To be argued by: BEEZLY J. KIERNAN
Time requested: 10 minutes

Supreme Court of the State of New York
Appellate Division – Third Department

In the Matter of the Application of

PRISONERS' LEGAL SERVICES OF NEW YORK,

Petitioner-Appellant,

v.

NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION,

Respondent-Respondent,

For a Judgment Pursuant to Article 78 of the Civil Practice Law & Rules.

No. 533722

BRIEF FOR RESPONDENT

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Dated: April 27, 2022

Supreme Court, Albany County – Index No. 909066-19

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

Page(s)

Page(s)

Page(s)

STATE STATUTES

PRELIMINARY STATEMENT

This C.P.L.R. article 78 proceeding concerns Freedom of Information Law (FOIL) requests filed by petitioner Prisoners' Legal Services of New York on behalf of four of its clients: Phillip Bradley, Antonion Christian, Charles Blanchard, and Shaun Martin. These individuals were charged with violating prison disciplinary rules in connection with yard incidents that occurred at Auburn and Clinton Correctional Facilities in May and June 2019. Petitioner sought all records introduced or viewed at its clients' subsequent disciplinary hearings. Respondent New York State Department of Corrections and Community Supervision (DOCCS) disclosed all responsive documents, except for video footage of the incidents and Bradley's non-finalized unusual incident report. Later, after petitioner commenced this proceeding, DOCCS finalized the unusual incident report and disclosed it to petitioner. Petitioner also obtained the Auburn video from defense counsel in related criminal proceedings, leaving petitioner's request for the Clinton videos as the only live claim for disclosure.

Supreme Court, Albany County (O'Connor, A.J.), dismissed the petition, and this Court should affirm. First, Supreme Court correctly

dismissed the petition as moot insofar as petitioner has now obtained both the unusual incident report and the Auburn video. And petitioner has failed to show that the Court should apply the exception to the mootness doctrine here. Second, DOCCS properly withheld the Clinton videos under Public Officers Law § 87(2)(f) because their disclosure could endanger the life or safety of others. The Clinton videos portray a series of racially-motivated altercations between rival gangs. Public disclosure of these videos could lead gang members to identify and retaliate against individuals who participated in the altercations as well as the correction officers who responded to them. Third, petitioner's claims for declaratory relief are meritless. And finally, Supreme Court properly denied petitioner's request for attorney's fees.

QUESTIONS PRESENTED

1. Did Supreme Court correctly dismiss the petition as moot insofar as petitioner has now received the Bradley unusual incident report and the Auburn video?

2. Did DOCCS establish that the Clinton videos, which portray violent, race-based altercations involving gangs, are exempt from disclosure because of the risk of retaliation by rival gang members?

3. Did Supreme Court correctly dismiss petitioner's claims for declaratory relief?

4. Did Supreme Court properly deny petitioner's request for attorney's fees?

STATEMENT OF THE CASE

A. Petitioner's FOIL Request and Administrative Appeal

Petitioner is a non-profit organization that provides legal services to indigent individuals incarcerated in New York State correctional facilities. (R. 109.) DOCCS charged four of petitioner's clients—Phillip Bradley, Antonion Christian, Charles Blanchard, and Shaun Martin—with violating prison disciplinary rules in 2019.

Bradley and Christian's charges were based on a May 11, 2019 incident at Auburn. (R. 112.) Petitioner submitted FOIL requests for, among other things, all evidence introduced or viewed at their Tier III disciplinary hearings. (R. 131, 133.) DOCCS disclosed all documents responsive to the Bradley and Christian requests except for video footage and Bradley's unusual incident report. (*See* R. 136, 150.) On administrative appeal, DOCCS explained that the May 11, 2019 Auburn video was exempt from disclosure under Public Officers Law § 87(2)(e)

because of the risk of interference with ongoing law enforcement investigations, including a pending criminal investigation. (R. 146, 156.) DOCCS noted that "release of the video at this time would threaten to prematurely reveal law enforcement and the District Attorney's plans for the case [and] prematurely reveal the identity of witnesses and sources." (R. 156.) DOCCS further explained that the Bradley unusual incident report was exempt under Public Officers Law § 87(2)(g) because it was a non-final intra-agency record. (R. 156.)

