-making in response.

22 JUDGE RIVERA: Sorry. That's an affidavit from a
23 police officer?

24 MR. DALY: It's the equivalent of an affidavit.
25 It's a sworn pleading, Your Honor. A verified answer. The

1 other point I'll make about that is, no court to have
2 addressed this issue, the trial courts, the majority of
3 which have ruled in our favor on this issue, the Appellate
4 Divisions, no court has disputed that this reliance
5 existed.

6 JUDGE CANNATARO: Counsel, can you just very
7 quickly explain to me before you go because your light is
8 on, why is this not an - - - just an expectation that's
9 been altered and is actually a right?

10 MR. DALY: It comes back to the point that this
11 is an - - - I think the distinction that the law draws is
12 between an expectation just because no law prohibits me
13 from doing something versus when there's a statute that
14 says this is going to be the case. I'm giving you this
15 right. And there's reliance on that right. It affects
16 behavior. The right had vested. And I'll just remind this
17 court of its 2018 decision in New York Civil Liberties
18 Union, how this court characterized the rights under the
19 Civil Rights Law, Section 50-a, a guarantee of
20 confidentiality, a promise of confidentiality. It provides
21 the exclusive means for disclosure of confidential
22 personnel records. So this is not a FOIL issue. 50-a
23 applies in all sorts of contexts, civil discovery, criminal
24 discovery. It prevented agencies from just turning over
25 this information. It was a right that belonged to police

1 officers. So this was a very powerful right. And I don't
2 think there's any case that this court has addressed or
3 that's been cited in the pleadings where you have an
4 affirmative right like this that's then repealed, triggers
5 General Construction Law, triggers the common law. And to
6 say that there's no retroactivity analysis required, I
7 don't think that's supported under any of the court's
8 precedents. I'll reserve my time for rebuttal.

9 CHIEF JUDGE WILSON: Thank you.

10 MR. CHASE: Good afternoon. May it please the
11 court. My name is Jeremy Chase from Davis Wright Tremaine,
12 and I represent Petitioners, NYP Holdings, Inc. and Craig
13 McCarthy. In June - - - this case concerns whether pre-
14 repeal disciplinary records must be disclosed in response
15 to post-repeal FOIL request.

16 JUDGE HALLIGAN: Do you want to maybe respond to
17 your adversary's argument about vested right versus
18 expectation?

19 MR. CHASE: Yes. This is clearly an expectation
20 based on pre-existing law. The whole idea of this being a
21 vested right is a bit - - - is a bit of a stretch.

22 JUDGE HALLIGAN: Well, the statute did provide
23 for release only upon court order or the express written
24 consent of the officer, right?

25 MR. CHASE: Yes, yes.

1 JUDGE HALLIGAN: And so why didn't that latter
2 provision give rise to a vested right? Which I take it as
3 the crux of their argument.

4 MR. CHASE: Why didn't the confident - - - why
5 didn't 50-a constitute a vested right is what you're
6 asking?

7 JUDGE HALLIGAN: Confer a vested right such that
8 we need to apply the retroactivity analysis, yes.

9 MR. CHASE: Yes. So first of all, the Landgraf
10 case by the U.S. Supreme Court, for example, it emphasized
11 that retroactivity deals with whether new legal
12 consequences to an event attaches - - -

13 JUDGE HALLIGAN: Well, I guess, I'm asking under
14 our case law - - -

15 MR. CHASE: Yes.

16 JUDGE HALLIGAN: - - - about what constitutes a
17 vested right. Why is this not a vested right that was
18 conferred by the prior statute?

19 MR. CHASE: I mean, I would ask when the right
20 vested at all. I mean, the - - - my colleague - - -

21 JUDGE CANNATARO: So then you agree it's a right.
22 It's just not a vested right?

23 MR. CHASE: When it was still - - - when it was
24 still in - - - when it was still an actual - - -

25

1 JUDGE CANNATARO: Well, I mean, counsel makes a
2 fairly good argument that in a situation like this where
3 the statute in question says X, Y, Z shall be confidential,
4 X, Y, Z becomes confidential the moment it's created. So I
5 don't want to put words in his mouth, but I think his
6 argument would be the right vests at the moment of creation
7 of the document in question.

