

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ALBANY

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In the Matter of :  
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NEW YORK CIVIL LIBERTIES UNION, :  
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Petitioner, : Index No. \_\_\_\_\_  
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-against- :  
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NEW YORK STATE DEPARTMENT OF :  
CORRECTIONAL SERVICES, :  
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Respondent. :  
 :  
For a Judgment Pursuant to Article 78 :  
Of the Civil Practice Law and Rules :  
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**VERIFIED PETITION**

**PRELIMINARY STATEMENT**

1. This Article 78 proceeding pursuant to the N.Y. Freedom of Information Law (FOIL), Article 6 of the Public Officers Law, seeks to vindicate the right of the petitioner New York Civil Liberties Union (NYCLU) and of the public to access records held by the New York State Department of Correctional Services (DOCS) regarding the use of ion scanners on prison. Ion scanners are a form of technology DOCS uses to detect trace elements of certain drugs. Since DOCS began using ion scanners in its facilities, the NYCLU has received many complaints concerning the machine's accuracy and its propensity to trigger false positive results. Hoping to discover information that would shed light on this matter, the NYCLU sought records under FOIL regarding DOCS's use of this technology.

2. In response to the NYCLU's request, Respondent produced a single document demonstrating a superficial effort to comply with its statutory obligations. Indeed, the single record Respondent produced to Petitioner itself identifies many other records that are both plainly responsive to Petitioner's request and non-exempt under FOIL. Respondent has not provided these documents, has not offered any reason for its nondisclosure, and has not responded to Petitioner's administrative appeal or any attempts to follow up on that appeal. Petitioner therefore asks this Court to compel DOCS to comply with its statutory obligations and produce all responsive records.

### **VENUE**

3. Pursuant to C.P.L.R. §§ 7804(b) and 506(b), venue in this proceeding lies in Albany County, in the judicial district in which Respondent took the action challenged here and where the offices of Respondent is located.

### **PARTIES**

4. Petitioner New York Civil Liberties Union is a not-for-profit corporation that defends and promotes civil rights and civil liberties, and ensures government openness in New York. The NYCLU's mission is to defend civil liberties and civil rights in New York and to preserve and to ensure government openness. For over fifty years, the NYCLU has been involved in litigation and public policy on behalf of New Yorkers, fighting against discrimination and advocating for individual rights and government accountability. New York's Freedom of Information Law is a crucial vehicle in the organization's efforts to ensure the accountability of the government, monitor state and municipal agencies, learn about governmental policies and, when appropriate, challenge the legality of problematic policies.

5. Respondent New York State Department of Correctional Services (DOCS) is a state agency responsible for the confinement and rehabilitation of state prison inmates in New York. As part of

these duties, DOCS administers prison visitation systems throughout the state. DOCS is subject to the requirements of the Freedom of Information Law (“FOIL”).

## FACTS

### *Ion Scanning Technology in DOCS Facilities*

6. Beginning in at least 2003, DOCS has used ion scanning technology to screen visitors to DOCS facilities for exposure to drugs.

7. According to DOCS, the ion scanner is an electronic detection device that aims to identify minute traces of drugs on clothing, body parts, and other surfaces.

8. Under DOCS’s procedures for executing an ion scanning test, an ion scanner operator takes the hand-held scanning device and passes it over areas on the individual’s body, clothing, or personal items. The operator then puts the samples in the ion scan machine in an attempt to detect the presence of certain microscopic substances.

9. A positive test result may occur in any case where a person has come into contact with a tested-for substance, regardless of whether the person has used that substance or not, whether the contact has been inadvertent or intentional, or whether the person may be authorized, for example by a doctor’s prescription, to use the substance.

10. If a positive reading results, no further investigation is conducted into whether the individual actually possesses illegal drugs. Visitors do not receive a pat frisk or any other type of search after a positive test result, even if they request or consent to a more invasive scan.

11. A person who refuses to submit to the ion scanner is treated the same as someone who has a confirmed, positive test result.

12. If a visitor tests positive, he or she is not allowed to enter the facility.

13. DOCS personnel photograph the visitor and photograph the visitor's ID. These records are attached to the positive scanner results and distributed to prison superintendents and members of the ion scan team to identify the visitor during future visits.

14. Visitors that test positive or refuse to test will be subject to mandatory testing until three consecutive tests show negative results.