Blanchard's and Martin's charges were based on a series of large-scale, racially-motivated incidents that took place on June 10, 11, and 14, 2019, at Clinton. (R. 115.) Specifically, according to Blanchard's misbehavior report, Blanchard took part in a "verbal confrontation [between] a group of white inmates and a group of black inmates" on June 10, and participated in a large-scale altercation in the yard on June 11. The misbehavior report states that Blanchard organized and recruited "other white inmates to the yard for support and participation" in the June 11 altercation, which grew to involve 45-60 incarcerated individuals. (R. 336.) According to Martin's misbehavior report and an unusual incident report, Martin was involved in another large-scale

altercation on June 14. (R. 277, 279-280.) Martin was observed "exchanging several closed fist punches with multiple African Americans" in the yard. (R. 277.) After Blanchard's and Martin's Tier III disciplinary hearings, petitioner again submitted FOIL requests for, among other things, all evidence introduced or viewed at the hearings. (R. 159-160, 170-171.) Petitioner also specifically requested video footage of the June 14, 2019 incident on behalf of Martin. (R. 159.)

DOCCS disclosed all responsive documents except for video footage of the incidents involving Blanchard and Martin. (*See* R. 297, 341.) On administrative appeal, DOCCS explained that the Clinton videos were exempt from disclosure under Public Officers Law § 87(2)(f) because disclosure could endanger the life or safety of others who were involved in those incidents, and who could be identified by video "for the purpose of retaliatory action." (R. 300, 344.) DOCCS further noted that while Blanchard and Martin viewed this footage at their disciplinary hearings, hearing officers can review evidence "in a secure setting outside the view of the general inmate population"; FOIL disclosure, however, is tantamount to publicly releasing records. (R. 300, 344.). DOCCS also asserted the law enforcement exemption for the Clinton videos, but

withdrew that exemption in this article 78 proceeding because all law enforcement investigations had concluded. (*See* R. 224-225.)

B. Proceedings Below

Petitioner brought this article 78 proceeding in Albany County Supreme Court challenging DOCCS's FOIL determinations as to Blanchard, Bradley, Christian, and Martin. The petition sought disclosure of the videos and Bradley's unusual incident report that DOCCS had withheld, or, in the alternative, in camera review of these materials, as well as attorney's fees. (R. 118.) The petition also asked for declaratory relief. Specifically, petitioner sought a declaration that

- "[unusual incident] reports are not inter-agency or intra-agency materials";
- "[unusual incident] reports are not compiled for law enforcement purposes" or, in the alternative, "the release of the requested [unusual incident] report would not interfere with an ongoing law enforcement investigation";
- "prison surveillance videos are not compiled for law enforcement purposes" or, in the alternative, release of the requested videos would not interfere with a law enforcement investigation, identify a confidential source or disclose confidential information related to a criminal investigation, or reveal confidential criminal investigative techniques or procedures; and
- "the release of the requested videos would not endanger the life or safety of any person." (R. 118.)

DOCCS offered the Affidavit of Assistant Counsel and FOIL Appeals Officer Michelle Liberty in support of its answer to the petition. Liberty explained that DOCCS had finalized Bradley's unusual incident report after this proceeding commenced, and thereafter provided the report to petitioner. (R. 223.) Liberty further stated that petitioner had received the Auburn video from defense counsel in pending criminal proceedings. (R. 223.) Liberty explained that unlike the Clinton videos, the Auburn video "did not involve a large, multi-participant fight," nor was the incident racially motivated or gang related. (R. 226.)

As to the Clinton videos, Liberty explained that viewing videos at a disciplinary hearing is distinguishable from disclosing videos under FOIL. "At a disciplinary hearing," on the one hand, "the hearing officer is in a position to allow the viewing of video in a controlled setting outside the sight of the general population." (R. 227.) Thus, "[w]hile there is some risk of the charged individual identifying others for retribution . . . , the controlled hearing setting minimizes those risks." (R. 227.) FOIL disclosure, on the other hand, "is a mechanism for unfettered public access and use." (R. 227.) Disclosure would allow members of the public—

including rival gang members—to identify other participants in the June 2019 altercations as well as their specific actions. (R. 226.)

