

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

PRISONERS' LEGAL SERVICES OF NEW YORK,

Petitioner,

**DECISION AND
ORDER/JUDGMENT**

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

Index No.: 909066-19
RJI No.: 01-20-ST0798

-against-

NEW YORK STATE DEPARTMENT OF
CORRECTIONS AND COMMUNITY SUPERVISION,

Respondent.

(Supreme Court, Albany County, Special Term)

(Justice Kimberly A. O'Connor, Presiding)

APPEARANCES: DEBEVOISE & PLIMPTON LLP
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O'CONNOR, J.:

Petitioner Prisoners' Legal Services ("PLS" or "petitioner") commenced this CPLR Article 78 proceeding challenging a denial of its requests under New York's Freedom of Information Law ("FOIL") for certain records relating to prison yard incidents at Auburn Correctional Facility

("Auburn CF") and Clinton Correctional Facility ("Clinton CF") involving four of its clients – Charles Blanchard ("Blanchard"), Phillip Bradley ("Bradley"), Antonion Christian ("Christian"), and Shaun Martin ("Martin"). By Decision and Order/Judgment, dated February 11, 2021, the Court denied those parts of the petition challenging the denial of PLS's June 6, 2019 FOIL request pertaining to Christian and its July 22, 2019 FOIL request pertaining to Bradley as moot, and the parts of the petition seeking declaratory relief as they were not properly before the Court. The Court directed respondent New York State Department of Corrections and Community Supervision ("DOCCS") to forward an unredacted copy of all video footage from the Clinton CF yard incidents responsive to PLS's July 23, 2019 FOIL request pertaining to Martin and its August 7, 2019 FOIL request pertaining to Blanchard, and reserved decision on those requests pending *in camera* review. In compliance with that directive, DOCCS has submitted four (4) DVDs containing the video footage from the June 10, 11, and 14, 2019 yard incidents at Clinton CF for the Court's inspection.

As stated in the Court's prior decision, FOIL implements the legislative declaration that 'government is the public's business' (Public Officers Law § 84), and imposes a broad standard of open disclosure upon agencies of government" (*Matter of M. Farbman & Sons v. New York City Health & Hosps. Corp.*, 62 N.Y.2d 75, 79 [1984]; see *Matter of Gould v. New York City Police Dep't*, 89 N.Y.2d 267, 274 [1996]; *Matter of Russo v. Nassau County Community Coll.*, 81 N.Y.2d 690, 697 [1993]; *Matter of Capital Newspapers Div. of Hearst Corp. v. Burns*, 67 N.Y.2d 562, 565 [1986]). Indeed, "[t]he statute proceeds under the premise that the public is vested with an inherent right to know and that official secrecy is anathematic to our form of government" (*Matter of M. Farbman & Sons v. New York City Health & Hosps. Corp.*, 62 N.Y.2d at 79 [internal quotation marks and citation omitted]; accord *Matter of Town of Waterford v. New York State*

Dep't of Env't'l Conservation, 18 N.Y.3d 652, 656-657 [2012]). In furtherance of the legislative objective, “[a]ll government records are thus presumptively open for public inspection and copying” under FOIL, “unless they fall within one of the enumerated exemptions of Public Officers Law § 87(2)” (*Matter of Gould v. New York City Police Dep't*, 89 N.Y.2d at 274-275; see *Matter of Fappiano v. New York City Police Dep't*, 95 N.Y.2d 738, 746 [2001]; *Matter of Hearst Corp. v. New York State Police*, 109 A.D.3d 32, 34 [3d Dep't 2014]).

To ensure that the public has maximum access to government records, the exemptions set forth in Public Officers Law § 87(2) are to be narrowly construed, and the burden rests on the government agency to show that the requested information is exempt from disclosure (see *Matter of Data Tree, LLC v. Romaine*, 9 N.Y.3d 454, 462-463 [2007]; *Matter of Gould v. New York City Police Dep't*, *supra* at 275; *Matter of Capital Newspapers Div. of Hearst Corp. v. Burns*, *supra* at 566; *Matter of M. Farbman & Sons v. New York City Health & Hosps. Corp.*, *supra* at 80; *Matter of Aurigemma v. New York State Dep't of Tax & Finance*, 128 A.D.3d 1235, 1237 [3d Dep't 2015]). To invoke one of the statutory exemptions, “the agency must articulate ‘particularized and specific justification’ for not disclosing [the] requested documents” (*Matter of Gould v. New York City Police Dep't*, *supra* at 275, quoting *Matter of Fink v. Lefkowitz*, 47 N.Y. 2d at 571; see *Matter of Capital Newspapers Div. of Hearst Corp. v. Burns*, 67 N.Y.2d at 566; *Matter of Police Benevolent Ass'n of New York State, Inc. v. State of New York*, 145 A.D.3d 1391, 1392 [3d Dep't 2016]). “Only where the material requested falls squarely within the ambit of one of [the] statutory exemptions may disclosure be withheld” (*Matter of Fink v. Lefkowitz*, *supra* at 571; see *Matter of Town of Waterford v. New York State Dep't of Env't'l Conservation*, 18 N.Y.3d 652, 657 [2012]; *Matter of MacKenzie v. Seiden*, 106 A.D.3d 1140, 1141 [3d Dep't 2013]).

