

STATE OF NEW YORK
COURT OF APPEALS

In the Matter of PRISONERS'
LEGAL SERVICES OF NEW
YORK,

Petitioner-Appellant,

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

v.

NEW YORK STATE DEPARTMENT
OF CORRECTIONS AND
COMMUNITY SUPERVISION,

Respondent-Appellee.

Albany County
Clerk Index No:
909066-19

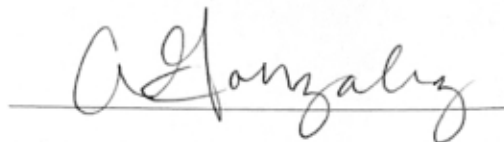
AD No. 533722

**NOTICE OF MOTION FOR
LEAVE TO APPEAL TO
THE COURT OF APPEALS**

PLEASE TAKE NOTICE that, upon the annexed Memorandum in Support of Motion for Leave to Appeal pursuant to Rules 500.21 and 500.22 of the Court of Appeals Rules of Practice, Petitioner-Appellant Prisoners' Legal Services of New York ("PLS") will move this Court, at the Courthouse in Albany, New York, on December 19, 2022, at 10:00 a.m., for an order granting leave to appeal to this Court from the Memorandum and Order of the Appellate Division, Third Judicial Department, decided and entered on October 27, 2022 (the "Memorandum and Order"), pursuant to C.P.L.R. § 5602(a)(1)(i).

Dated: December 5, 2022
Albany, New York

Respectfully submitted,



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**MEMORANDUM OF LAW IN SUPPORT OF PETITIONER-
APPELLANT'S MOTION FOR LEAVE TO APPEAL**

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TABLE OF CONTENTS

PRELIMINARY STATEMENT	1
BACKGROUND	3
A. PLS' FOIL Requests.....	3
1. Christian FOIL Request	4
2. Bradley FOIL Request	5
3. Martin FOIL Request	6
4. Blanchard FOIL Request.....	6
B. Procedural History	7
TIMELINESS OF THE MOTION FOR LEAVE TO APPEAL.....	10
JURISDICTIONAL STATEMENT	10
QUESTIONS PRESENTED FOR REVIEW	11
ARGUMENT	11
A. Whether Prison Surveillance Video Can Be Exempt from Disclosure under FOIL's Law Enforcement Exemption Is an Issue That Is Likely to Evade Review	11
B. The Issue of Whether Unusual Incident Reports Can Be Exempt From Disclosure Under FOIL's Inter/Intra-Agency Exemption Is Likely to Evade Review	15
CONCLUSION.....	18

TABLE OF AUTHORITIES

Cases

<i>Bezio v. Dorsey</i> , 21 N.Y.3d 93 (2013).....	13
<i>City of New York v. Maul</i> , 14 N.Y.3d 499 (2010)	1
<i>Gonzalez v. Annucci</i> , 32 N.Y.3d 461 (2018)	13
<i>In re Gould v. New York City Police Dep’t</i> , 89 N.Y.2d 267 (1996).....	16
<i>In re Madeiros v. New York State Educ. Dept.</i> , 30 N.Y.3d 67 (2017)	12
<i>In re New York Civ. Liberties Union v. City of Schenectady</i> , 2 N.Y.3d 657 (2004).....	16
<i>Matter of Hearst Corp. v. Clyne</i> , 50 N.Y.2d 707 (1980).....	2
<i>Hearst Corp. v. City of Albany</i> , 931 N.Y.S.2d 713 (N.Y. App. Div. 2011)	14, 17
<i>In re Associated General Contractors of New York State, LLC v. New York State Thruway Authority</i> , 105 N.Y.S.3d 573 (N.Y. App. Div. 2019)	15
<i>In re Disability Rights New York v. New York State Commission of Correction</i> , 149 N.Y.S.3d 290 (N.Y. App. Div. 2021)	11, 12
<i>In re Gannett Co. v. James</i> , 447 N.Y.S.2d 781 (N.Y. App. Div. 1982).....	16, 17
<i>In re Laborers’ Int’l Union of N. Am., Loc. Union No. 17 v. New York State Dep’t of Transp.</i> , 719 N.Y.S.2d 354 (N.Y. App. Div. 2001)	13, 14, 17
<i>In re McGee v. Putnam County Assistant District Attorney David M. Bishop</i> , 145 N.Y.S.3d 627 (N.Y. App. Div. 2021).....	15, 16, 17
<i>Prisoners’ Legal Servs. of New York v. New York State Dep’t of Corr. & Cmty. Supervision</i> , 209 A.D.3d 1208 (N.Y. App. Div. 2022).....	11
<i>Schermerhorn v. Becker</i> , 883 N.Y.S.2d 325 (N.Y. App. Div. 2009)	2
<i>Newsday LLC v. Town of Oyster Bay</i> , No. 001484/16, 2016 WL 94441610 (N.Y. Sup. Ct. July 8, 2016)	13

Statutes

Correct. Law § 47(1)(a)12

Correct. Law § 89-f.....16

Correct. Law § 139.....16

Correct. Law § 500-b16

Pub. Off. Law § 87(2)(e).....1, 4, 5, 7, 12, 13

Pub. Off. Law § 87(2)(e)(i).....6

Pub. Off. Law § 87(2)(e)(iv).....6

Pub. Off. Law. § 87(2)(f)6, 7, 9

Pub. Off. Law § 87(2)(g)1, 5, 15

Pub. Off. Law § 87(2)(g)(i).....16, 17

C.P.L.R. Art. 787

C.P.L.R. 5513(b)10

C.P.L.R. 5602(a)(1)(i).....1, 10

C.P.L.R. 561110

Pursuant to Civil Practice Law and Rules (C.P.L.R.) 5602(a)(1)(i),
Petitioner-Appellant Prisoners' Legal Services of New York ("PLS") respectfully
submits this memorandum of law in support of its motion for leave to appeal the
Memorandum and Order of the Supreme Court Appellate Division, Third
Department, dated and entered October 27, 2022, attached hereto as Exhibit A.

PRELIMINARY STATEMENT

Leave to appeal should be granted because the Appellate Division, Third
Department's decision raises issues that are novel and of public importance, to wit
whether video of prison can be withheld under New York Freedom of Information
Law's ("FOIL") law enforcement exemption, Pub. Off. Law § 87(2)(e), and
whether factual records like unusual incident reports can be withheld under FOIL's
inter/intra-agency exemption, Pub. Off. Law § 87(2)(g), both of which relate to
FOIL's primary purpose of transparency.

The Third Department erred in determining that the issues raised by
DOCCS' withholding of the video footage from the incident at the Auburn
Correctional Facility made in the Christian and Bradley FOIL requests and
Bradley's related UI report did not fall into the exception of the mootness doctrine
after having been produced by DOCCS after the start of litigation. These issues are
"substantial or novel, likely to recur and capable of evading review" and therefore
should not be considered moot. *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)); *see also Schermerhorn v. Becker*, 883 N.Y.S.2d 325, 327 (N.Y. App. Div. 2009).

The Supreme Court agreed that these issues are likely to recur; in fact, PLS sees these issues regularly in the course of its work. The public's right and need to access objective factual information concerning public officials' actions in the otherwise opaque prison environment, and to facilitate meaningful public oversight of a setting that's rife with potential for abuse is undeniably of substantial importance. However, the Third Department's holding that these issues are not likely to evade review does not conform to the facts: DOCCS is now in a position to repeatedly and without fail moot issues it does not want litigated by producing documents after PLS and other petitioners have expended resources to initiate legal proceedings. Indeed, this already appears to be DOCCS' practice.

The scope of FOIL's law enforcement and inter/intra-agency exemptions, like all exemptions under FOIL, were intended to be limited so as to uphold FOIL's central purpose of transparency to the public, including what happens behind prison walls. The Third Department's decision now shields DOCCS' wrongful claims of exemptions under FOIL from review. If left unchanged, the Third Department's decision would abrogate the public's right of access to law enforcement records and diminish FOIL's purposes of transparency and accountability.

BACKGROUND

For over forty years, PLS has provided nonprofit legal services to indigent, incarcerated individuals, including in administrative disciplinary proceedings before DOCCS and in investigations of alleged legal rights violations. In order to fully represent its clients, PLS requires access to primary factual evidence such as the surveillance video of incidents and unusual incident (“UI”) reports prepared by DOCCS employees that DOCCS relies on in administrative disciplinary hearings. FOIL enables PLS to obtain these documents from DOCCS for use in administrative appeals of discipline against PLS’ clients.

A. PLS’ FOIL Requests

Following three incidents at Auburn and Clinton Correctional Facilities involving four of PLS’ clients, PLS sought administrative records, including UI reports and surveillance video of the incidents for use in representing those clients’ appeals of disciplinary actions. Specifically, PLS sought the release of: (1) the administrative record of the May 24, 2019 disciplinary hearing for Antonion Christian relating to the incident at the Auburn Correctional Facility that occurred on May 11, 2019 (the “Christian FOIL request”); (2) the administrative record of the June 25, 2019 disciplinary hearing for Phillip Bradley relating to the same incident (the “Bradley FOIL request”); (3) the administrative record of the June 14, 2019 disciplinary hearing for Shaun Martin relating to an incident at the Clinton

Correctional Facility that occurred on June 14, 2019 (the “Martin FOIL request”); and (4) the administrative record of the July 12, 2019 disciplinary hearing for Charles Blanchard relating to an incident at the Clinton Correctional Facility that occurred on June 11, 2019 (the “Blanchard FOIL request”). R. at 130 (Smith Aff. Ex. B); 133 (Smith Aff. Ex. C); 160 (Smith Aff. Ex. K); and 169 (Smith Aff. Ex. O).

