

**SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, THIRD DEPARTMENT**

Prisoners' Legal Services of New York, **Appellate Division**

Petitioner-Appellant, **Case/Docket No. 533722**

For a Judgment Pursuant to Article 78
of the Civil Practice Laws and Rules

Supreme Court, Albany County

-against-

Originating Court No. 909066-19

New York State Department of
Corrections and Community
Supervision,

Respondent-Appellee.

BRIEF FOR PETITIONER-APPELLANT

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QUESTIONS PRESENTED

- I. Whether the lower court erred in denying Petitioner-Appellant's FOIL requests based on a finding that the prison surveillance video requested qualifies for a safety exemption under Public Officer's Law § 87(2)(f).
- II. Whether the lower court erred in holding moot certain of Petitioner-Appellant's Freedom of Information Law (FOIL) requests where the issue of Respondent-Appellee's non-compliance is novel and substantial, likely to recur, and capable of evading review.
- III. Whether the lower court erred in holding improper Petitioner-Appellant's claims for declaratory relief where Petitioner-Appellant filed a notice of petition and petition/complaint but not a summons.
- IV. Whether the lower court erred in holding that Petitioner-Appellant did not substantially prevail on its FOIL claims and denying Petitioner-Appellant attorney's fees and litigation cost.

PRELIMINARY STATEMENT

Prisoners' Legal Services of New York ("PLS" or "Petitioner-Appellant") asks this Court to reverse two Supreme Court orders addressing four Freedom of Information Law (FOIL) requests filed by PLS in 2019 as part of its representations of indigent individuals incarcerated in New York State. The FOIL requests, which PLS routinely files, sought materials, including an unusual incident or UI report (the "Bradley UI Report") and videos, from the New York State Department of Corrections and Community Supervision ("DOCCS" or "Respondent-Appellee") that DOCCS used in disciplinary hearings for four PLS clients – Antonion Christian, Phillip Bradley, Shaun Martin, and Charles Blanchard – in connection with separate incidents at the Clinton and Auburn correctional facilities. DOCCS refusals to produce these materials, which were accompanied by inadequate explanations, changing justifications, and unpredictable disclosure, have hindered PLS' ability to represent its clients and threaten to diminish PLS' ability to protect the rights of incarcerated individuals in the future.

In its Article 78 petition, PLS established that DOCCS unjustifiably withheld these materials. To justify its refusal, DOCCS invoked inter-agency and safety FOIL exemptions, and the law enforcement exemption, which it later withdrew. PLS challenged DOCCS's reliance on these FOIL exemptions. After

PLS filed this litigation, DOCCS produced the Bradley UI report and videos of the incident at Auburn Correctional Facility but continued to withhold videos of the incidents at Clinton Correctional Facility.

Although PLS's efforts to obtain the evidence it needed to represent its clients were substantially successful, its efforts to obtain full review of DOCCS's unlawful withholding were not. In its February 11, 2021 order (the "February Order"), the Supreme Court held as moot PLS's challenge to DOCCS's denial of the Bradley and Christian FOIL requests and denied as improper PLS's petition for declaratory relief. In its June 8, 2021 order (the "June Order"), after *in camera* review, the Supreme Court upheld DOCCS's withholding of the videos subject to the Martin and Blanchard FOIL requests and denied PLS attorney's fees. The Supreme Court erred as follows:

First, the Supreme Court improperly ruled that the issues presented by DOCCS's initial withholding of the Bradley UI report and Auburn videos were not novel or substantial or likely to evade review. Although DOCCS eventually provided the requested material, absent a ruling that its refusal was improper, DOCCS is likely to withhold similar material in the future and its exemption claims present novel and substantial issues that are likely to evade review. Therefore, these claims fall within the exception to the mootness doctrine.

Second, the Supreme Court erred in accepting DOCCS's invocation of the "safety" exemption despite DOCCS's inability to articulate a reasonable risk of harm or provide a particularized and specific factual basis for invoking the exemption.

Third, PLS's claim for declaratory relief was properly before the Supreme Court. Filing a separate summons was not necessary and even if it was, the notice of petition can and should function as a summons.

Finally, the Supreme Court erred in denying PLS attorney's fees and costs. PLS substantially prevailed on most of its FOIL claims in that DOCCS initially refused to produce the material and only did so after PLS filed this litigation, offering only as an explanation that its investigation and UI Report were pending and had since been completed. Furthermore, PLS successfully persuaded the lower court to conduct an *in camera* review of video footage of the Clinton Correctional Facility.

PLS and similar organizations are vital for incarcerated individuals. Access to the evidence being used against its clients is vital for PLS. In order to function, it requires state agencies like DOCCS to fulfill their statutory obligation to grant access these materials, or, in some cases, to invoke FOIL's narrow exemptions in a clear and justifiable manner. When PLS obtains materials over agency opposition, FOIL requires PLS be awarded attorneys' fees and costs. Doing so

promotes prompt agency compliance with FOIL and ensures PLS can fully represent its clients. The lower court's rulings at issue here are erroneous as a matter of law and counter to the purpose of the FOIL statute. For these reasons, PLS respectfully asks the Court to reverse the lower court's orders dated February 11, 2021 and June 8, 2021.