DOCCS also offered the affidavit of Theodore Zerniak, who formerly served as Deputy Superintendent of Security at Clinton. Zerniak explained why the disclosure of the Clinton videos could endanger the life or health of correction officers and incarcerated individuals. Zerniak stated that these videos portrayed violent, racially-motivated incidents between African-American and white incarcerated individuals in the yard at Clinton. (R. 349.) According to Zerniak, on June 10, there was a fight between an African-American and a white individual. (R. 347.) This fight led to a group of African-American individuals threatening to target white individuals as part of a "race war." (R. 347, 349.) On June 11, a large-scale racially-motivated fight broke out, involving between 45 and 60 incarcerated individuals. Correctional staff temporarily lost control of part of the facility due to the fight. (R. 348.) On June 14, another fight broke out between 22 African-American and white individuals—some of whom were armed with knives and wood logs. Multiple individuals were injured in these fights and required immediate medical attention. (R. 348.) Much of this information also appears in a June 15, 2019

internal DOCCS memorandum, which was attached as an exhibit to the Zerniak affidavit. (R. 353.) According to the memorandum, these events led to a facility-wide lockdown at Clinton. (R. 353.)

According to Zerniak, disclosure of the Clinton videos would allow others to identify the individuals who participated in these incidents and the correction officers who responded to them. (R. 349.) These third parties could then be subject to retaliation. Zerniak explained that the risk of retaliatory violence is even greater when gangs are involved, as they were in the June 2019 incidents. Gangs in prisons "use threats, force and extreme violence to attack or retaliate against those who are considered enemies." (R. 349.) Even individuals in protective custody are subject to attack. (R. 349.) The risk of retaliation also continues after release, as formerly incarcerated individuals "may be attacked or killed for the events that happened while they were confined." (R. 350.) Thus, disclosure of the requested videos "would make it easier for any individual to identify perceived enemies, including rival gang members, or staff, and plan retaliatory assaults." (R. 350.)

In a decision and order dated February 11, 2021, Supreme Court (O'Connor, A.J.) dismissed the petition in part. Specifically, the court

dismissed petitioner's claims regarding the Bradley and Christian FOIL requests as moot because DOCCS had disclosed Bradley's unusual incident report and petitioner had received the Auburn video through pending criminal proceedings. (R. 19.) The court also dismissed petitioner's declaratory claims because petitioner failed to file a summons and complaint. (R. 19-20.) The court further instructed DOCCS to submit the Clinton videos for in camera inspection. (R. 21.)

Subsequently, in a decision, order, and judgment dated June 8, 2021, the court dismissed the remainder of the petition. After reviewing the Clinton video footage in camera, the court agreed with DOCCS that disclosure of the same could endanger the life or safety of incarcerated individuals and correction officers who appear on video. (R. 51-52.) Thus, the court held that the videos were exempt from disclosure under Public Officers Law § 87(2)(f). (R. 51.) The court also denied petitioner's request for attorney's fees. (R. 52.)

Petitioner appealed both the February 2021 order and the June 2021 judgment. (R. 1, 41.)

ARGUMENT

POINT I

SUPREME COURT CORRECTLY DISMISSED THE PETITION AS MOOT IN PART

The petition is moot insofar as it challenges DOCCS's responses to the Bradley and Christian FOIL requests. DOCCS initially disclosed all responsive documents except for Bradley's unusual incident report and video footage of the May 11, 2019 incident at Auburn. (R. 136, 150.) DOCCS asserted the intra-agency exemption for the Bradley unusual incident report because it was not yet finalized. (R. 156.) And DOCCS asserted the law enforcement exemption for the Auburn video due to potential interference with ongoing law enforcement investigations, including by the District Attorney. (R. 146, 156.) DOCCS later disclosed the Bradley unusual incident report once it was finalized, and petitioner obtained the Auburn video through pending criminal proceedings. (*See* R. 223.) Thus, as Supreme Court correctly held (R. 19), petitioner's requests for those records are now moot. *See Matter of Associated Gen. Contractors of New York State, LLC v. New York State Thruway Auth.*, 173 A.D.3d 1526, 1527 (3d Dep't 2019). Petitioner does not contend otherwise.

And while petitioner urges the Court to address these FOIL requests notwithstanding their mootness (Br. 22-27), petitioner fails to show that the exception to the mootness doctrine applies here. A court may address an otherwise moot issue if it is likely to recur, is substantial and novel, and involves a phenomenon that typically evades review. *See Matter of Hearst Corp. v. Clyne*, 50 N.Y.2d 707, 714 (1980); *Matter of Associated Gen. Contractors of New York State*, 173 A.D.3d at 1527. Even if the issues presented herein are likely to recur, petitioner has failed to show that the other two requirements are met. First, as Supreme Court correctly held (R. 19), an agency's assertion of the intra-agency or law enforcement exemption is not an issue that typically evades review. Indeed, both exemptions are frequently litigated. *See, e.g.*, *Matter of McGee v. Bishop*, 192 A.D.3d 1446 (3d Dep't 2021) (intra-agency exemption); *Matter of Disability Rights New York v. New York State Comm'n of Corr.*, 194 A.D.3d 1230 (3d Dep't 2021) (law enforcement exemption).