1. Christian FOIL Request

On June 27, 2019, DOCCS produced records in response to the Christian FOIL request but withheld the UI report and the surveillance video shown during Christian’s disciplinary hearing. R. at 140-41 (Smith Aff. Ex. E). PLS contacted DOCCS about the withheld records and, on June 28, 2019, a DOCCS officer claimed “there was no video.” R. at 140 (Smith Aff. Ex. E). A month later, DOCCS claimed the incident involving Christian was still under active investigation and the video would continue to be withheld pursuant to Pub. Off. Law § 87(2)(e) under which an “agency may deny access to records or portions thereof that . . . (e) are compiled for law enforcement purposes.” R. at 143-44 (Smith Aff. Ex. F). PLS appealed the decision to withhold the surveillance video (but not the UI report) and DOCCS denied the appeal again citing Pub. Off. Law § 87(2)(e). R. at 135 (Smith Aff. Ex. D); and 145 (Smith Aff. Ex. G). DOCCS did not reference to any specific subsection of Pub. Off. Law § 87(2)(e), but stated that

“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.” R. at 146 (Smith Aff. Ex. G).

2. Bradley FOIL Request

On July 22, 2019, PLS submitted the Bradley FOIL request and DOCCS answered that “many” of the requested documents regarding the May 11 incident were being withheld. R. at 133 (Smith Aff. Ex. C); and 153 (Smith Aff. Ex. I). DOCCS later denied all of the materials from the Bradley FOIL request. *See* R. at 148 (Smith Aff. Ex. H). PLS filed an appeal, noting that DOCCS’ denial “did not...cite to the statutory exemption relied upon for the denial.” R. at 149 (Smith Aff. Ex. H). Similar to its denial of the Christian FOIL request, DOCCS claimed the surveillance video was exempt under Pub. Off. Law § 87(2)(e), without reference to any specific subsection. R. at 155 (Smith Aff. Ex. J). DOCCS further claimed Bradley’s UI report was a “preliminary report” exempt under Pub. Off. Law § 87(2)(g) and that its release “could interfere with ongoing law enforcement investigations,” making it exempt under Pub. Off. Law § 87(2)(e). R. at 156 (Smith Aff. Ex. J).

3. Martin FOIL Request

On July 23, 2019, PLS submitted the Martin FOIL request. R. at 160 (Smith Aff. Ex. K). Initially, DOCCS denied PLS' request for surveillance video, citing "safety and security reasons due to the ongoing investigation." R. at 165 (Smith Aff. Ex. M). DOCCS did provide the UI reports and other documents related to the incident. R. at 164 (Smith Aff. Ex. M). PLS contacted DOCCS' counsel regarding the video and, treating the communication as an appeal, denied it. R. at 161 (Smith Aff. Ex. L); and 166 (Smith Aff. Ex. N).

DOCCS' denial of the surveillance video requested as part of the Martin FOIL request cited Pub. Off. Law § 87(2)(e)(i) and (iv), explaining "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 cited the public safety exemption in Pub. Off. Law. § 87(2)(f), claiming 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." R. at 162 (Smith Aff. Ex. L).

4. Blanchard FOIL Request

On August 7, 2019, PLS submitted the Blanchard FOIL request. R. at 169 (Smith Aff. Ex. O). Mr. Blanchard's initial FOIL request for surveillance video 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. R. at 173 (Smith Aff. Ex. P)

PLS contacted DOCCS' counsel regarding the denial and, treating the communication as an appeal, denied it, citing Pub. Off. 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." R. at 174 (Smith Aff. Ex. Q); R. at 177-78 (Smith Aff. Ex. R).

B. Procedural History

On December 23, 2019, PLS filed a Notice and Verified Petition pursuant to Article 78 of the New York Civil Practice Law and Rules seeking declaratory relief and the release of the materials withheld by DOCCS. R. at 106. In response to PLS' petition, DOCCS responded by fulfilling several of the previously denied FOIL requests, including the Bradley UI Report and the Auburn Correctional Facility surveillance videos from the Christian and Bradley FOIL requests. R. at 386-87 (Hull Reply Decl.). On July 3, 2020, DOCCS filed a Verified Answer and Memorandum of Law in Opposition to PLS's Verified Petition and argued that the claims related to the requested materials that it produced had been mooted. R. at 358-59 (Resp't's Opp'n Mem. 2-3).

On July 24, 2020, PLS filed a reply brief arguing that DOCCS had not demonstrated a legitimate safety risk that warranted withholding the surveillance videos from the incidents at the Clinton Correctional Facility and that the inter-agency and law enforcement exemption issues fell within the exception to the mootness doctrine despite DOCCS' production of the Bradley UI Report and Auburn Correctional Facility surveillance videos. R. at 383 (Pet'r's Reply Mem. 6).

On 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 Correctional Facility surveillance videos. R. at 401 (Feb. 11, 2021 Order, at 12 (citation omitted)) The Supreme Court further held that, PLS' claims for declaratory relief were not properly before the Court because PLS did not serve a separate summons. R. at 403. Lastly, the Supreme Court ruled it could not determine whether the withheld surveillance videos were rightly withheld under the safety exemption and ordered an *in camera* review of the surveillance videos. R. 403.

Following *in camera* review, and citing the affidavit of Theodore Zerniak, Deputy Superintendent of Security at the Clinton Correctional Facility, the Supreme Court ruled that the surveillance video was rightly withheld under the

safety exemption because the surveillance video disclosed the depicted individuals' identities, presenting safety risks. R. at 411 (June 8, 2021 Order, at 5). The Supreme Court also denied PLS' request for attorney's fees and costs. R. at 411.

On July 27, 2021, PLS filed a Notice of Appeal from the Supreme Court's February 11, 2021 Order denying PLS' request for declaratory relief and holding moot the issues related to the Bradley UI Report and Auburn Correctional Facility surveillance videos. R. at 1. On August 2, 2021, PLS filed a second Notice of Appeal from the Supreme Court's June 8, 2021 Order denying PLS' petition and holding that DOCCS' records were exempt under Pub. Off. Law § 87(2)(f). R. 41. On January 24, 2022, PLS filed its brief supporting its appeal, arguing among other things that the Supreme Court erred in holding that DOCCS' disclosure of the Bradley UI report and Auburn Correctional Facility video mooted related claims.

On April 27, 2022, DOCCS filed its brief arguing in part that DOCCS' assertion of the law enforcement and inter/intra-agency exemptions "raises no question of general interest and substantial public importance," and that the issues were not likely to evade review. PLS submitted a reply brief on May 10, 2022 arguing that DOCCS can and does moot proceedings by producing documents after petitioners commence litigation and before DOCCS' claimed exemptions can be heard on the merits.

On October 27, 2022, the Appellate Division, Third Department issued its Memorandum and Order holding that, among other things, DOCCS' disclosure of the Bradley UI report and the Auburn Correctional Facility video rendered issues related to those requests moot and that PLS did not establish that the issues evaded review as exceptions to the mootness doctrine. Ex. A.

Now, PLS files this Notice of Motion for Leave to Appeal and memorandum of law in support thereof.

TIMELINESS OF THE MOTION FOR LEAVE TO APPEAL

Notice of Entry of the Appellate Division, Third Department's Memorandum and Order was served on November 4, 2022 by email. Ex. B. This motion for leave to appeal is timely made within 30 days of that service. *See* C.P.L.R. 5513(b).

JURISDICTIONAL STATEMENT

This Court has jurisdiction over this motion for leave to appeal and the proposed appeal because the Appellate Division, Third Department's Memorandum and Order constitutes a final order within the meaning of C.P.L.R. 5602(a)(1)(i) and 5611.

QUESTIONS PRESENTED FOR REVIEW

1. Does the issue of whether prison surveillance video can be exempt from disclosure under FOIL’s law enforcement exemption evade review as an exception to the mootness doctrine?

2. Does the issue of whether unusual incident reports can be exempt from disclosure under FOIL’s inter/intra-agency exemption evade review as an exception to the mootness doctrine?

These questions were preserved for review by this court. R. at 5, 19, 36, 74, 88, 196, 384, 401, 426, 442 & 456.

ARGUMENT

A. Whether Prison Surveillance Video Can Be Exempt from Disclosure under FOIL’s Law Enforcement Exemption Is an Issue That Is Likely to Evade Review

The Third Department held that PLS failed to establish that the law enforcement issue concerning withheld video footage is one that would typically evade review, claiming the issue is one it “frequently examine[s].” *Prisoners’ Legal Servs. of New York v. New York State Dep’t of Corr. & Cmty. Supervision*, 209 A.D.3d 1208, 1211 (N.Y. App. Div. 2022). However, the Third Department cited a single case in reaching this conclusion – the same case cited by DOCCS in its briefing. That case, *In re Disability Rights New York v. New York State*

Commission of Correction, 149 N.Y.S.3d 290 (N.Y. App. Div. 2021), is inapposite to the facts here.

Disability Rights N.Y. involved a FOIL request to the New York State Commission of Correction for “Facility Medical Director Report of Inmate Death” forms, also known as M-187 forms, for certain jails and correctional facilities that was denied based on claimed exemptions under Pub. Off. Law § 87(2)(e) because M-187 forms pertained to ongoing investigations. *In re Disability Rts. New York v. New York State Comm’n of Corr.*, 149 N.Y.S.3d 290 (N.Y. App. Div. 2021). In reaching this decision, the court in *Disability Rights* based its ruling on the statutory and regulatory functions of the Commission of Corrections. *Id.* The court specifically cited N.Y. Correct. Law § 47(1)(a), which expressly granted the Commission the power and duty to “[i]nvestigate and review the cause and circumstances surrounding the death of any incarcerated individual of a correctional facility.”