STATEMENT OF FACTS

PLS is a nonprofit legal services organization that represents indigent, incarcerated New Yorkers in appeals of administrative disciplinary proceedings that have resulted in punishment from DOCCS. PLS also investigates alleged legal rights violations including mistreatment, assault by staff, and failure to protect from assault by other prisoners. PLS has worked in this role for over forty years.

PLS cannot fully represent its clients without access to primary factual evidence such as the evidence at issue in this proceeding. In administrative disciplinary hearings related to incidents at DOCCS facilities, DOCCS relies on surveillance video of the relevant incidents and unusual incident ("UI") reports prepared by DOCCS employees who observed the incidents. On behalf of its clients, PLS uses FOIL to acquire these materials from DOCCS and reviews the materials to use in administrative appeals of discipline against PLS clients. Access to these materials enables PLS to ensure its clients' due process rights are respected.

A. Incidents for which PLS Sought Materials

In May and June 2019, a number of incidents occurred in the yards at the Auburn and Clinton correctional facilities. In connection with these incidents, DOCCS held Tier III administrative hearings for four PLS clients: Charles Blanchard, Phillip Bradley, Antonion Christian, and Shaun Martin. After each hearing, PLS sent DOCCS a FOIL request for the materials used against each client at his hearing, including video surveillance of the prison yards and UI reports. In each instance, DOCCS denied the FOIL request with respect to the video footage, and rejected PLS's appeals of the denials.

(a) The Auburn Facility Incident and Appeals

On May 11, 2019, Messrs. Christian and Bradley were both involved in an incident in the Auburn Facility yard. Pet'r's R. on Appeal, 130-34 (Smith Aff. Exs. B & Ex. C). As reported in the news media, the incident was an altercation between approximately 25 inmates and a corrections officer. R. at 195 (Memo. of Law Supporting Art. 78 Petition).

(i) Christian FOIL Request

DOCCS held a "Tier III" Disciplinary hearing for Mr. Christian on May 24, 2019. Upon information and belief, Mr. Christian was shown video footage of the incident during his hearing. . See R. at 136 (Smith Aff. Ex. D).. After the hearing, PLS submitted a FOIL request seeking, in part, "[a]ny videotapes and/or

photographs which were viewed at the hearing” and “[a]ny Unusual Incident Reports.” R. at 130, (Smith Aff. Ex. B).

DOCCS produced records on June 27, 2019, but those records did not include the surveillance video that was shown to Mr. Christian during his disciplinary hearing or the UI report. R. at 140-41 (Smith Aff. Ex. E). In response to PLS’s email about the deficient records on June 28, 2019, a DOCCS officer reported that the Liaison Officer who pulls the videos had told her that “there was no video,” and that the Liaison Officer “would look into it again.” R. at 140 (Smith Aff. Ex. E). A month later, PLS was told that the “incident in which [Mr. Christian] was involved in [*sic*] is still an active investigation, and [the Deputy Superintendent] will not release the video to anyone at this time.” R. at 144 (Smith Aff. Ex. F).

DOCCS’s Office of Counsel confirmed the denial, adding that the FOIL request was denied “pursuant to POL Section 87(2)(e) where release of records would interfere with law enforcement investigations.” R. at 143 (Smith Aff. Ex. F). PLS appealed the decision to withhold the video surveillance but did not appeal the withholding of the UI report. R. at 135 (Smith Aff. Ex. D).

DOCCS denied PLS’s appeal pursuant to Pub. Off. Law § 87(2)(e) without reference to any specific subsection. . R. at 145 (Smith Aff. Ex. G). In relevant part, the denial stated that:

[t]he incident in question is still under investigation internally, as well as externally by multiple law enforcement agencies. Based upon our further inquiry, release of the video at this time would threaten to prematurely reveal law enforcement and the District Attorney's plans for the case, prematurely reveal the identity of witnesses and sources, and result in the premature release of evidence in a pending criminal investigation. *Leshner v. Hynes*, 19 N.Y.3d 57 (2012).

R. at 146 (Smith Aff. Ex. G).

(ii) Bradley FOIL Request

Mr. Bradley's hearing was held on or about June 25, 2019. R. at 132 (Smith Aff. Ex. C). Upon information and belief, Mr. Bradley was shown surveillance video at his disciplinary hearing. *See* R. at 148 (Smith Aff. Ex. H). On July 22, 2019, PLS made an identical FOIL request for Mr. Bradley's hearing materials, seeking, in part, "[a]ny videotapes and/or photographs which were viewed at the hearing" and "[a]ll Unusual Incident Reports." R. at 133, (Smith Aff. Ex. C).

DOCCS sent an email to PLS stating that "many" of the requested documents regarding the May 11 incident were being withheld. R. at 153 (Smith Aff. Ex. I). DOCCS later disclosed that this was a denial of all of the materials related to Mr. Bradley's hearing that PLS had requested. *See* R. at 148 (Smith Aff. Ex. H).

After DOCCS made clear that the documents were being withheld, PLS filed an appeal, noting that the denial “did not...cite to the statutory exemption relied upon for the denial.” *Id.* at 149.

