

**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.

REPLY BRIEF FOR PETITIONER-APPELLANT

DEBEVOISE & PLIMPTON LLP
William C. Mattessich, Esq.
Adrian Gonzalez, Esq.
919 Third Avenue
New York, New York 10022
Tel. (212) 909-6000

*Counsel for Petitioner-Appellant
Prisoners' Legal Services of New York*

TABLE OF CONTENTS

| | |
|--|----|
| PRELIMINARY STATEMENT | 1 |
| ARGUMENT | 1 |
| I. The Exception to the Mootness Doctrine Applies to the Bradley and Auburn FOIL Requests Because the Issues Raised are Substantial, Likely to Recur and Capable of Evading Review | 1 |
| II. The Safety Exemption to FOIL Does Not Apply to the Requested Videos Because DOCCS’s Asserted Basis is Speculative | 4 |
| III. Petitioner-Appellant’s Claims for Declaratory Relief Are Properly before the Court and Appropriate for the Requested Materials | 7 |
| IV. Petitioner-Appellant Is Entitled to Attorney’s Fees | 9 |
| CONCLUSION | 13 |

TABLE OF AUTHORITIES

Cases

| | |
|---|-------|
| <i>101CO, LLC v. New York State Dep't of Env't Conservation</i> , 169 A.D.3d 1307 (3d Dep't 2019)..... | 12 |
| <i>Chanos v. MADAC, LLC</i> , 74 A.D.3d 1007 (2d Dep't 2010)..... | 9 |
| <i>City of New York v. Maul</i> , 14 N.Y.3d 499 (2010) | 1 |
| <i>Competitive Enter. Inst. v. Att'y Gen. of New York</i> , 161 A.D.3d 1283 (3d Dep't 2018)..... | 10 |
| <i>Gannett Satellite Info. Network, LLC v. New York State Thruway Auth.</i> , 181 A.D.3d 1072 (3d Dep't 2020) | 10 |
| <i>Greenberg v. Assessor of Town of Scarsdale</i> , 996 N.Y.S.2d 48 (2d Dep't 2014) | 7 |
| <i>Mack v. Howard</i> , 91 A.D.3d 1315 (4th Dep't 2012)..... | 6, 7 |
| <i>Maddux v. New York State Police</i> , 64 A.D.3d 1069 (3d Dep't 2009)..... | 12 |
| <i>Matter of Associated Gen. Contrs. of New York State, LLC v. New York State Thruway Auth.</i> , 173 A.D.3d 1526 (3d Dep't 2019)..... | 1, 11 |
| <i>Matter of Buffalo Broad. Co. Inc. v. New York State Dep't of Corr. Servs.</i> , 174 A.D.2d 212, lv. denied, 79 N.Y.2d 759 (1992) | 5, 6 |
| <i>Matter of Capital Newspaper Div. of Hearst Corp. v. Whalen</i> , 69 N.Y.2d 246 (1987)..... | 4 |
| <i>Matter of Data Tree, LLC v. Romaine</i> , 9 N.Y.3d 454 (2007) | 4 |
| <i>Matter of Fink v. Lefkowitz</i> , 47 N.Y. 2d 567 (1979) | 4 |
| <i>Matter of Hearst Corp. v. Clyne</i> , 50 N.Y.2d 707 (1980)..... | 1 |
| <i>McDevitt v. Suffolk Cty.</i> , 183 A.D.3d 826 (3d Dep't 2020) | 10 |
| <i>New York Pub. Int. Rsch. Grp., Inc. v. Carey</i> , 42 N.Y.2d 527 (1977) | 8 |

New York State Defs. Ass'n v. New York State Police,
87 A.D.3d 193 (2011).....11

Schermerhorn v. Becker, 64 A.D.3d 843 (3d Dep't 2009).....3

Statutes

N.Y. Pub. Off. Law § 87(2)(f)4

Pub. Off. Law § 84.....8

Pub. Off. Law § 87(2)(e).....3, 12

Pub. Off. Law §89(4)(c).....9, 10

Other Authorities

C.P.L.R. 3001.....9

C.P.L.R. article 78.....9

PRELIMINARY STATEMENT

Petitioner-Appellant Prisoners' Legal Services of New York (PLS) submits this reply brief in further support of its appeal and in response to Respondent-Appellee New York State Department of Corrections and Community Supervision's (DOCCS) opposition brief.

