

A.D. No. 533722

**State of New York
Court of Appeals**

In the Matter of the Application of

PRISONERS' LEGAL SERVICES OF NEW YORK,

Appellant,

v.

NEW YORK STATE DEPARTMENT OF CORRECTIONS AND
COMMUNITY SUPERVISION,

Respondent.

**MEMORANDUM IN OPPOSITION
TO MOTION FOR LEAVE TO APPEAL**

BARBARA D. UNDERWOOD
Solicitor General
JEFFREY W. LANG
Deputy Solicitor General
BEEZLY J. KIERNAN
*Assistant Solicitor General
of Counsel*

LETTITIA JAMES
*Attorney General
State of New York*
Attorney for Respondent
The Capitol
Albany, New York 12224
(518) 776-2023
(518) 915-7723 (f)
beezly.kiernan@ag.ny.gov

Dated: December 19, 2022

TABLE OF CONTENTS

PAGE

PRELIMINARY STATEMENT..... 1

BACKGROUND 2

ARGUMENT

 THE MOTION PRESENTS NO QUESTION WORTHY OF LEAVE..... 4

CONCLUSION 8

PRELIMINARY STATEMENT

The Court should deny the motion of petitioner Prisoners' Legal Services of New York for leave to appeal the unanimous memorandum and order of the Appellate Division, Third Department, entered October 27, 2022. Petitioner filed Freedom of Information Law (FOIL) requests on behalf of some of its clients who were charged with violating prison disciplinary rules in 2019. Respondent initially withheld video footage of one incident under the law enforcement exemption, and withheld a draft unusual incident report under the intra-agency exemption. Petitioner later obtained the video footage from defense counsel in related criminal proceedings. Additionally, respondent finalized the unusual incident report and disclosed it to petitioner. Supreme Court thus dismissed the FOIL claims regarding those records as moot and declined to apply the mootness exception. The Third Department affirmed.

Petitioner fails to raise a question worthy of leave. The Third Department correctly held that the law enforcement and intra-agency exemptions do not typically evade review—indeed, the exemptions are frequently litigated—and petitioner points to no authority inconsistent with that holding. Thus, the Court should deny leave to appeal.

BACKGROUND

This C.P.L.R. article 78 proceeding arises out of FOIL requests filed by petitioner on behalf of four of its clients—Phillip Bradley, Antonion Christian, Charles Blanchard, and Shaun Martin—who were charged with violating prison disciplinary rules in 2019. Bradley and Christian's charges were based on a May 11, 2019 yard fight at Auburn Correctional Facility. Respondent disclosed all documents responsive to the Bradley and Christian requests except for video footage and Bradley's draft unusual incident report. Respondent explained that the Auburn video was exempt from disclosure under Public Officers Law § 87(2)(e) because of the risk of interference with ongoing law enforcement investigations, including pending criminal proceedings. Respondent further explained that the Bradley unusual incident report was exempt under Public Officers Law § 87(2)(g) because it was a non-final intra-agency record.

Blanchard's and Martin's charges were based on a series of incidents that took place in June 2019 at Clinton Correctional Facility. Respondent disclosed all responsive records except for video footage. Respondent explained that the Clinton videos were exempt from disclosure under the law enforcement exemption because of pending

investigations, and under Public Officers Law § 87(2)(f) because disclosure could endanger the life or safety of others who were involved in those incidents.

Petitioner then brought this C.P.L.R. article 78 proceeding seeking, among other relief, disclosure of the records withheld by respondent. In response to the petition, respondent explained that petitioner had obtained the Auburn video from defense counsel in related criminal proceedings. Respondent also explained that Bradley's unusual incident report had been finalized and disclosed to petitioner. As to the Clinton videos, respondent withdrew its claimed law enforcement exemption because the investigations had concluded. But respondent continued to maintain that the Clinton videos fell within the public safety exemption.

Supreme Court, Albany County (O'Connor, J.), dismissed petitioner's claims regarding the Bradley and Christian FOIL requests as moot and declined to apply the mootness exception. (Ex. C to Mot. at 12.) And after reviewing the Clinton videos in camera, Supreme Court agreed with respondent that disclosure of the same could endanger the

life or safety of incarcerated individuals and correction officers who appear on video. (Ex. D to Mot. at 5.)¹

The Third Department unanimously affirmed. (Ex. A to Mot. [Memorandum and Order].) As relevant here, the Third Department held that the mootness exception did not apply to petitioner's claims regarding the Bradley and Christian FOIL requests. The court explained that whether respondent properly claimed the law enforcement and intra-agency exemptions was not an issue that typically evades review because those exemptions are frequently litigated. (Memorandum and Order at 4.) Petitioner now moves to appeal the Third Department's decision insofar as it declined to apply the mootness exception.