And second, DOCCS's assertion of these exemptions here raises no "question of general interest and substantial public importance." *Matter of Save the Pine Bush v. City of Albany*, 141 A.D.2d 949, 951 (3d Dep't),

lv. denied, 73 N.Y.2d 701 (1988) (citation omitted). Rather, DOCCS applied well-settled law to the facts of this case. DOCCS withheld the non-finalized unusual incident report under the intra-agency exemption because it was a draft document that did "not include final policy or determinations." *Matter of McGee*, 192 A.D.3d at 1450; *see also Matter of Bass Pro, Inc. v. Megna*, 69 A.D.3d 1040, 1041-42 (3d Dep't 2010). And DOCCS withheld the Auburn video under the law enforcement exemption because requests "for information concerning a recent or ongoing investigation by a law enforcement agency"—including by the District Attorney here—"implicate the core concerns underlying the law enforcement" exemption. *Matter of Abdur-Rashid v. New York City Police Dep't*, 31 N.Y.3d 217, 235, *rearg. denied*, 31 N.Y.3d 1125 (2018); *see also Matter of Lesher v. Hynes*, 19 N.Y.3d 57, 67 (2012). Thus, the issues presented by the Bradley and Christian FOIL requests are neither substantial nor likely to evade review, and the Court should not review them under the exception to the mootness doctrine.

POINT II

SUPREME COURT CORRECTLY DISMISSED PETITIONER'S REMAINING CLAIMS FOR DISCLOSURE

Petitioner's only live claim for disclosure is for the June 10, 11, and 14, 2019 videos from Clinton.[1] These videos were viewed at Blanchard's and Martin's disciplinary hearings. (R. 162, 178.) DOCCS properly withheld these videos under Public Officers Law § 87(2)(f), which permits agencies to withhold materials if their disclosure "could endanger the life or safety of any person." To be entitled to this exemption, DOCCS need only demonstrate a possibility of endangerment to any person arising from disclosure. *See Matter of Williamson v. Fischer*, 116 A.D.3d 1169, 1170-71 (3d Dep't), *lv. denied*, 24 N.Y.3d 904 (2014); *Matter of Stronza v. Hoke*, 148 A.D.2d 900, 901 (3d Dep't 1989), *lv. denied*, 74 N.Y. 2d 611 (1989). DOCCS met that burden by showing that disclosure of the videos "would entail the possibility of danger to personal safety of inmates or correctional facility staff." *Matter of Buffalo Broad. Co. v. New York State Dep't of Corr. Servs.*, 155 A.D.2d 106, 112 (3d Dep't 1990).

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[1] We have provided copies of these videos to the Court under separate cover.

As explained in the Zerniak Affidavit, the June 2019 videos portray a series of large-scale, racially-motivated incidents in the yard at Clinton. (R. 349.) The June 10 video recorded a fight between an African-American individual and a white individual, followed by a group of African-American individuals threatening to target white individuals. (R. 347, 349.) The June 11 video recorded a fight between 45 and 60 African-American and white individuals, which led correctional staff to temporarily lose control of part of the facility. (R. 348.) And the June 14 video recorded a third fight between 22 African-American and white individuals in the yard. (R. 348.) These violent incidents involved race-based gangs, which regularly "use threats, force and extreme violence to attack or retaliate against those who are considered enemies"—both inside and outside prisons. (R. 349.) As Zerniak explained, incarcerated individuals involved in these incidents "were recruiting others based on skin color for their version of a 'race war.'" (R. 349.) Disclosure of the requested videos "would make it easier for" other gang members "to identify perceived enemies, including rival gang members, or staff, and plan retaliatory assaults." (R. 350.)