ARGUMENT

I. The Exception to the Mootness Doctrine Applies to the Bradley and Auburn FOIL Requests Because the Issues Raised are Substantial, Likely to Recur and Capable of Evading Review

The exception to the mootness doctrine applies to DOCCS's withholding the Bradley unusual incident report ("UI Report") and the Auburn video. As DOCCS acknowledges, the exception applies where the issues presented "are substantial or novel, likely to recur and capable of evading review." *City of New York v. Maul*, 14 N.Y.3d 499, 507 (2010) (citing to *Matter of Hearst Corp. v. Clyne*, 50 N.Y.2d 707, 715 (1980)). The Supreme Court agreed that the issues raised by DOCCS's asserting the intra-agency and law enforcement 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)). Indeed, prisoners' counsel routinely request records relating to disciplinary hearings. Furthermore, these issues are likely to evade review because DOCCS can and does, as it did here, choose to render proceedings moot by producing documents after petitioners commence litigation and before the validity

of its claimed exemptions can be heard on the merits. In its opposition, DOCCS agrees these issues are “frequently litigated.” Resp’t’s Br. 12, but assumes that the frequency of litigation alone is enough to reduce the likelihood that the issues will evade review. To the contrary, the likelihood of recurrence should persuade this Court to consider the issue on the merits so that DOCCS cannot avoid production of these types of records in the future.

PLS’s challenges to DOCCS’s invocation of the intra-agency and law enforcement exemptions are substantial and novel and warrant an exception to mootness. No court has yet ruled on whether factual documents like UI reports generally fall within the intra-agency or law enforcement exemptions or whether video footage compiled for archival purposes qualifies as video compiled “for law enforcement purposes” under the law enforcement exemption. DOCCS argues that it properly withheld the unusual incident report because “it was a draft document that did ‘not include final policy or determinations.’” Resp’t’s Br. 13. However, “factual...data,” including factual summaries in UI reports, are an independent category of records that must be produced under FOIL regardless of their finality. Pub. Off. Law § 87(2)(g)(i). Accordingly, the factual portions of UI’s should be produced even if they are considered “preliminary.”

DOCCS’s categorization of the UI reports as “preliminary” undermines the purpose of FOIL. Applying this exemption to factual summaries allows DOCCS to

rely on the “preliminary” status of a UI report to initially deny production but agree to later produce the report once finalized. That finalization process itself is long enough to meaningfully and unlawfully impede access to records.

Additionally, while DOCCS may regularly litigate cases under Pub. Off. Law § 87(2)(g) as a generic matter, that does nothing to establish the specific question presented here as applied to UI reports that will routinely evade review.

Similarly, the law enforcement exemption does not apply to the Auburn video or the Bradley UI Report because such materials are not “compiled for law enforcement purposes.” Pub. Off. Law § 87(2)(e). Instead, such records are made for archival purposes and to record the routine operations within correctional facilities. The footage is made regardless of whether there is any law enforcement interest in the activities captured by the video. The Court should apply the exception to the mootness doctrine to rule on these novel legal theories in order to clarify the scope of these exemptions.

Lastly, the issues presented are substantial. An issue is substantial if it presents “significant or important questions.” *Schermerhorn v. Becker*, 64 A.D.3d 843, 845 (3d Dep’t 2009). The issues presented here are both significant and important. Whether DOCCS can continue to withhold factual, routine documents that do not fall within the FOIL statute’s stated exemptions bears directly on the ability of counsel to access factual records for the purpose of defending imprisoned

clients in disciplinary proceedings and the ability of the public to provide meaningful monitoring and oversight of events that occur in an opaque institutional setting. Respondent-Appellee incorrectly downplays the significance of these issues with the cursory claim that they raise “no ‘question of general interest and substantial public importance...’” Resp’t’s Br. 12-13. The issues here bear directly on the central purpose of FOIL – the ability of the public to meaningfully review and hold state officials accountable. Given the unique power imbalance and profound information access issues presented in prisons, there is an urgent need to guard against the improper application of FOIL exemptions that allow DOCCS to shield potential misconduct from public scrutiny.

