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NYSAC Legislative Director



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Policing in 2020: What We've Learned and How Do We Change



NYSAC Virtual Fall Seminar: Forward Together

**Presented by Karlee Bolaños of Bolaños Lowe PLLC with special guest
Undersheriff Jason Cassalia of the Onondaga County Sheriff's Office**

attorneys on your terms

Karlee S. Bolaños is a founding partner of the law firm Bolaños Lowe PLLC. Karlee is a veteran of labor and employment law. For over 20 years, Karlee has focused extensively on public sector labor and employment law. For years, there has been a legal standard defined by big corporate law firms that simply go through the motions, charge too much, and display a distinct lack of commitment. Karlee believes municipalities deserve better and went into business to prove it. The Bolaños Lowe firm practices a different kind of law—one where the bare minimum is nothing short of unprecedented partnership and success. Karlee and her firm offer expertise and results that rival the leading large firms, with a small firm mentality that's centered around the client.

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- Jason Cassalia is currently the Undersheriff of the Onondaga County Sheriff's Office, an organization of over 800 members that provides law enforcement, corrections, and civil operations for approximately 450,000 residents of the greater Syracuse, New York area.
- Undersheriff Cassalia is a 27-year veteran of law enforcement and public safety. He began his career as a police officer for the Town of Manlius Police Department in 1991. Jason served in many roles within the agency to include uniformed patrol, investigations, and ultimately commanding both the Operations and Administrative Divisions at the ranks of Lieutenant and Captain.
- Along with his career in law enforcement and public safety, Jason is a Team Leader for the Commission on Accreditation for Law Enforcement Agencies, Inc. (CALEA). The Commission provides for international public safety accreditation through an onsite and offsite assessment of best policy, best practice public safety initiatives. He has assessed over 40 agencies in the United States and Canada from Federal, State, County, Local, and Tribal Law Enforcement Agencies along with public and private emergency communications facilities, and training facilities.
- The Undersheriff is the Chairman of the Onondaga County 911 Policy Review and Oversight Committee, a former Town of Manlius Town Councilor, and served as a member of the Town of Manlius Police Committee and liaison to the Justice Courts. Jason is a member of the FBI National Academy Associates, FBI-Law Enforcement Executive Development Association, Police Futurists International, American Jail Association, National Sheriff's Association, the NAACP, the New York State Sheriff's Association, and the Onondaga County Chiefs of Police.
- Undersheriff Cassalia is a graduate of the 213th Session of the Federal Bureau of Investigation National Academy.

Agenda

1. Executive Order No. 203: New York State Police Reform and Reinvention Collaborative
2. NYS Criminal Justice Legislative Reform: “Say Their Name Agenda”
3. Repeal of 50-a
 - Specifics of Legislation
 - Impacts
 - Bargaining Obligations

Executive Order 203

- On June 12, 2020, Governor Cuomo issued an Executive Order with the stated purpose to create law enforcement changes in response to police-involved deaths and concerns about racially biased law enforcement and to create accountability for law enforcement agencies.

Overall Requirement of Executive Order 203

- Local government entities must:
 - Develop police reform plans with community involvement
 - Effectuate the plan as legislative action
 - Submit a police reform plan to the State by no later than April 1, 2021
- Failure to submit proof of compliance with the Executive Order may result in the local government entity losing funding for the police agency/police officers.
- The Division of Budget is supposed to work with the Division of Criminal Justice Services (DCJS) to promulgate more detailed guidance in connection with the Executive Order.

Government Entities Covered by EO 203

- For purposes of the Executive Order, covered governmental entities are those that employ police officers as that word is defined in Section 1.20 of the NYS Criminal Procedure Law.
- This definition of police officer includes, for example, a sworn member of the division of state police; Sheriffs, Undersheriffs and Deputy Sheriffs of counties; sworn officers of authorized police departments or police forces in cities, towns, villages or police districts; investigators employed in the office of a district attorney; sworn officers of the division of law enforcement in the department of environmental conservation; and university police officers appointed by the state university.