8 MR. CHASE: I would say, under the pre-existing
9 law, when 50-a was an extant law, I would say that it - - -
10 it certainly was a right that was - - - that belonged to
11 the police officers or - - -

12 JUDGE HALLIGAN: But if I think - - - if there -
13 - - if you're conceding that it was a vested right, then I
14 think the question becomes, first of all, when did the
15 right accrue? When would the right have accrued? At the
16 time, I assume, that the record was created. And then I
17 think we're in the box of applying the retroactivity
18 analysis. But I thought you argued to us that we need not
19 do that.

20 MR. CHASE: Well, Your Honor, I'm not saying that
21 it is a vested right. I'm saying that it was a - - - it
22 was a right, certainly, that belonged. But qualifying it
23 as a vested right, I don't think that's accurate.

24 JUDGE HALLIGAN: So why is it not a vested right
25 such that we need to consider whether or not the repeal is

1 retroactive?

2 MR. CHASE: Well, Your Honor, first of all, let
3 me - - - give me one moment, please. There's no - - - as I
4 mentioned before - - - so there's no legal consequences
5 that attach to the release of these records. So whether
6 it's a vested - - - let's see - - -

7 CHIEF JUDGE WILSON: Well, what - - - what do you
8 mean by that?

9 MR. CHASE: Sorry about that. So it's - - -
10 strike that. I'm sorry, Your Honors. Why is this not a
11 vested right? Excuse me.

12 JUDGE HALLIGAN: Just to step back - - -

13 MR. CHASE: Yes.

14 JUDGE HALLIGAN: - - - maybe.

15 MR. CHASE: Please.

16 JUDGE HALLIGAN: It seems to me that Acevedo and
17 Forti raised the question of whether or not - - - and I
18 think this is how your adversary responds to those cases -
19 - - whether or not the right to confidentiality in the - -
20 - whether or not the prior statute conferred a right to
21 confidentiality in these records that vested at the time
22 that the records were created. Because if that's correct,
23 then it may be that we have to go through and apply the
24 retroactivity test to determine whether the legislature
25 intended for this to be retroactive. And so what I'm

1 trying to understand is, in your brief, you argue - - -

2 MR. CHASE: Yes.

3 JUDGE HALLIGAN: - - - that this is not a case of
4 retroactivity at all and we need not apply that framework.
5 And so I'm - - - I'm exploring - - - trying to explore why
6 it is that the analysis doesn't apply. I think it turns on
7 whether it's a statutory privilege or a vested right. And
8 so why would it not be a vested right?

9 MR. CHASE: Well, Your Honor, I mean, again, 50-a
10 - - - what we're talking about here is the Freedom of
11 Information Law. And in the context here, Section 50-a is
12 merely applied as an exemption via 87(2)(a) in the Freedom
13 of Information Law as an exemption to disclosure, so - - -

14 JUDGE HALLIGAN: But I think the argument would
15 be that, at the time the record is created, because the
16 statute said it could not be disclosed absent court order -
17 - - we'll set that to the side - - -

18 MR. CHASE: Sure.

19 JUDGE HALLIGAN: - - - or the express written
20 consent of the officer, that that creates a vested right
21 that the officer holds in the permanent confidentiality of
22 that record, and that that's different than a statutory
23 privilege, that if you don't happen to invoke it while the
24 statute is still in place, doesn't travel forward if it's
25 then repealed. So I think that's what I'm trying to



1 explore.

2 MR. CHASE: I understand. Well, Your Honor, even
3 if one were to assume, just for the moment, that this were
4 a vested right, what we're - - - the intent of the
5 legislature here could not be clearer. There's - - - yes,
6 there - - - there is no express statement of retroactivity
7 in the law. We acknowledge that. But there's no
8 requirement that particular words be used. And in some
9 instances, retroactive intent can be discerned from the
10 nature of the legislation. And this is exactly that type
11 of legislation. Section 50-a was repealed - - - was
12 repealed.

13 JUDGE CANNATARO: Is this the remedial argument?
14 Is that what you're saying?

15 MR. CHASE: This is an argument, just that, even
16 if one were to assume that this were a vested right, the
17 pre-repeal record still should be disclosed because the
18 very nature of the legislation was to shed light on pre-
19 existing records.

20 JUDGE CANNATARO: And my question is, yeah, what
21 is the nature - - - what is it about this particular piece
22 of legislation that indicates the legislature's intent that
23 it be applied retroactively - - -

24 MR. CHASE: Well - - -

25 JUDGE CANNATARO: - - - that's different than

1 what we've said in a number of cases?