Here, the requested material involves prison surveillance video, which, unlike the M-187 forms in *Disability Rights*, is used for observation and recording purposes and not for the sole purpose of fulfilling an express duty under state law. PLS is not aware of any court that has decided whether prison surveillance video does not qualify for the law enforcement exemption because they are not prepared

for law enforcement purposes but rather for other purposes, such as generating a visual record of everyday operations in correctional facilities.

Furthermore, as this Court has recognized, “the phrase ‘law enforcement purposes’ is not defined in the FOIL statutes.” *In re Madeiros v. New York State Educ. Dept.*, 30 N.Y.3d 67, 75 (2017) (limiting disclosure to audits “specifically targeted at ferreting out improper and potentially illegal or fraudulent reporting” and did not include “routine fiscal audits”). The question of the precise definition of “compiled for” under Pub. Off. Law § 87(2)(e) does not appear to have reached the appellate courts.¹

This Court has held that issues are likely to evade review when they occur during a limited period of time or when there are other exigencies. *See Gonzalez v. Annucci*, 32 N.Y.3d 461, 471 (2018) (issue involving placement at residential treatment facility where such placement was for a “transitory duration”); *Bezio v. Dorsey*, 21 N.Y.3d 93, 100 (2013) (“the case falls within the exception to the

¹ Some courts have held that “compiled for” is limited to the original purpose of collecting records and does not include later uses. In *Newsday LLC v. Town of Oyster Bay*, No. 001484/16, 2016 WL 94441610 (N.Y. Sup. Ct. July 8, 2016), the court rejected an argument that the phrase “compiled for” under Pub. Off. Law § 87(2)(e) meant anything other than the original purpose for which a record was created. The court held that the “made-in-the-ordinary-course” contracts and disclosure forms at issue were not exempt from disclosure regardless of whether they “may be used as evidence in a criminal proceeding,” acknowledging that this was the purpose of the FOIL statute. “[An] argument to the contrary reveals a misunderstanding (or perhaps contempt) of the purpose of the FOIL statutes.” *Id.* at *9.

mootness rule since it is novel, likely to recur and, given the exigencies involved . . . would typically evade review”). The issues here present exigent circumstances. DOCCS’s absolute control over the video footage and its ability to change the basis for its decision to withhold records empowers it to “invariably render a proceeding moot” as it pleases. *In re Laborers’ Int’l Union of N. Am., Loc. Union No. 17 v. New York State Dep’t of Transp.*, 719 N.Y.S.2d 354 (N.Y. App. Div. 2001). Indeed, that is what DOCCS did here. DOCCS evaded review of its claimed law enforcement exemption over the video footage by providing the requested materials after PLS initiated legislation.

If left unreviewed, DOCCS can continue to only provide materials when it is convenient to do so instead of carrying out its obligations under New York law or justify its claimed exemptions in court. Lower courts have recognized that such control can make issues capable of evading review. *See Laborers’ Int’l Union of N. Am., Loc. Union No. 17 v. N.Y. State Dep’t of Transp.*, 719 N.Y.S.2d 354 (N.Y. App. Div. 2001) (“[R]espondent’s substantial control over the timing of the contract, the approvals and the ultimate production of the demanded material places it in a position to almost invariably render a proceeding moot”); *Hearst Corp. v. City of Albany*, 931 N.Y.S.2d 713 (N.Y. App. Div. 2011) (in case where respondent produced records following commencement of litigation “while nevertheless maintaining that its initial denial of the FOIL request was legally

permissible,” the court determined that “respondent’s strategy in releasing the documents...amply justifies the inference that respondent will strive to ensure that those issues evade review in the future” and case falls within exception to the mootness doctrine).

B. The Issue of Whether Unusual Incident Reports Can Be Exempt From Disclosure Under FOIL’s Inter/Intra-Agency Exemption Is Likely to Evade Review

Similar to the law enforcement issue, the inter/intra-agency exemption issue as it pertains to UI reports is also likely to evade review. In its decision, the Third Department cited two cases: *In re Associated General Contractors of New York State, LLC v. New York State Thruway Authority*, 105 N.Y.S.3d 573 (N.Y. App. Div. 2019) and *In re McGee v. Putnam County Assistant District Attorney David M. Bishop*, 145 N.Y.S.3d 627 (N.Y. App. Div. 2021). Neither case addresses the issue of whether factual records like UI reports are exempt under FOIL’s inter/intra-agency exemption, Pub. Off. Law § 87(2)(g).

General Contractors involved a request from a trade association for “a due diligence study prepared to assist [New York State Thruway Authority] in deciding whether to require the use of a project labor agreement ... in a design-build project.” *Associated Gen. Contractors of New York State, LLC v. New York State Thruway Auth.*, 105 N.Y.S.3d 573, 574–75 (N.Y. App. Div. 2019). However, the court in *General Contractors* never decided this issue on the merits because, as

here, the respondent produced the records after litigation commenced. *Associated Gen. Contractors of New York State, LLC v. New York State Thruway Auth.*, 105 N.Y.S.3d 573, 575 (N.Y. App. Div. 2019). Even if the court had decided the issue on the merits, the records at issue in that case are far different from the UI reports at issue here. UI reports are factual records and should have been disclosed under Pub. Off. Law § 87(2)(g)(i). The factual nature of these documents is evidenced by the fact that references to unusual incidents in statutory laws are limited to the context of regular record-keeping. *See, e.g.*, N.Y. Correct. Law § 139 (McKinney) (nature and type of unusual incidents to be included in commissioner’s semi-annual report to senate and assembly committees by facility); N.Y. Correct. Law § 500-b (McKinney) (unusual incidents to be included in chief administrative officer’s quarterly report on housing of incarcerated individuals to the commission); N.Y. Correct. Law § 89-f (McKinney) (analysis of frequency and severity of unusual incidents at alternative correctional facilities to be included in annual commission report).

Additionally, this Court has noted that the issue of whether use-of-force forms, which are similar to UI reports, qualify as intra-agency materials has not been decided. *In re New York Civ. Liberties Union v. City of Schenectady*, 2 N.Y.3d 657, 661 (2004) (noting conflict between *In re Gannett Co. v. James*, 447

N.Y.S.2d 781 (N.Y. App. Div. 1982), *lv. denied*, 435 N.E.2d 1099 (N.Y. 1982), and *In re Gould v. New York City Police Dep't*, 89 N.Y.2d 267 (N.Y. 1996)).

McGee, which was also cited by DOCCS, involved two emails and a draft response generated by a district attorney's office during its review of documents given to it by the petitioner in that case who made allegations of criminal behavior. *McGee v. Bishop*, 145 N.Y.S.3d 627, 629 (N.Y. App. Div. 2021). Again, this is unrelated to the facts here. A communication and a draft response prepared by a district attorney's office in the course of reviewing evidence for the purposes of determining whether a crime occurred is not the same as a factual record produced in the ordinary course such as the UI report at issue in this case. In fact, the court in *McGee* held that factual information included in one of the emails was not subject to the exemption, citing Pub. Off. Law § 87(2)(g)(i). *McGee v. Bishop*, 145 N.Y.S.3d 627, 631 (N.Y. App. Div. 2021).

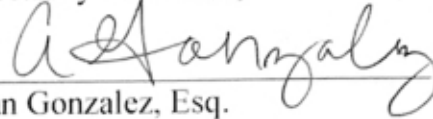
Similar to the withheld surveillance video issue, DOCCS' claim of the inter/intra-agency exemption as the basis for withholding UI reports will continue to evade review because DOCCS can continue to exercise control and ensure review does not occur. *See Laborers' Int'l Union of N. Am., Loc. Union No. 17 v. New York State Dep't of Transp.*, 719 N.Y.S.2d 354 (N.Y. App. Div. 2001); *Hearst Corp. v. City of Albany*, 931 N.Y.S.2d 713 (N.Y. App. Div. 2011).

CONCLUSION

For the foregoing reasons, PLS respectfully requests that it be granted leave to appeal.

Dated: December 5, 2022
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Appellant Prisoners' Legal Services
of New York*

EXHIBIT A

Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: October 27, 2022

533722

In the Matter of PRISONERS'
LEGAL SERVICES OF NEW
YORK,

Appellant,

v

MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF
CORRECTIONS AND COMMUNITY
SUPERVISION,

Respondent.

Calendar Date: September 7, 2022

Before: Clark, J.P., Aarons, Pritzker, Reynolds Fitzgerald and
Ceresia, JJ.

Debevoise & Plimpton LLP, New York City (William C. Mattessich of counsel), and Prisoners' Legal Services of New York, Albany (Matthew McGowan of counsel), for appellant.

Letitia James, Attorney General, Albany (Beezly J. Kiernan of counsel), for respondent.

Pritzker, J.

Appeals from two judgments of the Supreme Court (Kimberly A. O'Connor, J.), entered February 11, 2021 and June 8, 2021 in Albany County, which dismissed petitioner's application, in a combined proceeding pursuant to CPLR article 78 and action for declaratory judgment, to review a determination of respondent denying petitioner's Freedom of Information Law requests.