ARGUMENT

THE MOTION PRESENTS NO QUESTION WORTHY OF LEAVE

This proceeding is moot insofar as petitioner has obtained the Auburn video and the unusual incident report petitioner had sought via FOIL requests. And the Third Department properly declined to apply the

¹ Petitioner does not seek review on the issue of the application of the life or safety exemption.

mootness exception. Petitioner's challenge to the Third Department's decision raises no recurring question of public importance, nor any question that implicates a conflict of decisions among the departments of the Appellate Division or with prior decisions of this Court. *See* 22 N.Y.C.R.R. § 500.22(b)(4). Thus, the Court should deny the motion for leave.

As the Third Department held, petitioner failed to establish that respondent's reliance on either the law enforcement exemption or intra-agency exemption involves a phenomenon that typically evades review. *See Matter of Hearst Corp. v. Clyne*, 50 N.Y.2d 707, 714-15 (1980). Indeed, the law enforcement exemption is frequently litigated. *See, e.g., Matter of Madeiros v. New York State Educ. Dep't*, 30 N.Y.3d 67 (2017); *Matter of Abdur-Rashid v New York City Police Dep't*, 31 N.Y.3d 217, *rearg. denied*, 31 N.Y.3d 1125 (2018). *Matter of Cohen v. Alois*, 201 A.D.3d 1104 (3d Dep't 2022); *Matter of Clayton v. Wetmore*, 195 A.D.3d 1264 (3d Dep't), *lv. denied*, 37 N.Y.3d 916 (2021); *Matter of Disability Rights New York v. New York State Comm'n of Corr.*, 194 A.D.3d 1230 (3d Dep't 2021). The intra-agency exemption is also frequently litigated. *See, e.g., Matter of National Lawyers Guild, Buffalo Ch. v. Erie County Sheriff's Off.*, 196

A.D.3d 1195 (4th Dep't 2021); *Matter of Jewish Press, Inc. v. New York City Dep't of Investigation*, 193 A.D.3d 461 (1st Dep't 2021); *Matter of McGee v. Bishop*, 192 A.D.3d 1446 (3d Dep't 2021).

And while petitioner disputes the applicability of these exemptions here, the Third Department did not address the merits and those issues are not properly before the Court. Rather, the only issue on which petitioner seeks leave is whether the Third Department erred in declining to apply the mootness exception. (Mot. at 11.) That is not a recurring question of public importance. And petitioner points to no authority—from this Court or the other departments of the Appellate Division—inconsistent with the Third Department's holding.

Nor does the record reflect that respondent disclosed the requested documents in order to evade review, as petitioner suggests (Mot. at 14, 17). Respondent initially withheld video footage of the May 11, 2019 yard fight at Auburn because of the risk of interference with ongoing law enforcement investigations, including a pending criminal case. *See* Public Officers Law § 87(2)(e); *Matter of Abdur-Rashid*, 31 N.Y.3d at 235. After petitioner commenced this article 78 proceeding, however, petitioner obtained the video footage from defense counsel in the related criminal

proceedings. Respondent thus withdrew its claimed law enforcement exemption. Respondent did so not in order to evade review, but because the reason for asserting the exemption had dissipated.

As for Bradley's unusual incident report, the report was not finalized when respondent received petitioner's FOIL request, so respondent withheld the draft report under the intra-agency exemption. *See Public Officers Law § 87(2)(g); Matter of Xerox Corp. v. Town of Webster*, 65 N.Y.2d 131, 132 (1985); *see also Matter of Gilbert v. Office of the Governor of the State of N.Y.*, 170 A.D.3d 1404, 1406 (3d Dep't 2019) (preliminary drafts of letter terminating sublease were properly withheld as intra-agency materials); *Matter of Spring v. County of Monroe*, 141 A.D.3d 1151, 1152 (4th Dep't 2016) (draft informal dispute resolution request was properly withheld as intra-agency material). Respondent later disclosed the finalized report. Again, respondent did so not in order to evade review, but because the intra-agency exemption no longer applied. In short, there is no reason for further review.

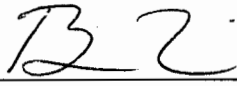
CONCLUSION

The motion for leave should be denied.

Dated: Albany, New York
December 19, 2022

Respectfully submitted,

LETITIA JAMES
Attorney General
State of New York
Attorney for Respondent

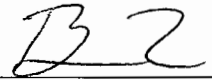
By: 
BEEZLY J. KIERNAN
Assistant Solicitor General

BARBARA D. UNDERWOOD
Solicitor General
JEFFREY W. LANG
Deputy Solicitor General
BEEZLY J. KIERNAN
Assistant Solicitor General
of Counsel

The Capitol
Albany, New York 12224
(518) 776-2023
beezly.kiernan@ag.ny.gov

AFFIRMATION OF COMPLIANCE

Pursuant to the Rules of Practice of the New York Court of Appeals (22 N.Y.C.R.R.) § 500.13(c)(1), Beezly J. Kiernan, an attorney in the Office of the Attorney General of the State of New York, hereby affirms that according to the word count feature of the word processing program used to prepare this brief, the brief 1,270 words, which complies with the limitations stated in § 500.13(c)(1).



BEEZLY J. KIERNAN