II. The Safety Exemption to FOIL Does Not Apply to the Requested Videos Because DOCCS’s Asserted Basis is Speculative

N.Y. Pub. Off. Law § 87(2)(f) exempts from FOIL records that “could endanger the life or safety of any person” if disclosed. Like other exemptions to FOIL, § 87(2)(f), must 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)), and any agency claiming the safety exemption must offer a “particularized and specific justification” for withholding the requested records. *Matter of Fink v. Lefkowitz*, 47 N.Y. 2d 567, 571 (1979).

DOCCS relies on *Matter of Hynes v. Fischer*, to support its claim that records that could be used to identify individuals for retaliatory action are properly withheld under FOIL's safety exemption. *See* 101 A.D.3d 1188 (3d Dep't 2012). However, *Matter of Hynes* is easily distinguishable from the facts here. *Matter of Hynes* involved an anonymous letter writer and the court was concerned that the handwritten letter could be analyzed to determine the identity of the writer. 101 A.D.3d 1188, 1190 (3d Dep't 2012). Without access to the letter, there was no way for the petitioners to identify the writer. Here, the requested record is video footage of an incident involving dozens of individuals in plain view of one another. Furthermore, despite arguing the footage could not be released for fear that the individuals captured on video would be identified, DOCCS showed the video to prisoners during disciplinary hearings. While DOCCS argues that these showings occurred in a "controlled setting," they do not explain how release of the videos to counsel would increase risk of retaliation beyond the risk incurred from showing the videos at disciplinary hearings.

Respondent-Appellee also argues that *Matter of Buffalo Broad. Co. Inc. v. New York State Dep't of Corr. Servs.*, 174 A.D.2d 212 (3d Dep't), lv. denied, 79 N.Y.2d 759 (1992) is not persuasive because DOCCS offered "additional support" for the claimed exemption. However, the court in *Matter of Buffalo Broadcasting* stated that such additional support cannot be "conclusory and unsupported by

demonstration from the tapes or evidentiary facts.” *Buffalo Broad. Co. Inc. v. New York State Dep’t of Corr. Servs.*, 174 A.D.2d 212, 216 (1992). Here, Respondent-Appellee warns of unspecified retaliation by “rival gang members,” Resp’t’s Br. 7-8. The court in *Matter of Buffalo Broadcasting* found such conclusory statements insufficient to support the claimed exemption and this Court should do the same.

Lastly, Respondent-Appellee attempts to distinguish *Matter of Buffalo Broadcasting* because the video at issue in that case did not involve “large-scale, racially-motivated altercations.” Resp’t’s Br. 18. However, Respondent-Appellee ignores entirely the more recent holding in *Mack v. Howard*, 91 A.D.3d 1315 (4th Dep’t 2012), which *did* involve an altercation. The court in *Mack* held that the video at issue, which depicted an altercation between an inmate and several deputy sheriffs, was not exempt from disclosure. In reaching its decision, the court relied on *Matter of Buffalo Broadcasting*, which denied the respondent’s claimed exemption for requested videos because “the depictions [at issue] were of scenes witnessed by the general prison population.” 91 A.D.3d 1315, 1316–17 (4th Dep’t 2012). The *Mack* court reasoned that video of the altercation between the inmate and deputy sheriffs similarly depicted scenes “witnessed by the general prison population” and denied the claimed exemption because the respondent failed to establish that the release of the videotape could endanger the life or safety of any

person. Like the courts in both *Matter of Buffalo Broadcasting* and *Mack*, this Court should find that the safety exemption does not apply to the Auburn video.

III. Petitioner-Appellant's Claims for Declaratory Relief Are Properly before the Court and Appropriate for the Requested Materials

The Court should convert Petitioner-Appellant's claims to a hybrid proceeding-action and grant declaratory relief. Petitioner-Appellant is entitled to declaratory relief as its notice of petition and petition were sufficient to commence a hybrid Article 78 proceeding-action. *See* Pet'r's Br. 27-29. The lower court improperly denied relief on procedural grounds which it could have remedied easily by permitting the notice of petition to serve as a summons. *See Greenberg v. Assessor of Town of Scarsdale*, 996 N.Y.S.2d 48, 52 (2d Dep't 2014). DOCCS was not prejudiced by Petitioner-Appellant's filing of a notice of petition and petition rather than a summons and complaint. Indeed, DOCCS did not even object to the method of filing until after the lower court's discussion of the issue in its February ruling. *See* Pet'r's Br. 28-29.