In May and June 2019, numerous incidents took place in the yards of the Auburn and Clinton Correctional Facilities for which respondent conducted Tier III disciplinary hearings for four incarcerated individuals represented by petitioner – Charles Blanchard, Phillip Bradley, Antonion Christian and Shaun Martin. Following the hearings, petitioner filed separate requests pursuant to the Freedom of Information Law (*see* Public Officers Law art 6 [hereinafter FOIL]) for each incident involving one of petitioner's clients seeking, among other things, the surveillance video and unusual incident (hereinafter UI) reports from each client's hearing. As relevant here, respondent denied the requests to the extent that each sought surveillance video footage of the incidents from the respective facilities, as well as Bradley's UI report. Specifically, with respect to Christian, petitioner contacted Auburn's superintendent via email to inquire about the video footage. Approximately one month later, respondent's counsel ultimately denied the requested video pursuant to Public Officers Law § 87 (2) (e), asserting that disclosing it would "interfere with law enforcement investigations." Petitioner administratively appealed the denial, which was denied by respondent's FOIL appeals officer, who again cited Public Officers Law § 87 (2) (e). The appeals officer took the position that, contrary to petitioner's contention, "the review of evidentiary records during a disciplinary hearing does not negate the applicability of FOIL exemptions in response to a subsequent FOIL request for [those] records."

Petitioner made a virtually identical request to Auburn regarding Bradley, which respondent denied based upon the fact that a criminal investigation was still ongoing, and that petitioner could renew its request upon the conclusion of the investigation. In its administrative appeal of the denial, petitioner asserted that respondent's former denial failed to specify the incarcerated individuals to whom the denial applied and did not cite the statutory exemption relied upon. Respondent's FOIL appeals officer upheld the denial, setting forth the same reasoning relied upon in Christian's denial and further relying upon Public Officers Law § 87 (2) (g) and (e). Petitioner made similar FOIL requests to Clinton for videos

viewed at the disciplinary hearings of Martin and Blanchard; those requests were denied and the denial was upheld upon administrative appeal due to an "ongoing investigation," relying upon Public Officers Law § 87 (2) (e) and (f).

Petitioner then commenced this combined CPLR article 78 proceeding and action for declaratory judgment, seeking to compel disclosure of the remainder of the requested materials. Notably, during the pendency of the proceeding, respondent withdrew its claimed law enforcement exemption with respect to the Auburn footage and Bradley's UI report and provided petitioner with said materials. Accordingly, in addition to arguing that respondent had violated its obligations under FOIL, petitioner contended that respondent's subsequent disclosure of Bradley's UI report and the Auburn video footage established that petitioner substantially prevailed and was entitled to counsel fees and costs. In its February 2021 judgment, Supreme Court found that petitioner's claim was moot to the extent it had sought Bradley's UI report and the Auburn video footage relating to Christian and Bradley, as respondent had produced these materials subsequent to commencement of the proceeding, and that the mootness exception did not apply. The court found that petitioner's failure to serve a summons, in addition to its notice of petition, rendered its claims for declaratory relief not properly before the court. As to the Clinton video footage relating to Martin and Blanchard, the court found that it could not determine whether the withheld videos fell within a FOIL exemption without viewing the footage in camera and ordered that the remainder of the petition be held in abeyance pending review. Thereafter, in a June 2021 judgment, the court concluded, based upon its in camera review, that respondent had met its burden of establishing that disclosure of the requested material could lead to the possibility of endangerment such that the aforementioned footage fell within the exemption under Public Officers Law § 87 (2) (f). The court further declined to award petitioner counsel fees, stating that petitioner did not substantially prevail. Petitioner appeals.

Initially, contrary to petitioner's contention, we agree with Supreme Court that respondent's disclosure of Bradley's UI

report and video footage from Auburn mooted the challenge to respondent's denial of the requests for those materials. "Where a petitioner receives an adequate response to a FOIL request during the pendency of his or her CPLR article 78 proceeding, [that issue is] moot because a determination [on that issue] will not affect the rights of the parties" (*Matter of Gannett Satellite Info. Network, LLC v New York State Thruway Auth.*, 181 AD3d 1072, 1073-1074 [3d Dept 2020] [internal quotation marks and citations omitted]). Despite petitioner's assertion to the contrary, we do not find the exception to the mootness doctrine to be applicable (*see Matter of Cobado v Benziger*, 163 AD3d 1103, 1105 [3d Dept 2018]). To be sure, petitioner argues that, because the issue of whether surveillance footage of a facility may be exempt from disclosure under the law enforcement exemption and whether UI reports fall within the inter/intra-agency exemption have not been previously addressed by this Court and are of tantamount importance, the issue may be considered novel and substantial, and that it is likely to reoccur in light of respondent's tendency to rely upon these exemptions to refuse disclosure of video surveillance and UI reports. However, petitioner failed to establish that this issue is one that would typically evade review as these exemptions and their invocation are frequently examined by this Court (*see Matter of Associated Gen. Contrs. of N.Y. State, LLC v New York State Thruway Auth.*, 173 AD3d 1526, 1527 [3d Dept 2019]; *see e.g. Matter of Disability Rights N.Y. v New York State Commn. of Corr.*, 194 AD3d 1230, 1232 [3d Dept 2021]; *Matter of McGee v Putnam County Assistant Dist. Attorney David M. Bishop*, 192 AD3d 1446, 1449-1450 [3d Dept 2021]).¹

¹ Additionally, we discern no abuse of discretion in Supreme Court's dismissal of petitioner's claims for a declaratory judgment in light of its failure to file a summons and combined petition/complaint, nor did the court err in failing to convert the proceeding into a hybrid proceeding/action, particularly where, as here, several of the requested declarations were mooted by respondent's disclosure of the corresponding requested materials (*see Matter of New York Times Co. v City of N.Y. Police Dept.*, 103 AD3d 405, 407 [1st Dept 2013], *lv dismissed* 21 NY3d 930 [2013], *lv denied* 22 NY3d 854

We now turn to petitioner's assertion that Supreme Court erred in finding that the safety exemption applied to petitioner's FOIL requests for the Clinton video footage. "Under FOIL, all government records are presumptively open for public inspection and copying unless they fall within one of the enumerated exemptions of Public Officers Law § 87 (2)" (*Matter of Laveck v Village Bd. of Trustees of the Vil. of Lansing*, 145 AD3d 1168, 1169 [3d Dept 2016] [internal quotation marks, brackets, ellipsis and citations omitted]). As relevant here, "Public Officers Law § 87 (2) (f) exempts from disclosure materials that, if disclosed, *could* endanger the life or safety of any person," and respondent, "the agency in question, need only demonstrate a *possibility* of endangerment in order to invoke this exemption" (*Matter of Hutchinson v Annucci*, 189 AD3d 1850, 1854 [3d Dept 2020] [internal quotation marks, brackets and citations omitted]). "Although exemptions are to be narrowly construed to provide maximum access, and the agency seeking to prevent disclosure carries the burden of demonstrating that the requested material falls squarely within a FOIL exemption, exemptions must be given their natural and obvious meaning where such interpretation is consistent with the legislative intent and with the general purpose and manifest policy underlying FOIL" (*id.* at 1853 [internal quotation marks, brackets and citations omitted]; *see Matter of Abdur-Rashid v New York City Police Dept.*, 31 NY3d 217, 225 [2018]).

In support of its position that disclosure of the Clinton footage – which includes three videos depicting incidents on June 10, 11 and 14, 2019 – would "endanger the life or safety of any person," respondent proffered an affidavit by the Deputy Superintendent of Security at Clinton, asserting that the materials sought "could jeopardize the safety and security of [Clinton's] personnel, [incarcerated individuals], and staff." To that end, the Deputy Superintendent expressed respondent's concern "that if [the] involved [incarcerated individuals] represented by petitioner are permitted access to these videos, they could be used to identify other inmates in these incidents, which were violent, race-based incidents involving rival groups

[2013]; *see also Premier Restorations of N.Y. Corp. v New York State Dept. of Motor Vehs.*, 127 AD3d 1049, 1049 [2d Dept 2015]).

of numerous [incarcerated individuals]." The Deputy Superintendent went on to detail each of the incidents depicted in the videos, all of which were related. He further attested that the investigations of said incidents confirmed that various incarcerated individuals "were recruiting others based on skin color for their version of a 'race war.'" As to the applicability of the safety exemption, the Deputy Superintendent opined that disclosure of the Clinton surveillance footage, akin to "public release of these videotapes," "would allow any individual to view, study, and identify participants in the aforementioned violence and race-related gang activity," which "could endanger the life or safety of any person if used by an [incarcerated individual] to identify other participants in the action for purposes of retaliatory action," as well as risk retaliatory violence against correctional staff. He expressed that "[t]he dynamics involved in prison violence and gang cases are complex," noting that gang affiliation frequently persists following incarceration and that protective custody for individuals suspected to be at risk of retaliatory violence is not sufficient to shield against that threat.

Upon review, we agree with Supreme Court's conclusion that respondent has satisfied its burden of demonstrating that the withheld materials fell within the safety exemption to FOIL disclosure as it "could potentially endanger the life or safety of the persons involved" in the incidents that took place on June 10, 11 and 14, 2019 "so as to be exempt under Public Officers Law § 87 (2) (f)" (*Matter of Hutchinson v Annucci*, 189 AD3d at 1854; *see Matter of Kairis v Fischer*, 138 AD3d 1360, 1361 [3d Dept 2016]; *Matter of Williamson v Fischer*, 116 AD3d 1169, 1171 [3d Dept 2014], *lv denied* 24 NY3d 904 [2014]). Although petitioner argues that the showing of this footage at petitioner's clients' disciplinary hearings presented the same risk of retaliation against involved persons, this assertion does not negate respondent's showing of the "'possibility of endangerment,'" which is sufficient to meet its burden (*Matter of Kairis v Fischer*, 138 AD3d at 1361, quoting *Matter of Bellamy*

v New York City Police Dept., 87 AD3d 874, 875 [1st Dept 2011], *affd* 20 NY3d 1028 [2013]).²

Finally, petitioner argues that Supreme Court erred in determining that it was not entitled to counsel fees, particularly in light of respondent's initial denial of its requests and their subsequent disclosure of a portion of the requested materials subsequent to commencement of this proceeding. "[A] court in a FOIL proceeding shall assess, against such agency involved, reasonable counsel fees and other litigation costs in any case in which such person has substantially prevailed and the court finds that the agency had no reasonable basis for denying access to the records sought" (*Matter of Aron Law PLLC v Town of Fallsburg*, 199 AD3d 1286, 1290 [3d Dept 2021] [internal quotation marks, brackets, ellipses and citation omitted]). "A petitioner substantially prevails under Public Officers 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" (*Matter of Competitive Enter. Inst. v Attorney Gen. of N.Y.*, 161 AD3d 1283, 1286 [3d Dept 2018] [internal quotation marks, brackets and citation omitted]).