EO 203: Stage 1/Initial Review

- Each local government entity must perform a comprehensive review of current police force deployments, strategies, policies, procedures, and practices.

EO 203: Stage 2/Developing the Plan

- The chief executive of the local government entity must convene with the head of the local police agency and community stakeholders to develop, adopt, and implement the recommendations resulting from its review and consultation, including any modifications, modernizations, and innovations to its policing deployments, strategies, policies, procedures, and practices, tailored to the specific needs of the community and general promotion of improved police agency and community relationships based on trust, fairness, accountability, and transparency, and which seek to reduce any racial disparities in policing.

EO 203: Components of the Plan

- The plan must consider the following:
 - evidence-based policing strategies, including but not limited to, use of force policies and procedural justice;
 - any studies addressing systemic racial bias or racial justice in policing;
 - implicit bias awareness training;
 - de-escalation training and practices;
 - law enforcement assisted diversion programs;
 - restorative justice practices;
 - community-based outreach and conflict resolution;
 - problem-oriented policing; hot spots policing;
 - focused deterrence;
 - crime prevention through environmental design;
 - violence prevention and reduction interventions;
 - model policies and guidelines promulgated by the New York State Municipal Police Training Council; and
 - standards promulgated by the New York State Law Enforcement Accreditation Program.

EO 203: Stakeholders

- The local government entity, in coordination with its police agency, must consult with stakeholders, including but not limited to membership and leadership of the local police force; members of the community, with emphasis in areas with high numbers of police and community interactions; interested non-profit and faith-based community groups; the local office of the district attorney; the local public defender; and local elected officials.

EO 203: Stage 3/Public Comment and Legislative Act

- The plan must be offered for public comment to all citizens in the locality.
- After consideration of the public comments, the plan must be presented to the local legislative body in the political subdivision.
- The local legislative body must ratify or adopt such plan by local law or resolution, as appropriate, no later than April 1, 2021.

EO 203: Stage 4/Submission of Plan to NYS

- The local government entity must transmit a certification to the Director of the Division of the Budget to affirm that such process has been complied with and such local law or resolution has been adopted.
- The Director of the Division of the Budget will condition receipt of future appropriated state or federal funds, which such local government would otherwise be eligible for, upon filing of such certification.
- It is not clear if non-compliance means a loss of just police funding or other additional state funding
 - Guidelines are anticipated to be issued by the Division of the Budget and the Department of Criminal Justice Service (DCJS).

Begin the EO 203 Process Now

- In order to have an appropriately prepared plan in place by April 1, 2021, local governments and their police agencies should have begun or must begin this process now.
- As local governments create plans and review existing policies, they should take into consideration the laws recently passed by the New York State Legislature in June 2020. These laws require revisions and additions to many current police department policies and procedures.
- Next, we will review these new laws.

The Eric Garner Anti-Chokehold Act (Senate Bill 6670B / Assembly Bill 6144B):

- Established the crime of aggravated strangulation for police officers where such officer commits the crime of criminal obstruction of breathing or blood circulation or uses a chokehold or similar restraint and causes serious physical injury or death.
- Police agencies should review and update use of force policies to include the prohibition of chokeholds if they have not already done so.
- Effective June 12, 2020.

Civil Action for Summoning a Police Officer Without Reason (Senate Bill 8492 / Assembly Bill 1531B)

- Established a private right of action where a person summons a police officer on a member of a protected class (i.e., race, color, national origin, ancestry, gender, religion, religious practice, age, disability or sexual orientation), without reason, and alleges a crime or an imminent threat to person or property existed, but where a reasonable person would not suspect a crime or threat to have existed.
- Police officers should be informed of this development in the law.
- Effective June 12, 2020.