DOCCS properly withheld the Clinton videos under Public Officers Law § 87(2)(f) in light of this risk of retaliation. Indeed, courts consistently apply this endangerment exception where, as here, the disclosure of records would allow individuals to identify and retaliate against others. *See, e.g.*, *Matter of Hutchinson v. Annucci*, 189 A.D.3d 1850, 1854 (3d Dep't 2020); *Matter of Burns v. Cooke*, 189 A.D.3d 826 (2d Dep't 2020), *lv. denied*, 37 N.Y.3d 906 (2021); *Matter of Empire Ctr. for Public Policy v. New York City Police Pension Fund*, 188 A.D.3d 595, 595-96 (1st Dep't 2020), *lv. denied*, 37 N.Y.3d 906 (2021); *Matter of Rose v. Albany County Dist. Attorney's Off.*, 111 A.D.3d 1123, 1127 (3d Dep't 2013); *Matter of Hynes v. Fischer*, 101 A.D.3d 1188, 1190 (3d Dep't 2012); *Matter of Bellamy v. New York City Police Dep't*, 87 A.D.3d 874, 875 (1st Dep't 2011), *aff'd*, 20 N.Y.3d 1028 (2013).

In *Matter of Hynes*, for example, this Court found that disclosure of anonymous handwritten letters regarding petitioner's safety—which led to petitioner's placement in involuntary protective custody—"could foreseeably lead to attempts to identify the individuals who wrote them and to dangerous retaliatory action." 101 A.D.3d at 1190. The letters accordingly were held exempt from disclosure under § 87(2)(f). *Id.* Here,

likewise, rival gang members could use the requested videos to identify individuals who participated in and responded to the June 2019 altercations, and target them for retaliation.

Petitioner downplays DOCCS's concerns about retaliation as speculative. (Br. 18-19, 21-22.) But DOCCS "need not demonstrate the existence of a specific threat or intimidation"; rather, the mere "*possibility* of endangerment" is sufficient under Public Officers Law § 87(2)(f). *Matter of Luongo v. Records Access Officer, Civilian Complaint Review Bd.*, 150 A.D.3d 13, 25 (1st Dep't 2017), *lv. denied*, 30 N.Y.3d 908 (2017) (citation omitted and emphasis added). And as the Court of Appeals has noted, "'[r]etaliation is much more than a theoretical possibility'" in the "simmering and often dangerous prison environment." *Matter of Abdur-Raheem v. Mann*, 85 N.Y.2d 113, 121-22 (1995) (quoting *Wolff v. McDonnell*, 418 U.S. 539, 562 [1974]). This risk of retaliation is particularly significant when gangs are involved, as they were here. (R. 349.) Thus, the Zerniak Affidavit establishes that disclosure of the requested videos would endanger individuals who participated in, and correction officers who responded to, the race-based violence at Clinton in June 2019.

Petitioner's reliance on *Matter of Buffalo Broadcasting* is unavailing. The case does not stand for the proposition that video footage should be disclosed if it "depicts what the general population would have observed personally," as petitioner contends (Br. 15). Rather, the Court held that the endangerment exception would not apply "to matters depicted on the tapes which would have been readily observable by the inmates, *unless* there was additional support for" the exception. *Matter of Buffalo Broad. Co. Inc. v. New York State Dep't of Corr. Servs.*, 174 A.D.2d 212, 216 (3d Dep't), *lv. denied*, 79 N.Y.2d 759 (1992) (on appeal after remand) (emphasis added). DOCCS provided such support here, offering the Zerniak Affidavit to explain the risk of retaliation by rival gang members against individuals and correction officers portrayed on video. The video footage at issue *Matter of Buffalo Broadcasting*, by contrast, involved no large-scale, racially-motivated altercations. Rather, the requested videos mainly portrayed individuals residing in special housing units.[2] *Matter of Buffalo Broad.*, 155 A.D.2d at 110-12.

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[2] On appeal after remand, the Court upheld the withholding of certain videos—such as those showing "techniques for the storming of a cell and for the administration of tear gas"—disclosure of which created

(*continued on the next page*)

And while petitioner contends that the participants in the June 2019 altercations are already known—both to petitioner's clients and to others who were present (Br. 17-19)—nothing in the record supports that contention. Nor does the fact that the videos were viewed at Blanchard's and Martin's disciplinary hearings warrant disclosure. As explained in the Liberty Affidavit, at a disciplinary hearing videos may be viewed "in a controlled setting outside the sight of the general population." (R. 227.) And even assuming that Blanchard, Martin, and other participants in the June 2019 incidents know, to some extent, who else participated and which correction officers responded, there remains the risk that rival gang members could identify others who were involved. Gang members could also discern specific actions taken by participants, and then plan retaliatory assaults against participants and correction officers. (*See* R. 226.) DOCCS's showing was sufficient to demonstrate the possibility of endangerment.