Initially, with respect to the Bradley UI report and the Auburn video footage, although respondent's release of these documents rendered moot petitioner's challenge to respondent's initial denial as to these requests, "this development does not render moot respondent[']s challenge to Supreme Court's [denial] of counsel fees and costs" (*Matter of Vertucci v New York State Dept. of Transp.*, 195 AD3d 1209, 1210 [3d Dept 2021], *lv denied* 37 NY3d 917 [2022]). However, petitioner did not substantially prevail in this proceeding because it did not receive all the information that it requested – namely, the Clinton surveillance footage. Even if petitioner can be said to have substantially prevailed in this proceeding because it ultimately obtained the UI report and Auburn video footage after commencing this proceeding, Supreme Court, nevertheless, did not abuse its discretion in denying petitioner's request for an award of

² We note that the due process concerns differ in a disciplinary proceeding as opposed to a FOIL request.

counsel fees and costs because respondent "had a reasonable basis for denying access to the [requested materials] at the time of petitioner's FOIL request" (*Matter of Associated Gen. Contrs. of N.Y. State, LLC v New York State Thruway Auth.*, 173 AD3d at 1528; *see Matter of Save Monroe Ave., Inc. v New York State Dept. of Transp.*, 197 AD3d 808, 810 [3d Dept 2021], *lv denied* 38 NY3d 905 [2022]). To that end, respondent had denied disclosure of the aforementioned materials in light of the nonfinality of the inter/intra-agency UI report and because the UI report and Auburn footage fell within the law enforcement exemption as there were ongoing investigations regarding the incidents relating to those materials (*see Public Officers Law* § 87 [2] [e] [i]; [g] [iii]; *see Matter of New York State Funeral Directors Assn. v New York State Dept. of Health*, 200 AD3d 1255, 1257 n 2 [3d Dept 2021]).

Clark, J.P., Aarons, Reynolds Fitzgerald and Ceresia, JJ., concur.

ORDERED that the judgments are affirmed, without costs.

ENTER:

A handwritten signature in black ink that reads "Robert D. Mayberger". The signature is written in a cursive, slightly slanted style.

Robert D. Mayberger
Clerk of the Court

EXHIBIT B

NEW YORK SUPREME COURT
APPELLATE DIVISION : THIRD DEPARTMENT

In the Matter of PRISONERS' LEGAL SERVICES
OF NEW YORK,

Petitioner,

NOTICE OF ENTRY

v.

A.D. No. 533722

NEW YORK STATE DEPARTMENT OF
CORRECTIONS AND COMMUNITY
SUPERVISION,

Respondent.

PLEASE TAKE NOTICE that the within is a true and complete copy of the Memorandum and Order duly entered in the above-entitled matter in the Office of the Clerk of the Supreme Court, Appellate Division, Third Department on October 27, 2022.

Dated: November 4, 2022
Albany, New York

LETITIA JAMES
Attorney General of the
State of New York
Attorney for State Respondents
The Capitol
Albany, New York 12224

By: /s/ Beezly Kiernan
BEEZLY KIERNAN
Assistant Solicitor General
(518) 776-2023

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: October 27, 2022

533722

In the Matter of PRISONERS'
LEGAL SERVICES OF NEW
YORK,

Appellant,

v

MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF
CORRECTIONS AND COMMUNITY
SUPERVISION,

Respondent.

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Ceresia, JJ.

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Letitia James, Attorney General, Albany (Beezly J. Kiernan
of counsel), for respondent.

Pritzker, J.

Appeals from two judgments of the Supreme Court (Kimberly
A. O'Connor, J.), entered February 11, 2021 and June 8, 2021 in
Albany County, which dismissed petitioner's application, in a
combined proceeding pursuant to CPLR article 78 and action for
declaratory judgment, to review a determination of respondent
denying petitioner's Freedom of Information Law requests.

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Petitioner made a virtually identical request to Auburn regarding Bradley, which respondent denied based upon the fact that a criminal investigation was still ongoing, and that petitioner could renew its request upon the conclusion of the investigation. In its administrative appeal of the denial, petitioner asserted that respondent's former denial failed to specify the incarcerated individuals to whom the denial applied and did not cite the statutory exemption relied upon. Respondent's FOIL appeals officer upheld the denial, setting forth the same reasoning relied upon in Christian's denial and further relying upon Public Officers Law § 87 (2) (g) and (e). Petitioner made similar FOIL requests to Clinton for videos

viewed at the disciplinary hearings of Martin and Blanchard; those requests were denied and the denial was upheld upon administrative appeal due to an "ongoing investigation," relying upon Public Officers Law § 87 (2) (e) and (f).

Petitioner then commenced this combined CPLR article 78 proceeding and action for declaratory judgment, seeking to compel disclosure of the remainder of the requested materials. Notably, during the pendency of the proceeding, respondent withdrew its claimed law enforcement exemption with respect to the Auburn footage and Bradley's UI report and provided petitioner with said materials. Accordingly, in addition to arguing that respondent had violated its obligations under FOIL, petitioner contended that respondent's subsequent disclosure of Bradley's UI report and the Auburn video footage established that petitioner substantially prevailed and was entitled to counsel fees and costs. In its February 2021 judgment, Supreme Court found that petitioner's claim was moot to the extent it had sought Bradley's UI report and the Auburn video footage relating to Christian and Bradley, as respondent had produced these materials subsequent to commencement of the proceeding, and that the mootness exception did not apply. The court found that petitioner's failure to serve a summons, in addition to its notice of petition, rendered its claims for declaratory relief not properly before the court. As to the Clinton video footage relating to Martin and Blanchard, the court found that it could not determine whether the withheld videos fell within a FOIL exemption without viewing the footage in camera and ordered that the remainder of the petition be held in abeyance pending review. Thereafter, in a June 2021 judgment, the court concluded, based upon its in camera review, that respondent had met its burden of establishing that disclosure of the requested material could lead to the possibility of endangerment such that the aforementioned footage fell within the exemption under Public Officers Law § 87 (2) (f). The court further declined to award petitioner counsel fees, stating that petitioner did not substantially prevail. Petitioner appeals.

Initially, contrary to petitioner's contention, we agree with Supreme Court that respondent's disclosure of Bradley's UI

report and video footage from Auburn mooted the challenge to respondent's denial of the requests for those materials. "Where a petitioner receives an adequate response to a FOIL request during the pendency of his or her CPLR article 78 proceeding, [that issue is] moot because a determination [on that issue] will not affect the rights of the parties" (*Matter of Gannett Satellite Info. Network, LLC v New York State Thruway Auth.*, 181 AD3d 1072, 1073-1074 [3d Dept 2020] [internal quotation marks and citations omitted]). Despite petitioner's assertion to the contrary, we do not find the exception to the mootness doctrine to be applicable (*see Matter of Cobado v Benziger*, 163 AD3d 1103, 1105 [3d Dept 2018]). To be sure, petitioner argues that, because the issue of whether surveillance footage of a facility may be exempt from disclosure under the law enforcement exemption and whether UI reports fall within the inter/intra-agency exemption have not been previously addressed by this Court and are of tantamount importance, the issue may be considered novel and substantial, and that it is likely to reoccur in light of respondent's tendency to rely upon these exemptions to refuse disclosure of video surveillance and UI reports. However, petitioner failed to establish that this issue is one that would typically evade review as these exemptions and their invocation are frequently examined by this Court (*see Matter of Associated Gen. Contrs. of N.Y. State, LLC v New York State Thruway Auth.*, 173 AD3d 1526, 1527 [3d Dept 2019]; *see e.g. Matter of Disability Rights N.Y. v New York State Commn. of Corr.*, 194 AD3d 1230, 1232 [3d Dept 2021]; *Matter of McGee v Putnam County Assistant Dist. Attorney David M. Bishop*, 192 AD3d 1446, 1449-1450 [3d Dept 2021]).¹

¹ Additionally, we discern no abuse of discretion in Supreme Court's dismissal of petitioner's claims for a declaratory judgment in light of its failure to file a summons and combined petition/complaint, nor did the court err in failing to convert the proceeding into a hybrid proceeding/action, particularly where, as here, several of the requested declarations were mooted by respondent's disclosure of the corresponding requested materials (*see Matter of New York Times Co. v City of N.Y. Police Dept.*, 103 AD3d 405, 407 [1st Dept 2013], *lv dismissed* 21 NY3d 930 [2013], *lv denied* 22 NY3d 854

We now turn to petitioner's assertion that Supreme Court erred in finding that the safety exemption applied to petitioner's FOIL requests for the Clinton video footage. "Under FOIL, all government records are presumptively open for public inspection and copying unless they fall within one of the enumerated exemptions of Public Officers Law § 87 (2)" (*Matter of Laveck v Village Bd. of Trustees of the Vil. of Lansing*, 145 AD3d 1168, 1169 [3d Dept 2016] [internal quotation marks, brackets, ellipsis and citations omitted]). As relevant here, "Public Officers Law § 87 (2) (f) exempts from disclosure materials that, if disclosed, *could* endanger the life or safety of any person," and respondent, "the agency in question, need only demonstrate a *possibility* of endangerment in order to invoke this exemption" (*Matter of Hutchinson v Annucci*, 189 AD3d 1850, 1854 [3d Dept 2020] [internal quotation marks, brackets and citations omitted]). "Although exemptions are to be narrowly construed to provide maximum access, and the agency seeking to prevent disclosure carries the burden of demonstrating that the requested material falls squarely within a FOIL exemption, exemptions must be given their natural and obvious meaning where such interpretation is consistent with the legislative intent and with the general purpose and manifest policy underlying FOIL" (*id.* at 1853 [internal quotation marks, brackets and citations omitted]; *see Matter of Abdur-Rashid v New York City Police Dept.*, 31 NY3d 217, 225 [2018]).