2 MR. CHASE: Yes. Well, initially, Section 50 was
3 repealed less than three weeks after George Floyd's murder.
4 The entire purpose of Section 50-a was to make the
5 disciplinary records open to the public and thereby restore
6 trust.

7 CHIEF JUDGE WILSON: Well, wait, wait, wait.
8 Let's take this - - - let's just slow down a little bit.

9 MR. CHASE: Yes.

10 CHIEF JUDGE WILSON: So it was done three weeks
11 after George Floyd's murder?

12 MR. CHASE: Yes.

13 CHIEF JUDGE WILSON: How does that let us know
14 that the legislature meant to produce your - - - or exempt
15 from - - - remove the exemption for old records as opposed
16 to going forward?

17 MR. CHASE: Yes. Well - - - so there are a
18 number of things.

19 CHIEF JUDGE WILSON: Why does that - - - why does
20 that cut on that?

21 MR. CHASE: Well - - - so first of all, the
22 legislative history is replete with references, including
23 by the PBA itself, showing that the understanding was that,
24 by repealing section 50-a, all records would be made
25 available.

1 CHIEF JUDGE WILSON: All old records?

2 MR. CHASE: All old records. All records,
3 period.

4 CHIEF JUDGE WILSON: Well, all records, period,
5 doesn't really distinguish between forthcoming and old.

6 MR. CHASE: Okay. Well - - -

7 CHIEF JUDGE WILSON: Right? I mean, what is it
8 you can point to directly, if anything, in the legislative
9 history that - - - that shows the legislature intended - -
10 -

11 MR. CHASE: Sure.

12 CHIEF JUDGE WILSON: - - - to require the
13 production of pre-existing records?

14 MR. CHASE: Of course. So for example, we cite a
15 number of examples of legislators in the floor debates
16 specifically calling out the history of the debate. So for
17 example, the bill sponsor, Senator Bailey. This bill would
18 repeal Section 50 of the Civil Rights Law that had
19 necessary privacy protections. The - - - Senator Gianaris
20 is - - -

21 CHIEF JUDGE WILSON: Yeah. But that doesn't tell
22 me forward or backwards.

23 MR. CHASE: - - - Senator Gianaris, let us know
24 who the people with a history of problems are so that we
25 can work to improve the system. In the - - - in the bill

1 jacket at - - - in the introducers memorandum, in support,
2 Senator Bailey said, police-involved killings by law
3 enforcement officials who have had histories of misconduct
4 complaints and in some cases recommendations - - -

5 CHIEF JUDGE WILSON: Yeah. But even - - - even
6 the word - - - yeah. Even the word history there doesn't
7 talk - - - that doesn't distinguish between a forthcoming
8 history that is your record, basically, history in that
9 sense, and the past. I'm still not getting there.

10 MR. CHASE: Well - - -

11 CHIEF JUDGE WILSON: Let me shift you a little
12 bit to something else that goes back a little bit to what
13 Judge Halligan was asking about. So the state - - -
14 various state agencies have people's mental health records
15 and those are protected confidentially, right?

16 MR. CHASE: Yes.

17 CHIEF JUDGE WILSON: So suppose the protection
18 for that was repealed, would you say that there's no vested
19 right there?

20 MR. CHASE: So - - -

21 CHIEF JUDGE WILSON: People's old mental health
22 records should be produced if - - - if the exemption were
23 removed?

24 MR. CHASE: I think that given the - - - if the
25 legislature chose to repeal those provisions - - -



1 CHIEF JUDGE WILSON: Uh-huh.

2 MR. CHASE: - - - and made statements of
3 legislative intent as clear as here, which we contend that
4 they are, yes, those provisions would be repealed, but - -
5 -

6 CHIEF JUDGE WILSON: So that - - - but that
7 really goes to a - - - your view that they intended this to
8 be retroactive, not that this is not a vested right. Let -
9 - - let me ask it - - -

10 MR. CHASE: Correct.

11 CHIEF JUDGE WILSON: - - - more prospectively,
12 right?

13 MR. CHASE: Okay.

14 CHIEF JUDGE WILSON: Or not prospectively, but
15 directly. Would you perceive a difference in whether
16 somebody's mental health records constitute a vested right
17 or somebody's police disciplinary records are a vested
18 right? Is there a difference?