DOCCS denied the appeal regarding the video surveillance, using the same language as in the denial of Mr. Christian’s appeal. R. at 153 (Smith Aff. Ex. I). It likewise claimed the materials were exempt under Pub. Off. Law § 87(2)(e), without reference to any specific subsection. R. at 155 (Smith Aff. Ex. J). The appeal denial also affirmed DOCCS’s decision to withhold a UI report used at Mr. Bradley’s hearing, stating that:

[It] is still a preliminary report. Pursuant to Public Officers Law (“POL”) § 87(2)(g), non-final deliberative records are exempt from disclosure. Furthermore, the release of a preliminary investigative reports [*sic*] could interfere with ongoing law enforcement investigations, and therefore such records are also exempt from release under Public Officers Law § 87(2)(e).

Id. at 156.

(b) The Clinton Facility Incidents Requests and Appeals

On three dates in June 2019, three separate yard incidents occurred at the Clinton Correctional Facility. Mr. Blanchard was involved in an incident that occurred on June 11, 2019, and Mr. Martin was involved in an incident that occurred on June 14, 2019.

(i) Martin FOIL Request

Upon information and belief, Mr. Martin's disciplinary hearing about the June 14, 2019 incident was held in July 2019. R. at 158 (Smith Aff. Ex. K). Mr. Martin was shown video footage during his hearing which depicted the events in the yard, and the people taking part in the events were identifiable. R. at 161(Smith Aff. Ex. L). On July 23, 2019, PLS sent a FOIL request for materials, including surveillance video, related to Mr. Martin's involvement in the Clinton Facility incident. . R. at 160 (Smith Aff. Ex. K).

PLS's request for the video of the incident was initially denied "for safety and security reasons due to the ongoing investigation." R. at 165 (Smith Aff. Ex. M). However, DOCCS did provide PLS with the UI reports and all other written documentary evidence surrounding the incident. *Id.* at 164. PLS attempted to obtain the requested video by emailing DOCCS Assistant Counsel Samantha Koolen, R. at 166 (Smith Aff. Ex. N), who treated this contact as an appeal and assigned an appeal number to the case. The appeal was denied. Smith Aff. Ex. L, p. 1-2. R. at 161 (Smith Aff. Ex. L).

That denial was the only one of the four to state specific law enforcement exemption subsections that allegedly justify withholding the requested material— Pub. Off. Law § 87(2)(e)(i) and (iv). While not entirely precise, DOCCS stated that it believed § 87(2)(e)(iv) applied because "the subject video would . . . reveal the protocols and response time for the Department's security staff in Clinton's North

Yard.” R. at 162 (Smith Aff. Ex. L). DOCCS also relied on the public safety exemption in Pub. Off. Law. § 87(2)(f). It claimed that “[r]elease of this video poses such a threat if used to identify other participants in the incident for the purpose of retaliatory action.” *Ibid.*

(ii) Blanchard FOIL Request

Mr. Blanchard’s Tier III Hearing was held on or about July 12, 2019. R. at 170 (Smith Aff. Ex. O). During his disciplinary hearing, Mr. Blanchard was shown surveillance videos of incidents that occurred on June 10 and June 11, 2019. Upon information and belief, the videos shown at the disciplinary hearing depicted the events, and the people taking part in the events were identifiable. R. at 177 (Smith Aff. Ex. R). On August 7, 2019, PLS requested the hearing packet, documentary evidence viewed at the hearing, video surveillance footage and photos shown at the hearing, and the Individual Protective Custody report, for Mr. Blanchard. R. at 169 (Smith Aff. Ex. O).

Mr. Blanchard’s initial FOIL request for the incident videos was denied “for safety and security reasons due to the ongoing investigation.” R. at 173 (Smith Aff. Ex. P). DOCCS produced the other requested materials related to the incident—the video footage was the only requested material withheld. *Id.*

PLS attempted to resolve the issue regarding the video informally by emailing DOCCS Assistant Counsel Samantha Koolen. *See* R. at 174 (Smith Aff.

Ex. Q). DOCCS treated the email as an appeal and assigned an appeal number for Mr. Blanchard. R. at 177 (Smith Aff. Ex. R). The appeal was denied. Mr. Blanchard's appeal denial stated the "responsive video footage" was denied pursuant to:

Public Officers Law §87(2)(e) and (f), where disclosure would interfere with ongoing law enforcement investigations and could endanger the life or safety of any person if used by an inmate to identify other participants in the incident for the purpose of retaliatory action. . . . The incident in question is the subject of both internal and external law enforcement investigations. We have determined that release of the video at this time could prematurely reveal law enforcement plans for the case, prematurely reveal the identity of witnesses, and would constitute a premature release of evidence in a pending criminal investigation. *Leshner v. Hynes*, 19 N.Y.3d 57 (2012).

Id. at 178.

B. Procedural History

On December 23, 2019, PLS submitted a petition pursuant to Article 78 of the New York Civil Practice Law and Rules requesting release of withheld materials from DOCCS and seeking declaratory relief. In response, DOCCS fulfilled several of the previously denied FOIL requests and produced the Bradley UI Report and the Auburn videos. DOCCS filed a Verified Answer and Memorandum of Law in Opposition to PLS's Verified Petition on July 3, 2020,

which argued that the claims had been mooted with respect to the requested materials which had been produced. R. at 358-59 (Resp't's Opp'n Mem. 2-3).