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the "possibility of endangerment to prison security and the personal safety of correctional staff." *Matter of Buffalo Broad.*, 174 A.D.2d at 215.

Thus, DOCCS properly withheld the Clinton videos under the endangerment exception, and this Court should affirm Supreme Court's dismissal of the petition to the extent it seeks disclosure of those videos.

POINT III

SUPREME COURT CORRECTLY DISMISSED PETITIONER'S CLAIMS FOR DECLARATORY RELIEF

This Court also should affirm Supreme Court's dismissal of petitioner's claims for declaratory relief. Petitioner seeks a declaratory judgment that (a) unusual incident reports generally are not exempt inter- or intra-agency materials; (b) unusual incident reports generally, or Bradley's unusual incident report in particular, are not exempt under the law enforcement exemption; (c) prison surveillance videos generally, or the requested videos in particular, are not exempt under the law enforcement exemption; and (d) release of the requested videos would not endanger anyone's life or safety. (R. 118.) A declaratory judgment action must be commenced by the filing of a summons and complaint. C.P.L.R. 304(a). Petitioner failed to comply with this procedural requirement, instead filing only a notice of petition and petition. (*See* R. 106, 180.)

Supreme Court dismissed petitioner's claims for declaratory relief for that reason. (R. 19-20.)

Even if this Court were to convert petitioner's article 78 proceeding to a hybrid proceeding and declaratory judgment action, it should nonetheless affirm Supreme Court's dismissal of petitioner's declaratory claims. To the extent petitioner seeks a declaration regarding the applicability of the law enforcement exemption or endangerment exemption to the requested documents that remain at issue, the claims should be dismissed for the reasons set forth in Points I and II. And to the extent petitioner seeks a declaration covering types of records that have already been disclosed, this proceeding is moot with respect to those records and there is no longer a "justiciable controversy" regarding them. C.P.L.R. 3001; *see also Salvador v. Town of Queensbury*, 162 A.D.3d 1359, 1360 (3d Dep't 2018) (dismissing declaratory claims because plaintiff failed to allege "a real dispute between adverse parties, involving substantial legal interests for which a declaration of rights will have some practical effect" [citation omitted]).

Otherwise, this Court should decline petitioner's request for sweeping declaratory relief regarding broad categories of records such as

unusual incident reports and prison surveillance videos. That request simply duplicates petitioner's request to apply the mootness exception, and should be rejected for the reasons stated in Point I and amplified upon below.

Declaratory relief is not appropriate here. "[A] declaratory judgment is discretionary." *Matter of Karakash v. Del Valle*, 194 A.D.3d 54, 65 (1st Dep't 2021). It allows a court to declare "the rights and other legal relations of the parties to a justiciable controversy." C.P.L.R. 3001. But every FOIL determination is fact-specific. Indeed, when an agency withholds documents under one of the FOIL exceptions, it "must articulate a particularized and specific justification" for doing so. *Matter of Police Benevolent Ass'n of N.Y. State, Inc. v. State of New York*, 145 A.D.3d 1391, 1392 (3d Dep't 2016) (citation and internal quotation marks omitted). Thus, petitioner is not entitled to the broad declaratory judgment it seeks—namely, a declaration that unusual incident reports generally are not exempt inter- or intra-agency materials or exempt under the law enforcement exemption, and that prison surveillance videos generally are not exempt under the law enforcement exemption.

Those are not questions that should be answered in the abstract, in the absence of an actual dispute between the parties over specific records.

POINT IV

SUPREME COURT PROPERLY DENIED PETITIONER'S REQUEST FOR ATTORNEY'S FEES

Finally, petitioner is not entitled to attorney's fees as to the Bradley and Christian FOIL requests. In a FOIL case, attorney's fees and costs are appropriate if the petitioner (1) "substantially prevailed" and (2) showed that "the agency had no reasonable basis for denying access." Public Officers Law § 89(4)(c). These statutory prerequisites were not met here.