New Yorker's Right to Monitor Act (Senate Bill 3253/Assembly Bill 1360A)

- A person not under arrest or in police custody has the right to record police activity and to maintain custody and control of the recording and any property or instruments used to record police activities.
- Police agencies should adopt a policy that informs officers of the public's right to record police activity.
- Effective July 14, 2020.

The Police Statistics and Transparency (STAT) Act (Senate Bill 1830C /Assembly Bill 10609):

- Requires reporting of criminal offenses and arrest-related deaths.
 - Courts must compile and publish aggregate racial and other demographic data of all low-level offenses, including misdemeanors and violations.
 - Police agencies are required to promptly report any arrest-related deaths to the Department of Criminal Justice Services (DCJS), and submit annual reports containing that same information to the DCJS, the Governor, and the Legislature.
- Effective December 12, 2020.

Reporting Police Officer's Discharge of Weapon (Senate Bill 2575B / Assembly Bill 10608)

- Requires state and local police and peace officers, whether on or off duty, to report to a supervisor within six hours of the discharge of their weapon under circumstances where a person could have been struck.
- Verbal report to supervisor within six hours and a written report within 48 hours of the occurrence.
- Police department policies should be revised to include this new reporting requirement.
- Effective September 13, 2020.

Right to Medical and Mental Health Attention While In Police Custody (Senate Bill 6601A /Assembly Bill 8226A)

- Amends the NYS Civil Rights Law to affirm the right to medical and mental health attention while in police custody and established a private right of action against an officer if the individual did not receive reasonable and good faith attention, assistance or treatment and as a result suffered injury or significant exacerbation of injury.
- Police officers should be trained about this addition of a private right of action for failure to provide reasonable and good faith attention, assistance or treatment to a person in police custody.
- Effective June 15, 2020.

NYS Police Body-Worn Camera Program (Senate Bill 8493 /Assembly Bill 8674)

- Requires the Division of State Police to provide all state police officers with body-worn cameras that are to be used any time an officer is on patrol.
- Effective April 1, 2021.

Law Enforcement Misconduct Investigative Office (Senate Bill 3595B / Assembly Bill 10002B):

- Establishes the Law Enforcement Misconduct Investigative Office within the Department of Law which would investigate complaints, allegations of corruption, fraud, use of excessive force, criminal activity, conflicts of interest, or abuse in certain law enforcement agencies.
- Requires every officer to promptly report to the Investigative Office any information concerning police corruption, fraud, use of excessive force, criminal activity, conflicts of interest or abuse by another officer or employee relating to his/her office or employment, or by a person having business dealings with a covered agency relating to those dealings.
- An officer's known failure to report such information is cause for his/her removal.
- Police departments are also required to report to the Investigative Office any officer who is named in five or more complaints, relating to five separate incidents, within a two-year period.
- Police agencies should adopt a policy and introduce education regarding the duty to report information to the Investigative Office.
- Effective April 1, 2021.

Office of Special Investigation (Senate Bill 2574C / Assembly Bill 1601B):

- Creates an Office of Special Investigation within the Office of the New York State Attorney General, which will independently investigate, and if warranted, prosecute incidents involving the death of a person caused by an act or omission of a police or peace officer.
- Effective April 1, 2021.

Repeal of 50-a

- For many years, Public Officers Law §87(2)(a) allowed covered entities to exempt disclosure of records if the records were “specifically exempted from disclosure by state or federal statute.”
- Civil Rights Law §50-a has required that law enforcement personnel records be treated as confidential and not released to the public except as mandated by a lawful court order or the consent of the police officer who is the subject of the records.
- On June 11, 2020, the Governor signed legislation repealing New York Civil Rights Law §50-a, in turn, allowing the public to have access to the disciplinary records of law enforcement personnel.
- This means: Law enforcement personnel records are no longer automatically exempt from disclosure.