On July 24, 2020, PLS filed its reply brief, arguing that DOCCS had not demonstrated a legitimate risk of harm that justified withholding the requested Clinton videos and that although DOCCS had provided the Bradley UI Report and Auburn videos, the intra-agency and law enforcement exemption issues fell within the exception to the mootness doctrine. R. at 383 (Pet'r's Reply Mem. 6).

In an Order dated February 11, 2021, the Supreme Court held that although the issues raised would likely recur, the issues were not “substantial, novel, or likely to evade review,” and therefore the mootness exception did not apply to the Bradley UI Report and Auburn videos. R. at 401 (Feb. 11, 2021 Order, at 12 (citation omitted)). The Supreme Court further ruled that, since PLS failed to serve a separate summons, its claims for declaratory relief were not properly before the Court. *Id.* at 401-02 (citations omitted). Lastly, the Supreme Court determined that it could not decide if the withheld videos properly fall under the FOIL safety exemption and ordered an *in camera* review of the relevant videos. *Id.* at 403.

Following *in camera* review, the Supreme Court decided that the video was properly withheld pursuant to the safety exemption because it disclosed the depicted individuals' identities. R. at 411 (June 8, 2021 Order, at 5).. Relying largely on the affidavit of Theodore Zerniak, Deputy Superintendent of Security at

Clinton Correctional Facility, the Supreme Court determined that, if individuals could be identified from the videos, there was a safety risk. The Supreme Court also denied PLS attorney's fees and costs. *Ibid.*

Now, PLS files this appeal from the Supreme Court's Orders dated February 11, 2021 and June 8, 2021.

ARGUMENT

I. The Lower Court Erred in Holding That the Safety Exemption to FOIL Applies to the Videos Requested.

FOIL grants the public a broad right of access to agency records. *Matter of Fink v. Lefkowitz*, 47 N.Y. 2d 567, 571 (1979) (“the public is vested with an inherent right to know and . . . official secrecy is anathematic to our form of government.”). FOIL provides for a limited number of exemptions, including where records “could endanger the life or safety of any person” if disclosed. N.Y. Pub. Off. Law § 87(2)(f) (McKinney) (the “public safety” exemption). However, exemptions, including § 87(f), are to be narrowly construed. *Matter of Data Tree, LLC v. Romaine*, 9 N.Y.3d 454, 462 (2007) (citing *Matter of Capital Newspaper Div. of Hearst Corp. v. Whalen*, 69 N.Y.2d 246, 252 (1987)). An agency claiming such an exemption must offer a particularized and specific justification for withholding the requested material. *Fink*, 47 N.Y.2d at 571 (“[An] agency does not have carte blanche to withhold any information it pleases. Rather it is required to

articulate particularized and specific justification . . . to exempt its records from disclosure”).

A. DOCCS Did Not Justify its Invocation of the Safety Exemption

As a preliminary matter, New York courts have declined to uphold FOIL safety exemption claims by agencies where the withheld video depicts what the general population would have observed personally. Where “[r]espondents have made no factual showing whatsoever . . . that the videotapes would reveal anything more to inmates than would be personally observed during their actual confinement,” assertions of endangerment are conclusory and cannot support application of the safety exemption. *Buffalo Broad. Co. Inc. v. New York State Dep't of Corr. Servs. (Buffalo Broad. I)* 552 N.Y.S.2d 712, 715 (1990); *see Mack v. Howard*, 932 N.Y.S.2d 785, 787 (App. Div., 4th Dep’t 2012) (citing *Buffalo Broadcasting Co. v. New York State Dep't of Correctional Servs. (Buffalo Broad. II)*, 174 A.D.2d 212 (App. Div., 3d Dep’t 1992)) in holding that videotape of an altercation between prisoner and corrections officers did not qualify for the safety exemption where the video depicted events “witnessed by the general prison population”). DOCCS asserts that dozens of prisoners were involved in the incidents at issue here, including as many as 18 individuals in the June 10, 2019 incident, “45-60” individuals in the June 11, 2019 incident, and 22 individuals in the June 14, 2019 incident. R. at 348 (Zerniak Aff. ¶ 6). Presumably, the roughly

dozens incarcerated individuals, including PLS's clients, and any bystanders who observed any of these three incidents can identify others who participated without any reliance on video footage. Under the FOIL statute, it is DOCCS's burden to show that some safety risk exists beyond what could be discerned from "scenes witnessed by the general prison population." *See Buffalo Broad. II*, 174 A.D.2d at 215. DOCCS cannot meet that burden.

Where, as here, the safety exemption is invoked "solely upon speculation," of harm, a videotape is not exempt from disclosure pursuant to § 87(2)(f). *Mack*, N.Y.S.2d, at 786–87 (safety exemption does not apply to surveillance video showing a physical altercation in a court holding cell among a prisoner and several deputy sheriffs); *see also Buffalo Broad. II*, 174 A.D.2d 212 (App. Div. 3d Dep't 1992); *Matter of Graham Windham v. City of New York Police Dep't*, 2013 WL 5636306, at *1 (Sup. Ct. N.Y. Cty. October 7, 2013) (police department could not invoke the exemption to withhold disclosure of records of an employee's shooting of a minor where the agency did "not articulate[] a factual basis for th[e] exemption"). "[B]are assertion[s]" about the danger of disclosing an individual's identity are insufficient to establish a risk of harm for the purposes of § 87(2)(f). *Windham*, 2013 WL 5636306, at *1 ("The NYPD has not articulated a factual basis for this exemption, instead it relies on its bare assertion that a strong possibility exists that disclosing information would endanger the safety of the detective

involved in [the] shooting, as well as those witnesses who spoke with investigators.”).