19 MR. CHASE: Well, Your Honor, I think, first of
20 all, the - - - in the context of police - - - well, yes,
21 police officers are public servants, Your Honor.

22 CHIEF JUDGE WILSON: Uh-huh.

23 MR. CHASE: And you know, they're provided with
24 vast authority to deprive people of liberty, to - - - to -
25 - - you know, in some cases, take people's lives. And yes,

1 I think that as public servants, they're certainly
2 differently situated than people in the situation that you
3 just described. I don't know if I - - - did I answer your
4 question, Your Honor?

5 CHIEF JUDGE WILSON: You did.

6 MR. CHASE: Okay. Sufficiently?

7 CHIEF JUDGE WILSON: Well, we'll see.

8 JUDGE CANNATARO: You'll find out.

9 MR. CHASE: But I think that the key point here,
10 though, is that, at bottom, this case really presents a
11 straightforward application of FOIL statute. And the only
12 - - - as I mentioned before, as of June 12, 2020, the FOIL
13 statute ceased to exist. And there is no exemption that
14 applies via the FOIL statute. The - - - that is
15 specifically exempted from disclosure by state or federal
16 statute, which is the only exemption at issue here.

17 JUDGE TROUTMAN: Is there any impact on the
18 reasons for the creation of the legislation or the effect
19 of the legislation if you exempt from disclosure those
20 prior records?

21 MR. CHASE: Massively. It completely guts the
22 legislation. I mean, basically - - - let me put it this
23 way, Your Honor. FOIL is inherently backward-looking. And
24 so by their nature, FOIL requests seek records that were
25 generated prior to the request date. The PBA's

1 interpretation here of the repeal would render it basically
2 a nullity. Think of it in these terms, Your Honor. The
3 petitioners filed 144 FOIL requests here seeking officer
4 disciplinary histories. All of them were made within a
5 week of the repeal. Most of them were made the day the
6 repeal was made. Under the PBA's reasoning, petitioners
7 would have been entitled to zero records. That's just so
8 contrary to the - - - the - - - to what the legislature
9 intended, which was to increase transparency, to make these
10 records open to the public. And to say that we were
11 entitled to zero records is - - - kind of just makes the
12 entire repeal - - -

13 CHIEF JUDGE WILSON: Well, except, today, if you
14 made the request, you'd be entitled to three years of
15 records - - -

16 MR. CHASE: Three years - - -

17 CHIEF JUDGE WILSON: - - - and ten years from
18 now, you get thirteen years of records. And at some point,
19 police officers retire. And it's not entirely innuitory.
20 It's just a long phasing.

21 MR. CHASE: Perhaps, but it does run in the face
22 of the idea that this needed to be enacted immediately,
23 which is in the text of the statute - - -

24 JUDGE SINGAS: Well, shouldn't we demand that
25 kind of language from the legislature if they're intending

1 retroactive effect or some clear intent of what they want
2 as opposed to having this discussion?

3 MR. CHASE: I think that if you - - - if anyone
4 lived through the period in 2020 during the protests that
5 led up to the repeal following Mr. Floyd's death, I think
6 that the intent was pretty clear. This is not some obscure
7 law - - -

8 JUDGE CANNATARO: Wouldn't it be more clear if
9 you would put the words in the statute, this applies to all
10 records that existed at any time before enactment of the
11 statute?

12 MR. CHASE: Well, Your Honor, I would say two
13 things to that. One, the text of the law - - - the repeal
14 wasn't made in isolation. It was part of a broader package
15 of FOIL amendments. Specifically, it added Section 86(6)
16 to FOIL, the definition for law enforcement disciplinary
17 records, which includes any records created in furtherance
18 of a law enforcement disciplinary proceeding. It also
19 defined various other terms using this broad term, any.
20 And so you know, in none of these provisions does it say
21 any record hereafter created or that records created before
22 the effective date were excluded. It said any record. And
23 the legislature, if they wanted to carve out this period
24 from 1976 to June 2020, they easily could have done that,
25 but they didn't do that. With respect to the point that



1 you just raised about the words used, the - - - this court
2 in the Regina case in 2020 said, there's no requirement
3 that particular words be used, and in some instances, the
4 retroactive intent could be discerned from the nature of
5 the legislation. And the nature of this legislation was to
6 shine a light on police disciplinary records and police
7 misconduct and to make - - - to try and increase trust and
8 accountability between the people and the public - - -
9 between the people and the police force. I see my time has
10 expired, but thank you, Your Honor.