Covered Agencies

- The legislation specifies that a "law enforcement agency" is any police agency or department of the state or any political subdivision thereof, including authorities or agencies maintaining police forces of individuals defined as police officers (as set forth in Section 1.20 of the NYS Criminal Procedure Law) a sheriff's department, the department of corrections and community supervision, a local department of correction, a local probation department, a fire department, or force of individuals employed as firefighters or paramedics.

Existing FOIL Exemptions Now In Play for Police Records

- Now, following the repeal of § 50-a, records of law enforcement agencies are available through FOIL unless one of the existing FOIL exemptions is deemed applicable. Generally, such records may be denied disclosure where they include information that:
 - If disclosed, would result in an unwarranted invasion of personal privacy (§ 87(2)(b));
 - Was compiled for law enforcement purposes, which if disclosed would: (i) interfere with law enforcement investigations or judicial proceedings, (ii) deprive a person of a right to a fair trial or impartial adjudication, (iii) identify a confidential source or disclose confidential information relating to a criminal investigation, or (iv) reveal criminal investigative techniques or procedures, except routine techniques and procedures (§ 87(2)(e));
 - Are inter-agency or intra-agency communications which are not: (i) statistical or factual tabulations or data, (ii) instructions to staff that affect the public, (iii) final agency policy or determinations, or (iv) external audits, including but not limited to audits performed by the comptroller and the federal government (§ 87(2)(g)).
- If a record, or portion thereof, is deemed to fall within one of the categories of deniable records, law enforcement records may still be excluded from public disclosure despite the repeal of § 50-a.

What Are Law Enforcement Disciplinary Records?

- “Law enforcement disciplinary records” are any records created in furtherance of a law enforcement disciplinary proceeding (which is defined as the commencement of any investigation and any subsequent hearing or disciplinary action conducted by a law enforcement agency), including, but not limited to:
 - the complaints, allegations, and charges against an employee;
 - the name of the employee complained of or charged;
 - the transcript of any disciplinary trial or hearing, including any exhibits introduced at such trial or hearing;
 - the disposition of any disciplinary proceeding; and
 - the final written opinion or memorandum supporting the disposition and discipline imposed including the agency's complete factual findings and its analysis of the conduct and appropriate discipline of the covered employee.

Redactions

- The records may be redacted in specific ways prior to disclosure. A law enforcement agency **shall redact**:
 - Any portion of a record containing personal medical information (not including records obtained during the course of an agency's investigation of such person's misconduct that are relevant to the disposition of such investigation);
 - The use of an employee assistance program, mental health service, or substance abuse services (unless such use is mandated by a law enforcement disciplinary proceeding);
 - Social security numbers;
 - Home addresses, or personal emails or telephone numbers.
 - The above information may also be redacted about any complainant or family member of the police officer.
 - Technical infractions **may be redacted**.
 - "Technical infraction" means "a minor rule violation by a person employed by a law enforcement agency solely related to the enforcement of administrative departmental rules that (a) do not involve interactions with members of the public, (b) are not of public concern, and (c) are not otherwise connected to such person's investigative, enforcement, training, supervision, or reporting responsibilities."

Personnel Files

- FOIL does not specifically address access to personnel files and because the specific records maintained in personnel files often differ among agencies it is the specific documents contained in such records that must be analyzed in determining whether they must be produced or may be withheld in response to a request for records.
- Initial consideration must be given to whether disclosure would constitute an unwarranted invasion of personal privacy (§ 87(2)(b)).
- Records relevant to the performance of the official duties of public employees and officers are generally deemed available for disclosure.
 - Example: Records indicating an employee's gross pay and time and attendance may be accessible, records of deductions for charitable contributions and alimony, or a medical condition would likely be exempt from disclosure as being unrelated to the performance of official duties.
- Personnel files often contain documents such as performance evaluations, assessments, counseling memoranda, and disciplinary records. Whether such records should be publicly available requires an assessment under both the exception related to personal privacy, as well as the exception related to certain inter-agency or intra-agency materials under § 87(2)(g) of the Public Officers Law. With respect to inter-agency or intra-agency materials, portions of these records that show opinion, advice, or recommendation may generally be withheld, whereas statistical or factual information and final agency determinations likely require disclosure.
- In the context of a assessing a request for access to an employee's performance evaluation, any aspect of such a record containing standards, objectives, and duties applicable to a specific position would likely be available. From a personal privacy standpoint, records containing this type of information are relevant to the performance of the official duties associated with the position.