DOCCS has never provided the requisite particularized and specific justification for its claimed safety exemption, nor can it. Instead, through the Zerniak Affidavit, upon which the Supreme Court heavily relied in its June 8, 2021 Order, DOCCS claims that disclosing the video would create a risk of retaliation from the individuals involved and from unspecified members of the public. DOCCS also discusses the general dynamics of prison gang activities. This showing does not satisfy the statute.

First, DOCCS’s concerns about showing the video to the individuals involved are flatly contradicted by the fact that DOCCS already showed the video to those same individuals. Zerniak explained that “DOCCS seeks to prevent petitioner from obtaining personal identifying information of inmates involved in the June 10, June 11 and June 14 incidents which are the subject of the video recordings, based upon the concern that if involved inmates represented by petitioner are permitted access to these videos, they could identify other inmates involved in these incidents.” R. at 346 (Zerniak Aff. ¶ 4). Zerniak also states that, “[r]eview of the videos by involved inmates could also reveal the identity of involved correctional staff, and potentially subject those individuals to retaliatory violence.” *Id.* at 349. However, at their disciplinary hearings, DOCCS showed

footage of the June 10, June 11, and June 14 incidents to the incarcerated individuals punished as a result of those incidents—the precise people that Zerniak alleges may commit retaliatory action.

In its Opposition Memo to PLS’s Verified Petition, DOCCS attempts to minimize this fact by arguing that viewings of the withheld footage at disciplinary hearings lessens the risk of the “charged individual identifying others for retribution purposes.” R. at 366 (Resp’t’s Opp’n Mem. 10).. However, in the very same paragraph, DOCCS explains that one of the purposes of showing the withheld footage in disciplinary hearings is to “enable the individual to identify others in the footage as potential witnesses.” *Ibid.* DOCCS provides no explanation for how it can show the withheld video to incarcerated individuals for the purposes of identifying individuals as potential witnesses while also claiming FOIL’s safety exemption to prevent *those exact same individuals* from identifying others for retribution.

Second, DOCCS cannot rely on an unspecified risk from members of the public to claim that “disclosure would endanger the safety of all [individuals] shown on the tapes.” *See Buffalo Broad. I*, 552 N.Y.S. at 714, DOCCS asserts that “the public release of [the videos of the June 10, 11 and 14, 2019 incidents] would allow any individual to view, study, and identify participants [in the incidents], and thus disclosure of these videos could endanger the life or safety of any person if

used by an inmate to identify other participants, or [non-participants.” R. at 365 (Resp’t’s Opp’n Mem. 9). DOCCS does not suggest which members of the public would be likely to review the video or how that could result in retaliation. This explanation is not an evidentiary basis for withholding, it is the type of “speculative” justification or “bare assertion” that does not satisfy the requirements of § 87(2)(f), which must be narrowly construed.

Finally, Zerniak’s explanation of the general dynamics of “prison violence and gang cases” is not sufficient to justify withholding the materials. *See* R. at 366-67 (Zerniak Aff., ¶¶ 10-13). Zerniak does not assert that the video depicted confidential information about corrections officers, witnesses, or informants. Although courts frequently uphold an agencies use of the safety exemption to keep such information confidential, *see, e.g., Matter of Canty v. Off. of Counsel, N.Y. Dep’t of Correctional Servs.*, 30 Misc. 3d 705, 710–11 (Sup. Ct. Albany Cty. 2010) (agency permitted to redact personal information of correctional officers, but not details of accident report describing officers’ injuries from prison riot), DOCCS does not claim that the footage at issue here would uncover any such confidential knowledge. To the contrary, it admits that the events depicted included many participants, and that they occurred in view of others in the prison population. In sum, DOCCS’s reasons for withholding the video footage do not

meet its burden to make a particularized and specific justification for invoking the safety exemption.

B. The Supreme Court Erred in Affirming DOCCS's Invocation of the Safety Exemption for the Clinton Video

The Supreme Court did not address the fact that PLS' clients had already seen the video, nor that the events depicted in the video were observable by the general prison population. Instead, after reviewing the materials *in camera*, the Court held only that because "the footage discloses the identities of the inmates in the yard incidents as well as the responding corrections officers," it was "satisfied that [DOCCS] has met its burden of demonstrating that disclosure of the requested material could potentially endanger the safety of a person or persons." R. at 411 (June 8, 2021 Order 5 (quoting *Matter of Kairis v. Fischer*, 138 A.D.3d 1360, 1361 (3d Dep't 2016))). The Supreme Court's reasoning is no more "particularized and specific" than DOCCS's affidavit, from which the Supreme Court had previously noted it "[was] unable to conclude, on the affidavit alone" that the videos qualified for the safety exemption. R. at 403 (Feb. 11, 2021 Order 14). The lower court did not provide any reasoning besides the statements in the affidavit, and repeated the Affidavit's general discussion of prison gang operations without articulating why these conclusory statements presented a "particularized and specific" justification that could overcome FOIL's broad grant of a right of access for PLS.