In support of its position that disclosure of the Clinton footage – which includes three videos depicting incidents on June 10, 11 and 14, 2019 – would "endanger the life or safety of any person," respondent proffered an affidavit by the Deputy Superintendent of Security at Clinton, asserting that the materials sought "could jeopardize the safety and security of [Clinton's] personnel, [incarcerated individuals], and staff." To that end, the Deputy Superintendent expressed respondent's concern "that if [the] involved [incarcerated individuals] represented by petitioner are permitted access to these videos, they could be used to identify other inmates in these incidents, which were violent, race-based incidents involving rival groups

[2013]; *see also Premier Restorations of N.Y. Corp. v New York State Dept. of Motor Vehs.*, 127 AD3d 1049, 1049 [2d Dept 2015]).

of numerous [incarcerated individuals]." The Deputy Superintendent went on to detail each of the incidents depicted in the videos, all of which were related. He further attested that the investigations of said incidents confirmed that various incarcerated individuals "were recruiting others based on skin color for their version of a 'race war.'" As to the applicability of the safety exemption, the Deputy Superintendent opined that disclosure of the Clinton surveillance footage, akin to "public release of these videotapes," "would allow any individual to view, study, and identify participants in the aforementioned violence and race-related gang activity," which "could endanger the life or safety of any person if used by an [incarcerated individual] to identify other participants in the action for purposes of retaliatory action," as well as risk retaliatory violence against correctional staff. He expressed that "[t]he dynamics involved in prison violence and gang cases are complex," noting that gang affiliation frequently persists following incarceration and that protective custody for individuals suspected to be at risk of retaliatory violence is not sufficient to shield against that threat.

Upon review, we agree with Supreme Court's conclusion that respondent has satisfied its burden of demonstrating that the withheld materials fell within the safety exemption to FOIL disclosure as it "could potentially endanger the life or safety of the persons involved" in the incidents that took place on June 10, 11 and 14, 2019 "so as to be exempt under Public Officers Law § 87 (2) (f)" (*Matter of Hutchinson v Annucci*, 189 AD3d at 1854; *see Matter of Kairis v Fischer*, 138 AD3d 1360, 1361 [3d Dept 2016]; *Matter of Williamson v Fischer*, 116 AD3d 1169, 1171 [3d Dept 2014], *lv denied* 24 NY3d 904 [2014]). Although petitioner argues that the showing of this footage at petitioner's clients' disciplinary hearings presented the same risk of retaliation against involved persons, this assertion does not negate respondent's showing of the "'possibility of endangerment,'" which is sufficient to meet its burden (*Matter of Kairis v Fischer*, 138 AD3d at 1361, quoting *Matter of Bellamy*

v New York City Police Dept., 87 AD3d 874, 875 [1st Dept 2011], *affd* 20 NY3d 1028 [2013]).²

Finally, petitioner argues that Supreme Court erred in determining that it was not entitled to counsel fees, particularly in light of respondent's initial denial of its requests and their subsequent disclosure of a portion of the requested materials subsequent to commencement of this proceeding. "[A] court in a FOIL proceeding shall assess, against such agency involved, reasonable counsel fees and other litigation costs in any case in which such person has substantially prevailed and the court finds that the agency had no reasonable basis for denying access to the records sought" (*Matter of Aron Law PLLC v Town of Fallsburg*, 199 AD3d 1286, 1290 [3d Dept 2021] [internal quotation marks, brackets, ellipses and citation omitted]). "A petitioner substantially prevails under Public Officers 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" (*Matter of Competitive Enter. Inst. v Attorney Gen. of N.Y.*, 161 AD3d 1283, 1286 [3d Dept 2018] [internal quotation marks, brackets and citation omitted]).

Initially, with respect to the Bradley UI report and the Auburn video footage, although respondent's release of these documents rendered moot petitioner's challenge to respondent's initial denial as to these requests, "this development does not render moot respondent[']s challenge to Supreme Court's [denial] of counsel fees and costs" (*Matter of Vertucci v New York State Dept. of Transp.*, 195 AD3d 1209, 1210 [3d Dept 2021], *lv denied* 37 NY3d 917 [2022]). However, petitioner did not substantially prevail in this proceeding because it did not receive all the information that it requested – namely, the Clinton surveillance footage. Even if petitioner can be said to have substantially prevailed in this proceeding because it ultimately obtained the UI report and Auburn video footage after commencing this proceeding, Supreme Court, nevertheless, did not abuse its discretion in denying petitioner's request for an award of

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counsel fees and costs because respondent "had a reasonable basis for denying access to the [requested materials] at the time of petitioner's FOIL request" (*Matter of Associated Gen. Contrs. of N.Y. State, LLC v New York State Thruway Auth.*, 173 AD3d at 1528; *see Matter of Save Monroe Ave., Inc. v New York State Dept. of Transp.*, 197 AD3d 808, 810 [3d Dept 2021], *lv denied* 38 NY3d 905 [2022]). To that end, respondent had denied disclosure of the aforementioned materials in light of the nonfinality of the inter/intra-agency UI report and because the UI report and Auburn footage fell within the law enforcement exemption as there were ongoing investigations regarding the incidents relating to those materials (*see Public Officers Law* § 87 [2] [e] [i]; [g] [iii]; *see Matter of New York State Funeral Directors Assn. v New York State Dept. of Health*, 200 AD3d 1255, 1257 n 2 [3d Dept 2021]).

Clark, J.P., Aarons, Reynolds Fitzgerald and Ceresia, JJ., concur.

ORDERED that the judgments are affirmed, without costs.

ENTER:

A handwritten signature in black ink that reads "Robert D. Mayberger". The signature is written in a cursive, slightly slanted style.

Robert D. Mayberger
Clerk of the Court

EXHIBIT C

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
RJ 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
Attorneys for Petitioner
(Daniel M. Abuhoff, Esq., Jennifer R. Cowan, Esq.,
and Joshua J. Smith, Esq., of Counsel)
919 Third Avenue
New York, New York 10022

HON. LETITIA JAMES
Attorney General for the State of New York
Attorney for Respondent
(John F. Moore, Esq., Assistant Attorney
General, of Counsel)
The Capitol
Albany, New York 12224-0341

O'CONNOR, J.:

Petitioner Prisoners' Legal Services ("PLS" or "petitioner") commenced this CPLR Article 78 proceeding challenging a denial of its request 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"). Respondent New York State

Department of Corrections and Community Supervision (“DOCCS” or “respondent”) answered the petition, opposes the requested relief, and asserts, among other objections in point of law, that petitioner fails to state a claim that any action taken by respondent was arbitrary and capricious, in violation of lawful procedure, affected by an error of law, contrary to law, or ultra vires; that all actions taken by DOCCS have been consistent with its lawful duties; and that some of petitioner’s claims should be dismissed as moot. PLS has replied to the opposition.

Background

PLS is a nonprofit legal services organization that provides civil legal services to indigent, incarcerated individuals in New York State correction facilities (*see* Verified Pet., ¶ 9, ¶ 18). PLS investigates alleged legal rights violations, including incorrect or unfounded disciplinary determinations, mistreatment, assault by staff, and failure to protect from assault by other prisoners (*id.* at ¶ 18). PLS routinely uses FOIL requests to acquire information from DOCCS on its clients’ behalf, including surveillance videos and unusual incident (“UI”) reports (*id.* at ¶ 19).

In May and June 2019, a number of yard incidents occurred at the Auburn and Clinton correctional facilities (*id.* at ¶ 23). DOCCS conducted Tier III disciplinary hearings with respect to four PLS clients – Charles Blanchard (“Blanchard”), Phillip Bradley (“Bradley”), Antonion Christian (“Christian”), and Shaun Martin (“Martin”), in connection with those incidents (*id.*). PLS forwarded separate FOIL requests to DOCCS on behalf of Blanchard, Bradley, Christian, and Martin following each of their Tier III hearings (*id.*).

Christian FOIL Request

On June 6, 2019, PLS sent a FOIL request to the Auburn CF Superintendent, seeking “the Superintendent’s Hearing packet and copies of all evidence introduced or viewed at [Christian’s May 24, 2019] hearing,” including, among other things, “[a]ny videotapes/photographs which

were viewed at the hearing” and “[a]ny [u]nusual [i]ncident reports” (Affirmation of Joshua J. Smith, Esq., Ex. B). On June 28, 2019, PLS emailed DOCCS regarding the responsive records it received the day before, noting that the records “[did] not include the video viewed at the hearing” and asking that the video be provided as soon as possible (*id.*, Ex. E).