11 CHIEF JUDGE WILSON: Thank you.

12 MR. DALY: I'll just spend a moment on the vested
13 rights issue, and then I'd like to turn to the
14 retroactivity now.

15 JUDGE TROUTMAN: Counsel, before you go to the
16 vested rights, 50-a operated as an exemption to FOIL,
17 correct?

18 MR. DALY: Not exclusively. It's an - - - it's -
19 - - it operated independently of FOIL. And so what this
20 court said in a case in 2018 is even - - - even if the
21 agency wanted to make redactions to the records to remove
22 names and things like that, 50-a - - - like, even - - - so
23 the FOIL exemption say they're discretionary including the
24 one that they rely on. What this court said is 50-a is an
25 independent mandatory statute, so there is no discretion

1 for this.

2 JUDGE TROUTMAN: Okay. So now that 50-a is gone,
3 what keeps the old records out of the hands of those who
4 request them?

5 JUDGE RIVERA: And just to add one more point to
6 that, you are correct in what you've said already about the
7 statute, but the statute itself recognizes exemptions by
8 statute. Once the statute is repealed, you no longer have
9 the statutory basis for the exemption under FOIL.

10 MR. DALY: But I would submit that, even without
11 that exemption within FOIL, 50-a would have said, these
12 records are confidential, you can't produce them, there
13 would be some kind of conflict with the statutes there.
14 But to answer Your Honor's question, the retroactivity
15 analysis is what keeps the rights preserved. Whenever
16 there's a change in the law, if somebody makes an argument
17 that, hey, this is prejudicing our rights that previously
18 existed, the task of the court is to engage in a
19 retroactivity analysis. And if there's an impact on pre-
20 existing rights, then unless the legislature makes a clear
21 expression of legislative intent; otherwise, those rights
22 continue. Just - - -

23 CHIEF JUDGE WILSON: But why isn't the urgency
24 with which this was enacted and the circumstances
25 surrounding it and the direction that it take effect

1 immediately, why isn't that enough of an indication?

2 MR. DALY: So when you - - - when this court has
3 talked about urgency, what I think this court has been
4 talking about is urgency in response to some court
5 decision. That's what the remedial doctrine is all about.
6 If you look at how this court has - - -

7 CHIEF JUDGE WILSON: No. No. I'm not asking
8 about remedial doctrine. I'm asking - - - right? We can
9 infer - - - we don't need the legislature to say this is
10 going to operate retroactively. I think we've been clear
11 we don't have to use words like that and that it can be
12 inferred from other circumstances. Would you agree at
13 least with that proposition?

14 MR. DALY: Your Honor, I think we should be more
15 specific with the test that this court has set forth. It
16 won't apply retroactively unless the language expressly or
17 by necessary implication requires it. That's Majewski,
18 that's Gottwald, that's King. So it's not just, is there
19 enough here for us to draw some kind of inference that
20 maybe this is what the legislature intended?

21 JUDGE CANNATARO: What about remediation? What
22 about the view that the legislature did what it did in this
23 amendment because it perceived a misbalancing in the rights
24 that was affected by 50-a that had to be corrected and
25 using that as a basis for saying it must be retroactive

1 because they saw a misapplication - - - a misbalancing of
2 the right between the public to know and the officer to
3 have confidentiality?

4 MR. DALY: The issue is that there's nothing in
5 this legislative record where the legislature made this
6 balancing and said, in order for these policy interests to
7 be served, we need the pre-repeal records to be disclosed.
8 If they had said that, fine. And that's all we're asking
9 the court to do.

10 JUDGE RIVERA: Well, if that's true, we wouldn't
11 be here. But the question is, really, are there - - - are
12 there circumstances that would lead one to say we can't
13 give the full robust effectiveness of the statute without
14 also letting it apply to previously created documents?