Although FOIL determinations are fact-specific inquiries, a ruling that UI reports are "factual data" and that UI reports and prison surveillance video are not "compiled for law enforcement purposes" remains appropriate. A ruling on the merits will provide clarity when PLS or other members of the public seek such material in the future.

The FOIL statute proceeds from the premise that it is “incumbent upon the state and its localities to extend public accountability wherever and whenever feasible” and that access to information “should not be thwarted by shrouding it with the cloak of secrecy or confidentiality.” Pub. Off. Law § 84. Declaring that UI reports and prison surveillance videos are generally not exempt corresponds with the spirit and purpose of FOIL in confirming that the statute’s baseline presumption is transparency rather than secrecy. DOCCS and other state agencies would still be able to identify different valid exemptions to withhold a record if the specific facts in a situation support it. However, DOCCS would be required to articulate more specific justifications for withholding these records than it has here.

Declaratory relief is appropriate for future events that may occur and that are within the control of the parties. *New York Pub. Int. Rsch. Grp., Inc. v. Carey*, 42 N.Y.2d 527, 530–31, (1977). PLS and similar organizations have brought similar FOIL claims for many years. It is highly likely, if not certain, that issues regarding the scope of the stated exemptions raised here will arise in the future. However, even if the Court does not grant declaratory relief with respect to UI reports and prison surveillance videos generally, declaratory relief is still appropriate here to reject DOCCS’s application of the exemptions to the specific materials in this case.

Petitioner-Appellant’s request for declaratory relief for the disclosed records is not moot and should be granted. “The primary purpose of a declaratory

judgment is to stabilize an uncertain or dispute jural relationship with respect to present or prospective obligations.” *Chanos v. MADAC, LLC*, 74 A.D.3d 1007, 1008 (2d Dep’t 2010). Despite the disclosure of specific materials, prospective obligations between the parties remain. Although certain materials have been disclosed, there is still a “justiciable controversy” within the meaning of C.P.L.R. 3001. Unlike in *Salvador v. Town of Queensbury*, where a taxpayer brought action against his town for not following proper procedures despite the absence of a statutory legal requirement to do so, Petitioner-Appellant has alleged “a real dispute between adverse parties, involving substantial legal interests” under FOIL’s statutory requirements. 162 A.D.3d 1359, 1360 (3d Dep’t 2018). Declaratory relief would also have “some practical effect” in providing Petitioner-Appellant and the general public with certainty regarding the grounds of the specific disclosure, which would help achieve the purpose of FOIL by clarifying which types of government records will be excepted from the presumption of transparency.

IV. Petitioner-Appellant Is Entitled to Attorney’s Fees

Petitioner-Appellant is entitled to attorney’s fees since both statutory prerequisites are satisfied. First, Petitioner-Appellant substantially prevailed on its FOIL claims. “A petitioner has ‘substantially prevailed’ within the meaning of Pub. Off. Law §89(4)(c) when the commencement of the CPLR article 78

proceeding ultimately succeeds in obtaining the records responsive to the FOIL request, whether by court order or by voluntary disclosure.” *McDevitt v. Suffolk Cty.*, 183 A.D.3d 826, 828 (3d Dep’t 2020); *see also Gannett Satellite Info. Network, LLC v. New York State Thruway Auth.*, 181 A.D.3d 1072, 1074 (3d Dep’t 2020) (stating that “[a] petitioner substantially prevails under Pub. Off. Law §89(4)(c) when it receives all the information that it requested and to which it was entitled in response to the underlying FOIL litigation, even where, as here, the response is received after the proceeding is commenced.” [internal quotation marks and citations omitted]).

Petitioner-Appellant received both the Bradley UI report and the Auburn Correctional Facility video surveillance footage after the commencement of proceedings through voluntary disclosure by DOCCS and by defense counsel in a pending criminal proceeding respectively. R. at 223. Even if PLS did not receive this information *directly* as a result of the underlying FOIL litigation, it did obtain the Bradley UI report and the Auburn Correctional Facility footage in response to the underlying litigation. *See* Pub. Off. Law § 89(4)(c) [emphasis added]. Since PLS received “a complete response and the actual document only after commencing the proceeding,” and received that information voluntarily, it has substantially prevailed in satisfaction of the attorney’s fees statute. *Competitive Enter. Inst. v. Att’y Gen. of New York*, 161 A.D.3d 1283, 1285, (3d Dep’t 2018).