These videos may significantly assist PLS in defending its clients in disciplinary appeals. The ability to compare video footage with the testimony of DOCCS employees is crucial to ensuring that PLS clients receive fair hearings. In particular, the surveillance video allows PLS to resolve discrepancies between the accounts of corrections officers and incarcerated individuals and determine which account is accurate. Allowing DOCCS to withhold video without a particularized showing of risk to human safety would deprive PLS of a significant avenue to corroborate evidence presented against its clients in the heavily restricted environment of DOCCS facilities.

Lastly, applying the safety exemption without the particularized evidence of specific risk—as the Supreme Court did here—would enable DOCCS to effectively withhold any video that, as the lower court reasoned, “disclos[ed] the identities” of incarcerated individuals and corrections officers based on conclusory and speculative assertions of a possibility of harm if others are able to identify the individuals depicted in the video. Almost all videos could be withheld if such a broad interpretation of the narrow FOIL safety exemption should be permitted to stand. Such a practice shifts the FOIL presumption from transparency to secrecy.

DOCCS has not articulated a legitimate risk of harm from providing PLS with a copy of the surveillance video at issue here, and the Supreme Court’s June Order did not address crucial deficiencies in DOCCS’s stated justification for

withholding the footage. Given the potential of far-reaching implications for FOIL requests of DOCCS video footage, this Court should reverse the lower court's order and hold the safety exemption inapplicable to the withheld video footage.¹

II. The Lower Court Erred in Holding That DOCCS's Disclosure of the Bradley UI Report and Auburn Video Mooted Those Claims

Although DOCCS produced materials responsive to the Christian and Bradley FOIL requests after PLS filed this litigation, these claims should not be considered moot because the issues raised “are substantial or novel, likely to recur and capable of evading review.” *City of New York v. Maul*, 14 N.Y.3d 499, 507 (citing to *Matter of Hearst Corp. v. Clyne*, 50 N.Y.2d 707, 715 (1980)); *see also Schermerhorn v. Becker*, 883 N.Y.S.2d 325, 327 (2009). Allowing DOCCS to continue to assert wrongful exemption claims and only reverse course after litigation is filed and then claim mootness would waste resources and increase the cost and difficulty of representing indigent individuals who are incarcerated in the state.

¹ New York appellate courts frequently review FOIL determinations of the Supreme Court which came after *in camera* review, and often conduct their own *in camera* review of withheld materials in order to review the lower court's findings. *See, e.g. Williamson v. Fischer*, 984 N.Y.S. 2d 194, 195 (App. Div. 3d Dep't 2014) (reversing the Supreme Court's order and denying disclosure following *in camera* review); *John H. v. Goord*, 809 N.Y.S.2d 682, 683-84 (App. Div. 3d Dep't 2006) (compelling disclosure following *in camera* review). In this instance, such a review may be warranted.

DOCCS relied on two exemptions for initially withholding the Christian and Bradley records. DOCCS claimed the materials were subject to FOIL's law enforcement exemptions, Pub. Off. Law §87(2)(e), but made no reference to any specific subsection therein. DOCCS further denied the Bradley UI Report claiming it was exempt from disclosure under the inter- or intra-agency exemption, N.Y. Pub. Off. Law § 87(2)(g). PLS contended that the Bradley UI Report and Auburn videos constituted mixed-use materials not subject to FOIL's law enforcement exemptions, *Matter of Prisoners' Legal Servs. of N.Y. v. N.Y. State Dep't of Corr. & Cmty. Supervision*, 173 A.D.3d 8, 13 (2019), and that DOCCS failed to articulate a "factual basis" for withholding the requested materials as required by law. *See Matter of Leshner v. Hynes*, 19 N.Y.3d 57, 67 (2012). *PLS also argued that the Bradley UI Report could not be withheld pursuant to the intra-agency exemption because it was a factual document in nature and did not include agency opinions or advice.*

A. PLS's Claims Address Novel and Substantial Issues

The issues presented by DOCCS's invocation of two FOIL exemptions in this context are both novel and substantial. First, whether the law enforcement or inter- and intra-agency materials exemptions apply to the materials requested in this case is a novel question. An issue is novel if it "has not yet been considered by this Court." *Cmty. Bd. 7 of Borough of Manhattan v. Schaffer*, 84 N.Y.2d 148, 154

(1994). When evaluating whether an issue is novel, courts assess if it presents “questions the fundamental underlying principles of which have not already been declared.” *Matter of Hearst Corp.*, 50 N.Y.2d at 715. PLS is unaware of any court that has considered the argument of whether prison surveillance video or UI Reports do not qualify for the law enforcement exemption because they are not prepared for law enforcement purposes but rather for archival purposes, such as creating a visual record of day-to-day operations in correctional facilities.

Furthermore, the Court of Appeals has noted that the question of whether use-of-force forms, which are factual accounts similar to UI Reports, qualify as intra-agency materials has not been addressed. *Matter of N.Y. Civ. Liberties Union v. City of Schenectady*, 2 N.Y.3d 657, 660–61 (2004) (noting conflict between *Matter of Gannett Co. v. James*, 86 A.D.2d 744 (4th Dep’t 1982), *lv. denied*, 56 N.Y.2d 502 (1982), and *Matter of Gould v. N.Y.C. Police Dep’t*, 89 N.Y.2d 267 (1996).).