First, petitioner did not substantially prevail below. A petitioner substantially prevails "when it receives all the information that it requested and to which it is entitled in response to the underlying FOIL litigation." *Matter of Competitive Enterprise Inst. v. Att'y Gen. of New York*, 161 A.D.3d 1283, 1286 (3d Dep't 2018) (citation and internal quotation marks omitted). While petitioner has received Bradley's unusual incident report (*see* R. 223), petitioner did not substantially prevail as to that record because DOCCS disclosed it when the document

was finalized "and not just in response to the litigation." *Matter of Save Monroe Ave., Inc. v. New York State Dep't of Transp.*, 197 A.D.3d 808, 810 (3d Dep't 2021). Nor did petitioner substantially prevail when it obtained the May 2019 Auburn video. As explained in the Liberty Affidavit, petitioner obtained that video from defense counsel in a pending criminal proceeding (*see* R. 223)—not "in response to the underlying FOIL litigation." *Matter of Competitive Enterprise Inst.*, 161 A.D.3d at 1286. This Court and the Second Department have denied attorney's fees in similar circumstances. *See Matter of Save Monroe Ave.*, 197 A.D.3d at 810 (denying fees because "respondent acted in good faith by specifying a reasonable basis for the delay and promptly releasing the documents upon completing its review and not just in response to the litigation"); *Matter of McDevitt v. Suffolk County*, 183 A.D.3d 826, 828 (2d Dep't 2020) ("petitioner did not 'substantially prevail' because, although the records relating to his arrest were produced, they were produced in accordance with an unsealing order and not as a result of this C.P.L.R. article 78 proceeding or a voluntary change in position by the respondents").

Second, petitioner failed to establish that DOCCS lacked a reasonable basis for denying access to either Bradley's non-finalized

unusual incident report or the Auburn video. DOCCS's initial denial of access was not per se unreasonable merely because it later disclosed the records, as petitioner suggests (Br. 31). *See, e.g.*, *Matter of Maddux v. New York State Police*, 64 A.D.3d 1069 (3d Dep't) (affirming denial of fee award where, even though agency later released the requested records, initial denial of FOIL request was not "so unreasonable as to justify an award of counsel fees"), *lv. denied*, 13 N.Y.3d 712 (2009). Rather, the reasonableness of DOCCS's withholding must be evaluated as of the time petitioner made its FOIL requests. *See Matter of Associated Gen. Contractors*, 173 A.D.3d at 1528.

DOCCS reasonably withheld the unusual incident report under Public Officers Law § 87(2)(g) because it was a non-final intra-agency record. (R. 156.) As noted earlier, it is well-settled that the intra-agency exception applies to draft documents that do "not include final policy or determinations." *Matter of McGee*, 192 A.D.3d at 1450; *see also Matter of Bass Pro*, 69 A.D.3d at 1041-42. DOCCS thus reasonably withheld the Bradley unusual incident report until it was finalized.

DOCCS also reasonably withheld the Auburn video under Public Officers Law § 87(2)(e) because of the risk of interference with ongoing

law enforcement investigations. (R. 146, 156.) As DOCCS stated in its appeal determinations dated August 28 and September 18, 2019, the Auburn incident—which had occurred only four months earlier, in May 2019—was then under investigation both internally and by the District Attorney. (R. 146, 156.) DOCCS explained that "release of the video at [that] time would threaten to prematurely reveal law enforcement and the District Attorney's plans for the case [and] prematurely reveal the identity of witnesses and sources." (R. 156.) As noted earlier, requests "for information concerning a recent or ongoing investigation by a law enforcement agency implicate the core concerns underlying the law enforcement" exemption. *Matter of Abdur-Rashid*, 31 N.Y.3d at 235. Thus, DOCCS reasonably withheld the Auburn video under the law enforcement exemption, and petitioner failed to show otherwise.

Because petitioner neither substantially prevailed nor showed that DOCCS lacked a reasonable basis for withholding documents in response to the Bradley and Christian FOIL requests, the Court should affirm Supreme Court's denial of petitioner's request for attorney's fees.

CONCLUSION

This Court should affirm the judgment of Supreme Court.

Dated: Albany, New York
April 27, 2022

Respectfully submitted,

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PRINTING SPECIFICATIONS STATEMENT

Pursuant to the Uniform Practice Rules of the Appellate Division (22 N.Y.C.R.R.) § 1250.8(j), the foregoing brief was prepared on a computer (on a word processor). A proportionally spaced, serif typeface was used, as follows:

Typeface: Century Schoolbook
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, certificate of compliance, or any authorized addendum containing statutes, rules, regulations, etc., is **4,872**.