Counseling Memos

- Counseling memos are one type of record often found within an employee's personnel file, and such records are similarly analyzed under the exceptions of § 87(2)(b) & (g).
- Typically, an employer will utilize a counseling memo to provide advice, a warning, or admonition to an employee, but not to serve as any type of discipline or final determination regarding an employee's conduct or performance.
- As to whether disclosure of a counseling memo would constitute an unwarranted invasion of personal privacy, where the counseling memo is prompted by allegations or charges of misconduct or complaints against an employee that did not result in discipline or a finding of misconduct; and it contains only a warning or guidance, disclosure may probably be withheld.
- While a counseling memo likely constitutes interagency material, if it is truly only a warning or guidance, and consists of opinion and recommendation, it is not a final agency determination, and as such, it would not be subject to disclosure.

Performance Improvement Plans

- A performance improvement plan, regardless of whether it relates to a complaint or performance issue, would likely be available for disclosure as such a record is generally focused on the duties an employee must perform in connection with his/her position.

Disciplinary Records

- While a record pertaining to a determination imposing some form of discipline on an employee will likely be available, at least in part, under FOIL, the same is not true for an allegation of misconduct or disciplinary charge that is actively under investigation or when an allegation has been dismissed, deemed to be without merit, or did not result in disciplinary action.
- Where the employer or agency determines that disclosure would result in an unwarranted invasion of personal privacy, such records may be withheld. Notably, the Committee on Open Government has affirmed this position in at least one Advisory Opinion issued since the repeal of § 50-a.
- Even in circumstances where a final determination of misconduct or discipline is appropriate for disclosure, records leading to such determination generally may be withheld.

Internal Affairs Files

- Where allegations or charges against an employee are referred to internal affairs, to the extent such allegations are deemed to be unfounded or the charges are dismissed following an investigation, records pertaining to such allegations or charges, including those created as part of an internal affairs investigation may be withheld.
- Authority exists to suggest that any recommendation issued following an internal affairs investigation may be withheld from disclosure, as such record would not constitute a final agency determination. The same may not hold true in circumstances where an internal affairs recommendation is subsequently adopted in full by the employer or agency.