Additionally, the applicability of Respondent-Appellee’s claimed FOIL exemptions to the requested material would be significant, and therefore substantial. An issue is substantial if it presents “significant or important questions.” *Schermerhorn*, N.Y.S.2d at 327. Issues “should not be dismissed as moot” if “the subject matter and controversies at the core of the proceedings are of general interest and substantial public importance.” *People ex rel. Guggenheim v. Mucci*, 32 N.Y.2d 307, 309 (1973). *See also E. Meadow Cmty. Concerts Ass’n v.*

Bd. of Ed. of Union Free Sch. Dist. No. 3, Nassau Cty., 18 N.Y.2d 129, 133 (1966) (substantial issues are also those of “high public importance.”). The issue of public visibility into what goes on behind prison walls bears on a number of other issues of substantial public importance, including misconduct against incarcerated people by prison staff. Organizations like PLS play a critical role in protecting the rights of these individuals, and they rely on FOIL to carry out their missions. At its core, FOIL is premised on increasing visibility into government operations to prevent corruption and promote accountability; a bar on the disclosure of prison video surveillance under the law enforcement exemption generally and factual records under the inter-agency exemption undercuts FOIL’s very purpose.

B. The Issues Presented by DOCCS’s Claimed Exemptions Are Likely to Recur

The lower court agreed in its order that the issues raised by DOCCS’s claimed FOIL exemptions “are likely to recur.” R. at 36 (Feb. 11, 2021 Order, at 12) (quoting *Matter of Associated Gen. Contrs. of New York State, LLC v. New York State Thruway Auth.*, 173 A.D.3d 1526, 1527 (3d Dep’t 2019)). PLS and other organizations representing incarcerated persons in New York routinely request the records underlying disciplinary proceedings in order to effectively represent their clients. The Third Department has addressed disclosure of these materials in the past and is likely to address disclosure of similar materials in the

future. *See, e.g. Matter of Prisoners' Legal Servs.*, 173 A.D.3d at 14 (UI reports); *Buffalo Broad. II*, 174 A.D.2d at 216 (video). These documents are in the sole custody of DOCCS and DOCCS is likely to invoke the intra-agency materials and law enforcement exemptions again in response to future FOIL requests. Failing to evaluate these claims on the merits provides DOCCS further incentive to avoid cooperating with organizations representing the legal rights of incarcerated persons and to only produce requested materials if the organization litigates the denial.

C. The Issues Presented by DOCCS's Claimed Exemptions Are Likely to Evade Judicial Review

DOCCS's exclusive control over these records and its ability to change the basis for a decision to withhold records places it in a position to "invariably render a proceeding moot" as it chooses. *Matter of Laborers' Int'l Union of N. Am., Local Union No. 17 v. N.Y. State Dep't of Transp.*, 280 A.D.2d 66, 69 (3d Dep't 2001). DOCCS's actions here illustrate this perfectly. DOCCS denied PLS's initial requests and then, in the appeal process, evaded review by the lower court by providing the requested materials. If its invocations of the law enforcement and intra-agency exemptions are not considered and rejected by the court, DOCCS will be able provide materials at its own convenience rather than recognize its obligations under New York law or justify its exemptions in court.

Given the novel and substantial nature of the issues presented by DOCCS's withholding of the Bradley UI report and the Auburn Correctional Facility videos, and the fact that such issues will arise repeatedly and are likely to evade review, PLS's claims regarding these materials should not be considered moot. The Supreme Court's opinion included no reasoning for its finding that the claims at issue here do not qualify for the exception to the mootness doctrine. R. at 36 (Feb. 11, 2021 Order, at 12). In light of the foregoing, PLS asks this Court to reverse the February 11, 2021 ruling regarding the Christian and Bradley FOIL requests and remand for consideration on the merits.

III. The Absence of a Filed Summons Does Not Preclude Petitioner-Appellant's Claims for Declaratory Relief

The lower court erred in holding Petitioner-Appellant's request for declaratory relief improper because Petitioner-Appellant filed a "hybrid" FOIL and declaratory relief claim without a summons. R. at 36-37 (February 11, 2021 Order, at 12-13). There is no substantive difference between a notice of petition and a summons and therefore the notice of petition can serve as the summons in a hybrid Article 78 proceeding-action. *See New York State Assemblyman Powell v. City of New York*, 847 N.Y.S.2d 898 (Sup. Ct. 2007) ("The initiatory papers filed and served here, denominated as a notice of petition and petition, are the functional equivalent of a summons and complaint for the declaratory judgment claim

pleaded as the second cause of action. The Court therefore deems them the summons and complaint.”).

Neither the Court of Appeals nor the Third Department has addressed this issue. In *Newton v. Town of Middletown*, this Court noted that the appellants in that case commenced the hybrid proceeding-action “by filing and serving a notice of petition and a summons under a single index number” but did not hold that a summons was required in a hybrid proceeding-action. 820 N.Y.S.2d 154, 156 (2006).