As relevant here, Public Officer's Law § 87(2)(f) permits "an agency [to] deny access to records or portions thereof that . . . if disclosed could endanger the life or safety of any person." In this regard, an agency is not "required to prove that a danger to a person's life or safety will occur if the information is made public" (*Matter of Stronza v. Hoke*, 148 A.D.2d 900, 901 [3d Dep't 1989]). The agency "'need only demonstrate a possibility of endangerment in order to invoke this exemption'" (*Matter of Kairis v. Fischer*, 138 A.D.3d 1360, 1361 [3d Dep't 2016], quoting *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]; see *Matter of Johnson v. Annucci*, 138 A.D.3d 1361, 1362 [3d Dep't 2016]; see *Matter of Williamson v. Fischer*, 116 A.D.3d 1169, 1170-1171 [3d Dep't 2014]).

In opposition to the petition, DOCCS proffered the affidavit of Theodore Zerniak ("Zerniak"), who is employed by DOCCS and has served as a Deputy Superintendent of Security at Clinton CF. Zerniak avers that release of the requested video footage "could jeopardize the safety and security of facilities, personnel, inmates, and staff" (Zerniak Aff., ¶ 3). According to Zerniak, investigations, which included multiple interviews, video surveillance, and eyewitness accounts of the events, revealed that the yard incidents of June 10, 11, and 14, 2019 were violent, race-based incidents involving rival inmate groups that started with a fight between two inmates, was followed by an encounter between those rival groups, and escalated into two major physical altercations where several inmates were injured and required medical attention (*see id.*, ¶¶ 5-8, Ex. A). Zerniak explains, among other things, that violent individuals and gangs in prison use threat, force and extreme violence to attack and retaliate against those who are considered enemies, and that any inmate who is an enemy or is mistakenly thought to be an enemy is at risk (*see id.*, ¶¶ 11-12). Zerniak that public disclosure of the requested videos would make it easier for an individual or a group to identify perceived enemies or staff, and plan retaliatory assaults (*see id.*, ¶¶ 11, 13).

The Court has viewed the video footage of the yard incidents at Clinton CF on June 10, 11, and 14, 2019. The footage shows one encounter and two physical altercations between African-American and Caucasian inmates in the Clinton CF yard, including a small fight that erupted into a major physical altercation involving more than 50 inmates fighting, in which DOCCS staff temporarily lost control of the area. The footage discloses the identities of the inmates in the yard incidents as well as the responding corrections officers. Given the facts and circumstances surrounding these incidents as described by Zerniak and shown in the video footage, the Court is “satisfied that the Department of Corrections and Community Supervision has met its burden of demonstrating that disclosure of the requested material could potentially endanger the safety of a person or persons” (*Matter of Kairis v. Fischer*, 138 A.D.3d at 1361; see *Matter of Lonski v. Kelly*, 149 A.D.2d 977, 978 [4th Dep’t 1989]). As such, the video footage was properly withheld, and the remainder of the petition challenging the denial of PLS’s July 23, 2019 FOIL request pertaining to Martin and its August 7, 2019 FOIL request pertaining to Blanchard is denied.

The Court also denies that part of the petition seeking an award of attorney’s fees since petitioner “has not ‘substantially prevailed’” (*Matter of Empire Ctr. for Public Policy v. New York City Off. of Payroll Admin.*, 187 A.D.3d 435, 436 [1st Dep’t 2020], quoting Public Officers Law § 89[4][c][ii]).

As a final note, the four (4) DVDs containing the June 10, 11, and 14, 2019 video footage submitted for *in camera* review are being sealed by separate order of the Court.

Accordingly, it hereby

ORDERED AND ADJUDGED, that the remainder of the petition challenging the denial of PLS’s July 23, 2019 FOIL request pertaining to Martin and its August 7, 2019 FOIL request

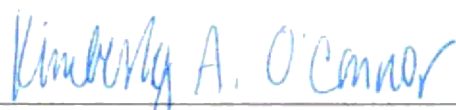
pertaining to Blanchard, and seeking an award of attorney's fees is denied for the reasons stated herein.

This memorandum constitutes the Decision and Order/Judgment of the Court. The original Decision and Order/Judgment is being uploaded to the NYSCEF system for filing and entry by the Albany County Clerk. The signing of this Decision and Order/Judgment and uploading to the NYSCEF system shall not constitute filing, entry, service, or notice of entry under CPLR 2220 and § 202.5-b(h)(2) of the Uniform Rules for the New York State Trial Courts. Counsel is not relieved from the applicable provisions of those rules with respect to filing, entry, service, and notice of entry of the original Decision and Order/Judgment.

SO ORDERED AND ADJUDGED.

ENTER.

Dated: June 8, 2021
Albany, New York



HON. KIMBERLY A. O'CONNOR
Acting Supreme Court Justice



Papers Considered:

06/08/2021

1. Notice of Petition, dated December 23, 2019; Verified Petition, dated December 23, 2019; Affirmation of Joshua J. Smith, Esq., dated December 23, 2019, with Exhibits A-R annexed; Memorandum of Law Supporting Article 78 Petition by Prisoners' Legal Services of New York, dated December 23, 2019;
2. Verified Answer, dated July 3, 2020; Affidavit of Michelle Liberty, Esq., sworn to July 3, 2020, with Exhibit 1 annexed; Affidavit of Theodore Zerniak, sworn to June 30, 2020, with Exhibit A annexed; Memorandum of Law in Opposition to Verified Petition, dated July 3, 2020, with Exhibit A annexed;
3. Reply Declaration of Alissa Hull, Esq., dated July 24, 2020, with Exhibit A annexed; Reply Memorandum of Law in Further Support of Article 78 Petition by Prisoners' Legal Services of New York, dated July 24, 2020; *and*
4. Four (4) DVDs, dated June 10, 2019 (North Yard), June 11, 2019 (UI 19-0234), June 14, 2019 (UI 19-0237), and June 14, 2019 (UI19-0237) for *in camera* review.