Elsewhere in its submissions, DOCCS recognizes that PLS's receipt of the documents amounts to a complete response. Yet when discussing attorney's fees, DOCCS contends that PLS's receipt of the requested documents does not qualify as substantially prevailing, despite earlier arguing that the receipt of the Bradley UI Report and the Auburn Correctional Facility render Petitioner-Appellant's arguments moot. *See* Resp't's Br. 11-13. By producing the documents voluntarily after PLS commenced litigation, and not in response to the initial FOIL requests, DOCCS has attempted to both moot several substantive issues and deny PLS relief through attorney's fees.

Furthermore, PLS has established that DOCCS lacked a reasonable basis for denying access to the records sought. PLS does not argue that DOCCS's later disclosure of the records indicates that DOCCS's initial disclosure was "per se unreasonable." *See* Resp't's Br. 25. Rather, Petitioner-Appellant contends that DOCCS's argument that its denial was reasonable "is belied by the virtually immediate release of the requested information upon [the] commencement of [the] proceeding[s]." *New York State Defs. Ass'n v. New York State Police*, 87 A.D.3d 193, 197 (2011) (citation omitted). DOCCS's justification for withholding the materials at the time it was made is just one indicator of reasonableness. *See Associated Gen. Contractors of New York State, LLC v. New York State Thruway Auth.*, 173 A.D.3d 1526, 1528 (3d Dep't 2019) (stating simply that the Court "had

a reasonable basis for denying access to the due diligence report at the time of petitioner's FOIL request," but neither establishing a requirement nor a rule.) DOCCS's production of the requested materials shortly after the proceedings commenced is similarly a relevant indication of reasonableness.

Indeed, this court has indicated previously that it considers the "circumstances" when determining whether an initial denial was unreasonable. *Maddux v. New York State Police*, 64 A.D.3d 1069, 1070 (3d Dep't 2009). DOCCS's withholdings were unreasonable under the present circumstances. The Department invoked broad exemptions and boilerplate language that neither meets the required particularized standard for FOIL responses nor indicates "a good faith effort to comply with the requirements of FOIL." *101CO, LLC v. New York State Dep't of Env't Conservation*, 169 A.D.3d 1307, 1313 (3d Dep't 2019); *see also* Smith Aff. Ex. G (including DOCCS's denial of PLS' appeal which does not reference any specific subsection of Pub. Off. Law § 87(2)(e); Smith Aff. Ex. H (including DOCCS's notice of withholding documents that does not mention to which specific PLS clients it relates.); Smith Aff. Ex. J (including DOCCS reason for denying PLS's appeal regarding the Auburn video surveillance, which also invokes Pub. Off. Law § 87(2)(e) without referencing a specific section.).

Thus, to allow DOCCS to delay producing material in response to FOIL requests until a petition is filed, as it did here, would be to undermine FOIL's

purpose and realize the Legislature’s original fear that “[c]ertain agencies [would adopt] a ‘sue us’ attitude in relation to providing access to public records.”

Assembly Mem. in Support, at 1, Bill Jacket, L. 1982, ch. 73. Awarding attorney’s fees will be a deterrent to DOCCS repeating this pattern in the future.

CONCLUSION

For the foregoing reasons, Petitioner-Appellant respectfully requests that this Court reverse the Orders below, issue a declaratory judgment that UI reports and prison surveillance video are not subject to the law enforcement or intra-agency exemptions without particularized and specific justification, and hold that that Petitioner-Appellant is entitled to an award of attorneys’ fees and costs.

Dated: May 9, 2022
New York, New York

Respectfully submitted,

DEBEVOISE & PLIMPTON LLP

/s/ William C. Mattessich

William C. Mattessich

Adrian Gonzalez

919 Third Avenue

New York, New York 10022

(212) 909-6000

*Counsel for Petitioner Prisoners’ Legal
Services of New York*

**PRINTING SPECIFICATIONS STATEMENT
PURSUANT TO 22 NYCRR § 1250.8[j]**

The foregoing brief was prepared on a computer. A proportionally spaced typeface was used, as follows:

Name of typeface: Times New Roman Point

Size: 14

Line spacing: Double

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service, printing specifications statement, or any authorized addendum containing statutes, rules, regulations, etc., is 2893.