15 MR. DALY: So that's the necessary implication
16 statement - - -

17 JUDGE RIVERA: Correct.

18 MR. DALY: - - - Your Honor. And the way - - -

19 JUDGE RIVERA: Correct.

20 MR. DALY: - - - the court has applied that
21 standard is, when the statute - - - when the change would
22 become ineffective or superfluous without retroactivity.
23 And that's not the case here by any - - -

24 JUDGE RIVERA: Why not? Why not?

25 MR. DALY: Because records post-repeal that

1 otherwise would have been continued to be protected are now
2 subject to disclosure. That's a big policy change in New
3 York - - -

4 JUDGE RIVERA: Sure, that's a good thing, but
5 that's not answering the question. The question is whether
6 or not all those records before the effective date of the
7 repeal that are already created would also be necessary to
8 furthering the goal of that repeal - - -

9 MR. DALY: Well - - - so that - - - --

10 JUDGE RIVERA: - - - and of FOIL?

11 MR. DALY: So - - - so that - - - so you're not
12 saying the statute would become superfluous. What you're
13 getting to there is, well, perhaps some could say the
14 policy interests maybe are better served by allowing pre-
15 repeal records to be disclosed, but - - -

16 JUDGE RIVERA: Not some. That that's what the
17 legislature intended, right?

18 MR. DALY: They didn't say - - - they did not say
19 that, Your Honor.

20 JUDGE RIVERA: No, I know. That's why it's
21 called implication. I understand that.

22 MR. DALY: I would submit that there's nothing
23 even to make that - - - to imply that, but I think - - -

24 JUDGE RIVERA: Okay.

25 MR. DALY: - - - but the - - -

1 JUDGE RIVERA: So protests in the streets across
2 the country including in New York - - -

3 MR. DALY: That's what led to the repeal - - -

4 JUDGE RIVERA: - - - that send a message that
5 moves the legislature faster than perhaps it's moved in
6 quite some time?

7 MR. DALY: The legislature certainly acted
8 quickly. I think the speed with which the legislature
9 acted works in our favor because they said, we need to get
10 this repeal in place so that records can start being
11 disclosed when - - - when - - - to the extent - - -

12 CHIEF JUDGE WILSON: Well - - - but you - - -

13 MR. DALY: - - - that incidents occur.

14 CHIEF JUDGE WILSON: - - - you sort of have two
15 possible views of what legislature might have done by
16 acting really quickly or done through the statute. One is
17 that they said there's a real problem here. We want to
18 make all these records available so the problem can be
19 addressed day one. Or you might say the legislature said
20 we would like to start making records available so that as
21 there's new police officers hired and police officers
22 retire, we'll start building up a record. And so twenty
23 years from now or twenty-five years from now, we'll have a
24 complete data set from which we can do this sort of thing.
25 And you're sort of choosing between which of those things

1 do you think the legislature meant.

2 MR. DALY: And I think the problem here is that
3 we're just stuck with a very, and at best, ambiguous
4 record. And policy arguments can be made on both sides.
5 There are policy arguments for disclosure, but there's also
6 policy arguments to protect rights because you had officers
7 who relied on - - -

8 JUDGE RIVERA: Your red light is on. So I just
9 wanted to ask you to be a little bit clearer about what - -
10 - what is the reliance? What is the expectation? And how
11 - - - how that - - - where I can find that in the record.
12 I know you've already given some citation, but what is it?
13 They changed - - - the officers changed some conduct, make
14 a decision based on this expectation that you can point to?

15 MR. DALY: Well, yes. So the record cite is the
16 one that I gave you, but I'll give you the best example.
17 And this - - -

18 JUDGE RIVERA: Yes.

19 MR. DALY: - - - comes from that - - -

20 JUDGE RIVERA: Yes.

21 MR. DALY: - - - record cite. So you have an
22 innocent officer who's had a meritless complaint asserted
23 against him. To fight a disciplinary complaint, it takes
24 resources. It takes time. It distracts the officer from
25 his job. Section 50-a promised that officer

1 confidentiality. So instead of taking the time the - - -
2 the burden to fight the charge, the officer said, this is
3 going to be confidential anyway. I'm just going to settle
4 this charge. I'm not going to fight it because the record
5 is subject to protection. Without section - - -

6 JUDGE RIVERA: With the understanding that a
7 court might, in the future, order access, right?

8 MR. DALY: If it's relevant to a pending action -
9 - -

10 JUDGE RIVERA: It's not that it's hermetically
11 sealed and no one will ever see it.

12 MR. DALY: Yeah. The - - - there are exceptions
13 under 50-a, but - - - but without 50-a - - -

14 JUDGE RIVERA: But if - - - but if you make that
15 choice, as you've just described it, with the understanding
16 that a court might order it, why - - - why is it so far
17 afield that one might not see and then this exemption might
18 be extinguished in the future?