After first being advised, by June 28, 2019 email on behalf of Auburn CF’s Inmate Records Coordinator (“IRC”), that “there was no video” and that the Liaison Officer “would look into it again,” PLS was later notified, in an email dated July 29, 2019, “that the incident in which [Christian] was involved in is still an active investigation,” and that the Deputy Superintendent “[would] not release the video to anyone at [that] time” (*id.*, Exs. E & F). DOCCS’ Office of Counsel agreed, and denied the requested video “pursuant to [Public Officers Law] § 87(2)(e) where release of records would interfere with law enforcement investigations” (*id.*, Ex. F). On August 13, 2019, PLS administratively “appeal[ed] the denial of [its] request for copies of video footage viewed at Mr. Christian’s Superintendent’s Hearing [on] May 24, 2019,” arguing, among other things, that Counsel’s Office “did not articulate any factual basis for [the] reasoning that disclosing the video footage would interfere with an active investigation,” and that disclosing the video would not interfere with a law enforcement investigation because “the video footage was presented as evidence and viewed at Mr. Christian’s hearing” (*id.*, Ex. D).

By letter dated August 28, 2019, DOCCS’ FOIL Appeals Officer “affirm[ed] the facility’s decision to withhold the responsive video” and denied PLS’s appeal (*id.*, Ex. G). Citing Public Officers Law § 87(2)(e) and *Matter of Leshner v. Hynes* (19 N.Y.3d 57 [2012]), the FOIL Appeals Officer stated:

The 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 (*id.*).

Further, the FOIL Appeals Officer noted that while Christian was able to view the video at his hearing, “the review of evidentiary records during a disciplinary hearing does not negate the applicability of FOIL exemptions in response to a subsequent FOIL request for [those] records” (*id.*). In that regard, the FOIL Appeals Officer explained that “[a] hearing officer is in a unique position where the review of evidence can be accomplished in a secure setting outside the view of the general inmate population” (*id.*).

Bradley FOIL Request

PLS made a virtually identical request to the Auburn CF Superintendent on July 22, 2019 for Bradley’s Superintendent’s Hearing packet and the evidence introduced or viewed at his June 25, 2019 hearing, including, among other things, “[a]ny videotapes and/or photographs which were viewed at the hearing” and “[a]ll [u]nusual [i]ncident reports” (Smith Affirmation, Ex. C). By email on behalf of the Auburn IRC, dated July 31, 2019, PLS was notified that several of its recent FOIL requests “stem from an incident date of 5/11/19,” that “[the] incident involved a large number of individuals, both staff and inmates,” that “the incident is still an open criminal investigation,” and that “[m]any of the requested FOIL items are unavailable.” PLS was advised that “[o]nce the investigation is complete, . . . [it] may renew [its] request for records at that time” (Smith Affirmation, Ex. I).

PLS emailed DOCCS’ Office of Counsel on August 1, 2019, asking for review of the denial and indicating, among other things, that the denial wasn’t detailed as to which of its clients it pertained to (*id.*, Ex. H). PLS emailed DOCCS’ Counsel’s Office again on August 29, 2019, noting that it appeared the July 31, 2019 denial “also included records pertaining to Phillip Bradley” and that “[b]oth the Arch Gate video and [u]nusual [i]ncident Report were viewed at his

hearing[,] but not produced by Auburn CF” (*id.*). PLS asked that DOCCS provide the statutory exemption being relied on, “[i]f the video and UI [report] are being denied with regards to Mr. Bradley’s Tier III hearing” (*id.*). The following day, DOCCS’ Counsel’s Office instructed PLS to “submit an appeal” (*id.*).

PLS administratively appealed the denial in an email, dated September 3, 2019 (*id.*). In its appeal, PLS asserted that Auburn CF’s denial did not indicate the prisoners to which the appeal referred, and did not cite the statutory exemption relied upon for the denial (*id.*). By letter, dated September 18, 2019, DOCCS’ FOIL Appeals Officer denied PLS’s appeal (*see* Smith Affirmation, Ex. J). The FOIL Appeals Officer “affirm[ed] the [facility’s] decision to withhold the responsive video,” based on the same reasoning and exemption set forth in the denial of Christian’s appeal (*id.*). Moreover, relying on Public Officers Law § 87(2)(g) and (e), the FOIL Appeals Officer further indicated that “as of the date of [the] response[,] the UI report ha[d] not been finalized and is still a preliminary report,” and that “the release of a preliminary investigative report[] could interfere with ongoing law enforcement investigations,” and, as such, the UI report was exempt from disclosure (*id.*).

Martin FOIL Request

On July 23, 2019, PLS sent a FOIL request to the Inmate Records Coordinator (“IRC”) at Clinton CF for information related to a use of force/usual incident on June 14, 2019 involving Martin, including “[a]ll videotapes; yard escort, etc.,” and “a copy of the administrative record of [Martin’s] Tier III hearing which was held at [Clinton] Correctional Facility,” including [v]ideotapes . . . viewed at the hearing” (Smith Affirmation, Ex. K [brackets in original]). By letter, dated August 6, 2019, PLS’s “request for the video of the incident [was] denied for safety and security reasons due to the ongoing investigation” (*id.*, Ex. M). Thereafter, PLS emailed

DOCCS' Office of Counsel, appealing the denial and seeking "intervention and assistance with respect to a FOIL denial for video camera footage involving Mr. [Martin]" (*id.*, Ex. N). Among other things, PLS indicated that it "was surprised to see this denial of video footage at all" as "PLS has long requested and routinely been provided such video footage of incidents, including incidents such as this involving large-scale incidents in the yard" (*id.*). PLS "object[ed] to the denial of [the] video footage due to any alleged safety and security concerns relating to any ongoing investigation," arguing that "the mere fact of and existence of any such investigation cannot serve to insulate and exempt the video from disclosure," and that the video "is merely a visual factual account of events" (*id.*). Moreover, PLS asserted that because the video was part of the tier hearing process, i.e., viewed at the hearing by Martin himself, and considered and relied upon as part of Martin's defense to the disciplinary charges and as evidence by the hearing officer in reaching and rendering a disposition, "there can be no dispute that [PLS] may not be denied this video" (*id.*).

DOCCS FOIL Appeals Officer denied the appeal in a letter, dated September 11, 2019 (*see* Smith Affirmation, Ex. L). Based on a review of the matter, the FOIL Appeals Officer found that "the responsive video footage was properly withheld, as it is exempt from release pursuant to Public Officers Law § 87(2)(e) and (f)" (*id.*). Noting that "[t]he incident in question [was] the subject of both internal and external law enforcement investigations," the FOIL Appeals Officer "determined that release of the video at [that] 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," as well as "reveal the protocols and response time for the Department's security staff in Clinton's North Yard" (*id.*). The FOIL Appeals Officer also concluded that release of the video "could endanger the life or safety of any person . . . if

used to identify other participants in the incident for the purpose of retaliatory action” (*id.*). Moreover, the FOIL Appeals Officer noted that “even if the hearing officer allowed [PLS’s] client to view certain evidentiary materials during the hearing, that disclosure does not preclude the Department from properly asserting an exemption under FOIL” (*id.*).

Blanchard FOIL Request

On August 7, 2019, PLS sent a FOIL request to the IRC at Clinton CF for “a copy of the administrative record of [Blanchard’s] Tier III hearing which was held at [Clinton] Correctional Facility and ended on [7/12/19],” including “[v]ideotapes . . . viewed at the hearing” (Smith Affirmation, Ex. O [brackets in original]). Like the response to the Martin FOIL request, PLS was notified, by letter dated August 20, 2019, that its “request for the video of the incident is denied for safety and security reasons due to the ongoing investigation” (*id.*, Ex. P). PLS subsequently emailed DOCCS’ Office of Counsel, appealing the denial and seeking “intervention and assistance with respect to another recent FOIL denial for video camera footage, this time involving Mr. Blanchard” for the same reasons set forth in its appeal of the denial of the Martin FOIL request (*id.*, Ex. Q).

By letter, dated September 4, 2019, DOCCS FOIL Appeals officer “affirm[ed] the facility’s decision to withhold the responsive video,” and denied the appeal (Smith Affirmation, Ex. R).

Based on a review of the matter, the FOIL Appeals Officer found that

the responsive video footage was properly withheld, as it is exempt from release pursuant to Public Officers Law § 87(2)(e) and (f), where disclosure would interfere with ongoing law enforcement investigations and could endanger the life and safety of any person if used by an inmate to identify other participants in the incident for the purpose of retaliatory action (*id.*).

Further, as “[t]he incident in question [was] the subject of both internal and external law enforcement investigations,” the FOIL Appeals Officer, citing *Matter of Leshner v. Hynes*,

“determined that release of the video at [that] 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” (*id.*). Moreover, the FOIL Appeals Officer noted that “even if the hearing officer allowed [PLS’s] client to view certain evidentiary materials during the hearing, that disclosure does not preclude the Department from properly asserting an exemption under FOIL” (*id.*). This proceeding followed.

Arguments

PLS argues that while DOCCS has disclosed some of the requested records, it has unjustifiably withheld the video footage of the incidents at both the Auburn and Clinton correctional facilities, and the UI report made in connection with the Bradley FOIL request. PLS contends that DOCCS improperly relied upon various law enforcement exemptions to withhold the video footage, providing nothing beyond boilerplate statements that there are ongoing investigations and that the requested videos could disclose confidential sources and non-routine criminal investigative techniques or procedures. PLS also asserts that the Bradley UI report cannot be withheld under the inter-agency/intra-agency exemption because it contains a factual account and not an opinion or an exchange of advice. Moreover, citing *Matter of Buffalo Broadcasting Co. v. New York State Dep’t of Correctional Servs.* (174 A.D.2d 212, 215-216 [1992]), PLS submits that DOCC has provided only conclusory and unsupported assertions that there is a safety risk in releasing the requested video footage, and has not provided any evidence suggesting that the videos include anything beyond what the incarcerated population and the prisoners who viewed the videos at their Tier III hearings would have seen.