Unsubstantiated Complaints

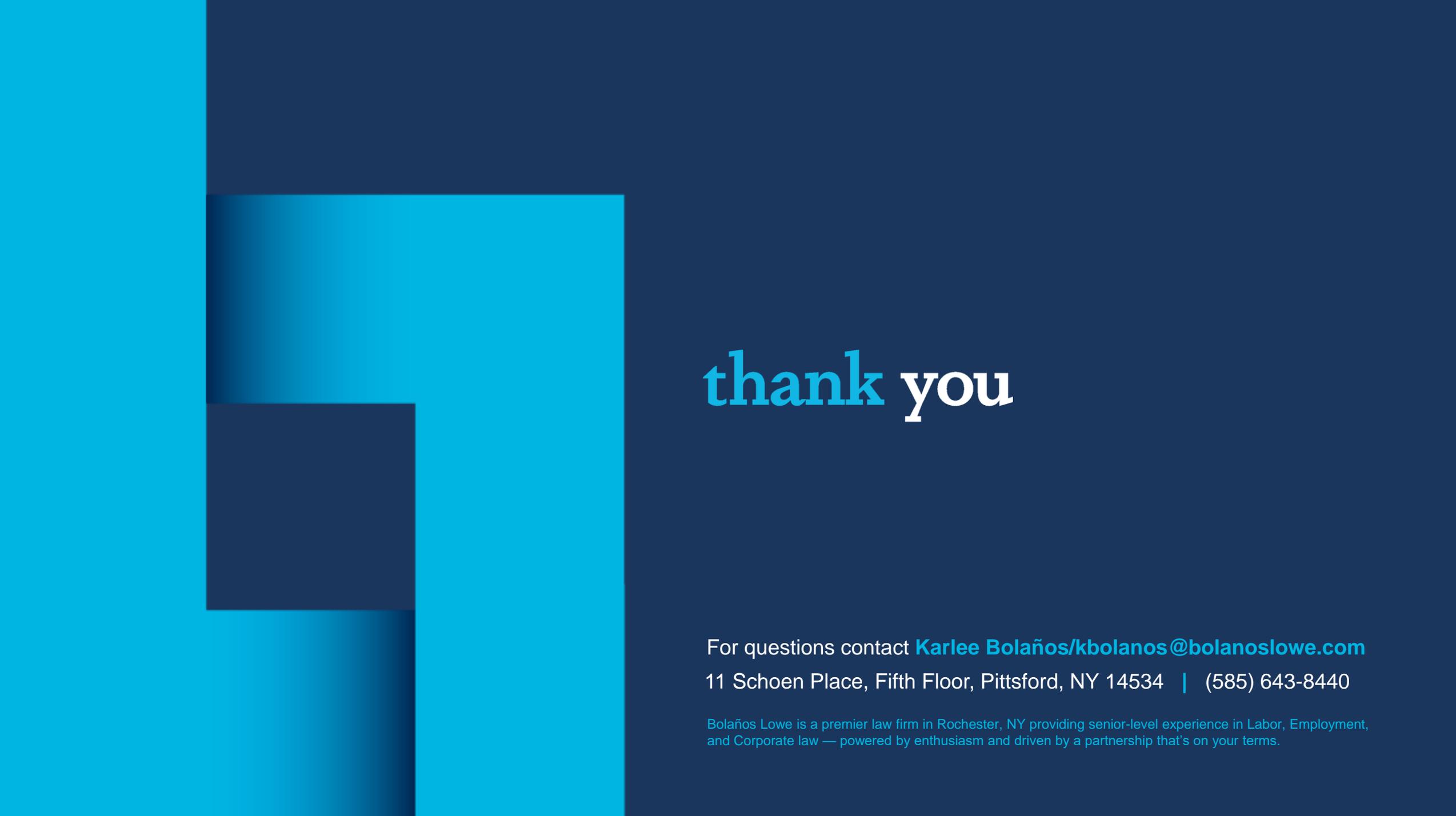
- At least one opinion issued by the NYS Committee on Open Government (FOIL AO 19775, issued July 27, 2020) found that the law does not require a law enforcement agency to disclose “unsubstantiated and unfounded complaints against an officer” where such agency determines that disclosure of the complaint would constitute an unwarranted invasion of personal privacy.
- An agency is not required to withhold these records.

Police Union Recent Demands Related to These Legal Changes

- Demands to negotiate 50-a repeal.
- Demands to stay FOIL responses based on *Uniformed Fire Officers Assoc., et. al. v. DeBlasio et. al.* (Civil Docket Case # 1:20-cv-05441-KPF).

Final Thoughts and Questions

- Undersheriff Cassalia shares his final thoughts and recommendations.
- Questions?



thank you

For questions contact [Karlee Bolaños/kbolanos@bolanoslowe.com](mailto:Karlee.Bolaños@bolanoslowe.com)

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MTX is a global cloud implementation partner enabling public sector organizations with expertise across various platforms and technologies, including Google Cloud, Salesforce, artificial intelligence/machine learning, data integration, analytics, and mobile technology. MTX has implemented many innovative solutions for public agencies across New York State, and recently deployed a "Community Engagement App" for the NYPD with the goal of building relationships, trust, and transparency among residents.