19 MR. DALY: I'm just answering your question, Your
20 Honor, in terms of reality of what happened. This is what
21 happened on the ground. If 50-a had not been in place,
22 officer would have fought the charge. Innocent officer
23 wouldn't have this on the record. The officer settled the
24 case, conceded to liability. Now, years later, the state
25 is taking away the confidentiality that was promised to the

1 officer, but the officer - - -

2 JUDGE RIVERA: What about the reliance - - -

3 JUDGE HALLIGAN: I - - -

4 JUDGE RIVERA: - - - of the not-so-innocent
5 officer who wants to - --

6 MR. DALY: Well, every - - -

7 JUDGE RIVERA: - - - use it as a shield so that
8 no one knows about their bad acts?

9 MR. DALY: Well, that's why the legislature
10 repealed this on a prospective basis, Your Honor.

11 JUDGE RIVERA: Yeah. But that's the point of the
12 - - - well - - - but in the past.

13 MR. DALY: Nobody said - - -

14 JUDGE RIVERA: Right? We're talking about the -
15 - - I'm asking about reliance.

16 MR. DALY: Well, that would - - - would - - -

17 JUDGE RIVERA: Should we honor the reliance of
18 the bad actors who wants to use it as a shield?

19 MR. DALY: The retroactivity analysis is not done
20 on an officer-by-officer basis. The retroactivity analysis
21 depends on, was there a right granted and how has that
22 right now been taken away? I think there's no question
23 that there was a right granted that's now - - -

24 JUDGE HALLIGAN: Just - - - just on that point -
25 - - I know your light's on, but just very quickly. Our

1 vested rights cases say that vested rights are what we have
2 called dangerous and that we should exercise great caution.
3 So my question for you is, what other statutory provisions
4 can you point to that are like this that have created a
5 vested right such that there's a question of retroactive
6 application?

7 MR. DALY: It's a good question, Your Honor. And
8 this is an issue of first impression in New York. Do
9 confidentiality - - -

10 JUDGE HALLIGAN: No. I know, but I mean, what
11 other statutory provisions outside of this context have
12 created vested rights? The reason I'm asking is, if our
13 cases say that it's something that we should be very
14 cautious about - - - a label we should be very cautious
15 about applying, where else have we done that, what you're
16 asking us to do here?

17 MR. DALY: The best that I can do for - - - to
18 answer your question, Your Honor, is to point you to the
19 Supreme Court of Utah, which - - - which - - -

20 JUDGE HALLIGAN: But not under our cases. Are
21 there other cases that you would point us to where we have
22 a statutory provision and that statutory provision creates
23 what we decide is a vested right such that the
24 retroactivity analysis is triggered? Because I haven't
25 found them. That's why I'm asking.

1 MR. DALY: Well, the Frontier - - - are you just
2 asking, in any context, has the court - - -

3 JUDGE HALLIGAN: Yes.

4 MR. DALY: - - - applied a vested right? So - -
5 -

6 JUDGE HALLIGAN: Not this particular context,
7 other contexts.

8 MR. DALY: This court has - - - the vested right
9 concept has not been significantly addressed by this court.
10 And I do think that this is an issue of first impression
11 for the court. But other state courts, and you'll see this
12 in our brief, have said confidentiality rights are vested
13 rights. And I just want to leave the court with the - - -
14 the question of how dangerous it would be for this court to
15 say in this case, well, confidentiality rights and privacy
16 rights are not rights that are subject to the presumption
17 against retroactivity. Because I think that's where your
18 questioning would be leading, to say, this is not a vested
19 right. We don't even have to engage in the retroactivity
20 analysis. Why should confidentiality and privacy rights be
21 second class rights that people are - - -

22 JUDGE RIVERA: Does it matter what you're trying
23 to hold confidential? The example given previously by the
24 Chief Judge, medical records versus disciplinary records?

25 MR. DALY: I think what's important is that

1 people rely on confidentiality. So when you have a case
2 like this that's promising confidentiality and you have
3 people fashioning their behavior based on that, to then
4 take that away after the fact, has an unfairness that the
5 retroactive doctrine is meant to prevent. And I don't
6 think there's any reason to treat these rights differently
7 than other statutory rights.

8 CHIEF JUDGE WILSON: Thank you.

9 MR. DALY: Thank you, Your Honors.

10 (Court is adjourned)

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C E R T I F I C A T I O N

I, Brandon Deshawn, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of NYP Holdings v. NYPD, No. 12 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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