By this proceeding, PLS seeks an order of the Court: (1) determining that DOCCS has improperly withheld the requested materials pursuant to FOIL; (2) declaring that UI reports are

not inter-agency or intra-agency materials; (3) declaring that UI reports are not compiled for law enforcement purposes, or, in the alternative, declaring that the release of the requested UI report would not interfere with an ongoing law enforcement investigation; (4) declaring that prison surveillance videos are not compiled for law enforcement purposes, or, alternatively, declaring that the release of the requested videos would not (a) interfere with a law enforcement investigation, (b) identify a confidential source or disclose confidential information relating to a criminal investigation, or (c) reveal criminal investigative techniques or procedures, except routine techniques or procedures; (5) declaring that the release of the requested videos would not endanger the life or safety of any person; (6) directing DOCCS to provide PLS with the requested materials immediately, or, in the alternative, providing for an *in camera* review of the requested materials for the propriety of DOCCS' asserted exemptions; and (7) awarding attorney's fees.

DOCCS, in opposition, submits that the Christian and Bradley FOIL requests are no longer at issue in this proceeding. More particularly, DOCCS contends that the Bradley UI report has been finalized, and was provided to PLS's counsel in this proceeding. DOCCS further asserts, upon information belief, that the May 11, 2019 Auburn CF video has been disclosed to defense counsel in a pending criminal proceeding related to the May 11, 2019 incident and that petitioner's counsel now has that video. To the extent that PLS does not possess the May 11, 2019 Auburn CF video, DOCCS submits that it has no objection to the video's disclosure.

As to the Martin and Blanchard FOIL requests for video footage from the Clinton CF yard incidents, DOCCS withdraws its claimed exemption, pursuant to Public Officers Law § 87(2)(e), as any internal and external law enforcement investigations have now concluded. DOCCS, however, argues, that the requested videos, dated June 10, June 11, and June 14, 2019, were properly withheld, pursuant to Public Officers Law § 87(2)(f), because the videos, if disclosed,

could endanger the life or safety of a person. Specifically, DOCCS asserts that if the involved inmates represented by PLS are permitted to access the videos, they could be used to identify other inmates involved in the incidents, which an investigation revealed were violent, race-based incidents involving rival inmate groups, for purposes of retaliatory action. Furthermore, DOCCS contends that review of the videos by involved inmates could also reveal the identity of involved correctional staff, potentially subjecting those individuals to retaliatory violence.

Moreover, DOCCS submits that the risks of disclosing the videos outweighs the benefit. In that regard, DOCCS explains that at a disciplinary hearing, the hearing officer is in a position to allow the viewing of a video in a controlled setting outside the sight of the general population and, while there is some risk of the charged individual identifying others for retribution purposes, the controlled setting minimizes those risks, whereas public disclosure under FOIL leaves open the risk of any individual using the footage for retribution. Further, DOCCS maintains that the withholding of the video footage does not hinder PLS's ability to advocate for their clients because the audio recording of any statements about the footage made at the hearing by their clients is subject to disclosure, and PLS may correspond with their clients directly about what the footage showed and review records. And citing *Matter of Bernier v. Mann* (166 A.D.2d 798, 799 [3d Dep't 1990]) and *Matter of Vidal v. Bruen* (Sup. Ct., Albany County, March 16, 2017, Hartman, J., index No. 5659-16 at 3), DOCCS contends that the safety exemption has been upheld where the possibility of a breach of institutional safety, including the safety of inmates, has been adequately shown.

In reply, PLS argues that DOCCS relies on an affidavit from a former deputy superintendent that generally describes the dangers of retaliatory gang violence in a prison setting, and has not provided any real or specific evidence to support its claim that disclosure of the

requested videos would create a tangible and increased risk of harm that can override the right to and need for disclosure. Additionally, PLS submits that DOCCS' claim is undermined by its decision to show the Clinton CF videos to the alleged participants in the incidents, as they would arguably have the greatest incentive to retaliate. Further, according to PLS, DOCCS' assertion that a disciplinary hearing is a controlled setting outside the sight of the general population is of no consequence because if DOCCS was genuinely concerned about the risk of retaliatory action, it would not have allowed prisoners to view the videos.

Furthermore, citing *Matter of Mack v. Howard* (91 A.D.3d 1315, 1316 [4th Dep't 2012]), *Matter of Windham v. City of New York Police Dep't* (2013 N.Y. Slip Op. 32418[U] [Sup. Ct., New York County 2013], 2013 WL 5636306, *1), and *Matter of Lavek v. Village Bd. of Trustees of Village of Lansing* (145 A.D.3d 1168, 1171 [3d Dep't 2016]), PLS maintains that the invocation of the safety exemption has been rejected in cases with comparable facts and with even more particularized justifications than provided here. Moreover, PLS contends that there would be adverse public policy implications to accepting DOCCS' expansive interpretation of the safety exemption, which would effectively allow for DOCCS to deny disclosure of any surveillance video showing not only violence by other prisoners or officers, but any misconduct by staff within a correctional facility because someone might use it for possible retaliation. In that regard, PLS asserts that prison violence, whether perpetrated by other prisoners or staff, is a matter of grave public interest and concern, and denying access to video surveillance of incidents would help shield DOCCS from accountability for its own actions or inactions, and significantly hamper the public's ability to inquire into such matters.

Lastly, PLS argues that even if DOCCS' contention that it fully produced the requested Auburn CF materials, the Christian and Bradley FOIL requests are still at issue in this proceeding

as the exception to the mootness doctrine applies. PLS asserts there is a likelihood that DOCCS will continue to rely upon the intra-agency materials and law enforcement exemptions and refuse to disclose UI reports and surveillance materials in response to future FOIL requests. Further, because the release of the FOIL materials is entirely within DOCCS' control in the first instance, PLS claims that the production of the demanded materials places it in a position to almost invariably render a proceeding moot, as it did here. Moreover, PLS submits that its requests for declaratory judgment are novel questions of important public policy issues. As such, PLS asks that the Court consider and decide its claims despite disclosure of the requested materials.

Discussion

Initially, PLS's receipt of the Bradley UI report, its receipt of a copy of the video from the South Yard at Auburn CF, and DOCCS' consent to provide PLS with the video from Arch Gate at Auburn CF, to the extent that it exists, renders petitioner's claims regarding the Christian and Bradley FOIL requests moot (*see Matter of Gannett Satellite Info. Network, LLC v. New York State Thruway Auth.*, 181 A.D.3d 1072, 1073-1074 [3d Dep't 2020]; *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]; *Matter of Cobado v. Benziger*, 163 A.D.3d 1103, 1105 [3d Dep't 2018]). Further, "[a]lthough the issues raised are likely to recur," the Court "do[es] not find them to be substantial, novel or likely to evade review" (*Matter of Associated Gen. Contrs. of New York State, LLC v. New York State Thruway Auth.*, 173 A.D.3d at 1527). As such and "contrary to petitioner's contention, the exception to the mootness doctrine does not apply" (*id.*).

Moreover, because PLS seeks hybrid FOIL and declaratory relief in this proceeding, it "[was] required to serve a summons[,] in addition to the notice of petition, and a combined petition/complaint" (*Matter of New York Times Co. v. City of New York Police Dep't*, 103 A.D.3d

405, 407 [1st Dep't 2013]). PLS's failure to do so leaves its claims for declaratory relief not properly before the Court.

Turning to the remainder of the petition, "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]).

Although DOCCS, through the affidavit of former Deputy Superintendent for Security at Clinton CF, sets forth specific reasons for not disclosing the video footage from the Clinton CF incidents on June 10, June 11, and June 14, 2020 to PLS, the Court is unable to conclude, on the affidavit alone, if the withheld videos "fall entirely within the scope of the asserted exemption" (*Matter of Gould v. New York City Police Dep't*, *supra* at 275). Therefore, the Court will conduct an *in camera* review of the requested video footage before making a determination (*see id.*; *Matter of Whitehead v. Warren County Bd. of Supervisors*, 165 A.D.3d 1452, 1454 [3d Dep't 2018]; *Matter of Hearst Corp. v. New York State Police*, 132 A.D.3d 1128, 1130 [3d Dep't 2015]).

Accordingly, it is hereby

ORDERED AND ADJUDGED, that those parts of the petition challenging the denial of PLS's June 6, 2019 FOIL request pertaining to Christian and July 22, 2019 FOIL request pertaining to Bradley are denied as moot for the reasons stated herein; and it is further

ORDERED AND ADJUDGED, that those parts of the petition seeking declaratory relief are denied as not properly before the Court; and it is further

ORDERED, that DOCCS shall forward to the Court, within thirty (30) days of the date of this Decision and Order/Judgment, an unredacted copy of all requested video footage from the Clinton CF incidents responsive to PLS's July 23, 2019 FOIL request pertaining to Martin and August 7, 2019 FOIL request pertaining to Blanchard for an *in camera* inspection; and it is further


ORDERED, that the determination of the remainder of the petition will be held in abeyance pending such review.

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: February 11, 2021
Albany, New York



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

Papers Considered:

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; *and*
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.

EXHIBIT D

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.