Even if a summons was required, the lower court erred in dismissing the claims for declaratory relief; instead, it should have deemed the notice of petition to also be a summons. “If a court has obtained jurisdiction over the parties, a civil judicial proceeding shall not be dismissed solely because it is not brought in the proper form, but the court shall make whatever order is required for its proper prosecution.” N.Y. C.P.L.R. 103(c) (McKinney); *See Greenberg v. Assessor of Town of Scarsdale*, 996 N.Y.S.2d 48, 52 (2d Dep’t 2014) (converting a special proceeding into a hybrid proceeding-action and deeming the notice of petition to also be a summons and the petition to be the petition/complaint). The manner in which PLS filed the petition did not prejudice DOCCS, and indeed DOCCS did not object to the form of PLS’s filing before the Court raised the issue in its February

Order. Dismissal of PLS's claims for declaratory relief on this ground was improper.

IV. The Lower Court Erred in Denying PLS Attorneys Fees and Costs

The lower court erred in holding that PLS did not substantially prevail on its FOIL claims. After filing the litigation, PLS obtained substantial disclosure in response to its requests and obtained *in camera* review of the Clinton videos.

FOIL provides that a court “may assess, against such agency involved, reasonable attorney's fees and other litigation costs reasonably incurred . . . in any case . . . in which such person has substantially prevailed.” N.Y. Pub. Off. Law § 89(4)(c) (McKinney). The purpose of § 89(4)(c) is to “encourage compliance with FOIL and to minimize the burdens of cost and time from bringing a judicial proceeding.” *New York Times Co. v. City of New York Off. of Mayor*, N.Y.S.3d 428, 435, *leave to appeal denied*, 37 N.Y.3d 913 (2021) (quoting 2017 NY Assembly Bill A2750).

“Where . . . a court determines that one of the requirements [of § 89(4)(c)] has not been met, [the appeals court] review[s] whether the [lower] court erred as a matter of law in reaching that conclusion.” *Madeiras v. New York State Educ. Dep't*, 30 N.Y.3d 67, 79, (2017) (citing *Matter of Beechwood Restorative Care Ctr. v. Signor*, 5 N.Y.3d 435, 441 (2005)). Here, the lower court denied Petitioner-

Appellant’s request for attorney’s fees after determining that Petitioner-Appellant “ha[d] not substantially prevailed.” R. at 436 (June 8, 2021 Order at 5 (quoting *Matter of Empire Ctr. for Pub. Pol’y v. New York City Off. Of Payroll Admin*, 187 A.D.3d 435, 436 (1st Dep’t 2020) (quoting § 89(4)(c))). The lower court provided no explanation for its determination.

A petitioner substantially prevails where an agency makes no disclosures prior to petitioner's commencement of a proceeding and “petitioner's legal action ultimately succeed[s] in obtaining substantial . . . post-commencement disclosure responsive to her FOIL request,” including information volunteered by the agency. *Madeiras*, 30 N.Y.3d at 79; see *Competitive Enterprise Inst. v. Att’y Gen. of New York*, 76 N.Y.S.3d 640, 643 (3d Dep’t 2018) (“Having received a complete response and the actual document only after commencing the proceeding, we conclude that petitioner substantially prevailed. . .”).

PLS obtained substantial disclosure responsive to its requests, including the Bradley UI report and video footage from the Auburn Correctional Facility. Therefore, PLS has substantially prevailed within the meaning of § 89(4)(c) and the lower court erred as a matter of law in determining that Petitioner-Appellant failed to meet the statutory prerequisites of § 89(4)(c). As the court cautioned in *Madeiras*, “to conclude otherwise would be to permit agencies to circumvent section 89(4)(c) because ‘only a petitioner who fully litigated a matter to a

successful conclusion could ever expect an award of counsel fees and a respondent whose position was meritless need never be concerned about the possible imposition of such an award so long as they ultimately settled a matter—however dilatorily.” *Madeiras*, 30 N.Y.3d at 79 (quoting *Matter of New York C.L. Union v. City of Saratoga Springs*, 926 N.Y.S.2d 732, 735 (2011)).

Indeed, DOCCS had no reasonable basis for denying access to the records sought by PLS. Where a court finds that an agency has “no reasonable basis for denying access,” the law requires that the court “shall assess” attorneys fees against the agency. N.Y. Pub. Off. L. § 89(4)(c)(ii). A denial is not reasonable where respondent “immediate[ly] release[s] the requested information upon commencement of [the] proceeding.” *New York State Defs. Ass'n v. New York State Police*, 87 A.D.3d 193, 197 (2011) (citation omitted). Here, DOCCS released certain of the requested information following commencement of this litigation.

As PLS finally obtained significant disclosure in response to its FOIL requests, requiring significant time and expense from PLS and its counsel, the lower court should have awarded attorneys fees to PLS.

CONCLUSION

DOCCS’s actions at issue here threaten to blunt, and even remove, a critical tool that PLS has to protect the rights of incarcerated individuals. PLS routinely relies on FOIL to access records from the tightly controlled prison environment,

and PLS's clients frequently have nowhere else to turn for advice and representation. Prior to this proceeding, DOCCS typically granted PLS's requests for such materials, but PLS cannot rely on the agency's discretion for such important disclosure. DOCCS's denial, leading to litigation that has now lasted more than two years, underscores the need for a robust interpretation of FOIL that allows PLS and other organizations to ensure transparency and accountability in New York's correctional facilities.

For the foregoing reasons, Petitioner-Appellant respectfully requests that the Court reverse the Orders below and hold that that Petitioner-Appellant is entitled to an award of attorneys' fees and costs.

Dated: January 24, 2022
New York, New York

Respectfully submitted,

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