15. In the decade since DOCS began using ion scanners, the NYCLU has received many complaints concerning the machine's accuracy and, in particular, its propensity to trigger positive results based on the handling of non-contraband.

16. Given the significant personal and monetary hardships visitors endure in journeying to visit incarcerated friends and family members, it is unsurprising that some report taking burdensome measures to ensure they will not be turned away: avoiding cash transactions on the day of the visit, wearing freshly-purchased clothing, and even forgoing prescribed pain medication.

*Suspension of Ion Scanning Technology in Federal Bureau of Prisons' Facilities*

17. Complaints regarding the machine's inaccuracy were confirmed in April of 2008 when all Federal Bureau of Prisons (BOP) facilities suspended the use of any ion spectrometry drug detection equipment due to problems with the machines' software.

18. On October 2, 2009, BOP reinstated the ion scanning programming, but only under limited conditions and with changes in policy and equipment that BOP deemed "necessary to improve the overall effectiveness of the program."<sup>1</sup>

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<sup>1</sup> Among these changes, BOP upgraded its equipment to be "less susceptible to false alarms by pharmaceuticals." See Memorandum for All Chief Executive Officers (Oct. 2, 2009) (attached to Stoughton Aff. as Ex. 9). BOP also prohibited staff from testing visitor's hands ("Staff will only test the other suggested items ... such as the tops of pants pockets, waist area, pants cuff (or shoe area), personal identification, etc. This will virtually eliminate the possibility of false alarms caused by hand sanitizers, hand lotions, handling of prescription drugs, and nuisance contact of drugs from money, doorknobs, etc. ..."). *Id.* In further recognition of the capability for ion scanning equipment to produce false positives, BOP conditioned use of the equipment on a flexible visitor entry policy, stating:

An initial positive and second confirmation positive are not grounds for an immediate denial of a visit  
(cont'd)

*The NYCLU's FOIL Request*

19. On September 22, 2009, as a result of its ongoing concern regarding the accuracy of ion scanning machines and the impact of their use on New Yorkers seeking to visit loved ones who are in prison, the NYCLU filed a FOIL request seeking copies of records maintained by DOCS regarding the use of ion scanners to test prison visitors for narcotics.

20. Specifically the NYCLU requested:

(1) Policies and procedures governing the use of ion scanners on visitors to DOCS facilities, including but not limited to: (a) policies and procedures governing when, under what circumstances, for what reasons, and upon whom the ion scanners may be used; (b) records reflecting the calibration or settings of ion scanners operated by DOCS; (c) policies and procedures to be followed in the event of positive test results; and (d) any policies and procedures reflecting exemptions from ion scanning requirements or accommodations to ion scanning procedures for persons with medical conditions, disabilities, or other conditions;

(2) Records and reports reflecting assessment of the capabilities, limitations, accuracy or reliability of ion scanners, whether created by DOCS or created by third parties and received by DOCS, including but not limited to: (a) assessments of which substances the ion scanners can test for and to what level of specificity; (b) records concerning the possibility of "false positives," including the rate of false positives and the substances or activities that can cause false positives;

(3) Records related to complaints or grievances regarding ion scanners, including any responses to those complaints or grievances; and

(4) Policies and procedures governing the maintenance and usage of records related to individual ion scan tests and test results.

*DOCS's Incomplete Response to the NYCLU's FOIL Request*

21. On October 8, 2009, the NYCLU received an acknowledgment letter from DOCS stating that a response to its FOIL request would be provided by November 6, 2009.

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... Wardens should assess every situation in which a visitor produces a confirmed positive test on his/her own merit before reaching a final decision. Wardens possess broad discretion to require pat/visual searches as a prerequisite to visitation, controlled or non-contact visitation, or complete denial of visitation.

*Id.*

22. DOCS sent a second letter on November 10, 2009, further postponing its response to December 10, 2009.

23. Finally, more than two months after the NYCLU's original FOIL request, on November 27, 2009, DOCS sent a letter stating that it had 12 pages of responsive records available and sought advance payment of \$3.00.

24. Following payment on December 7, 2009, DOCS produced a single 12 page document titled "Overview of Department's Ion Scanning Procedures" on December 22, 2009.

25. Neither DOCS's November 27 letter nor its December 22 letter indicated that DOCS was denying the NYCLU's request on any grounds within the FOIL statute or that any records were withheld pursuant to any FOIL exemption.

26. That record, titled "Overview of Department's Ion Scanning Procedures," briefly describes ion scanning technology and provides a broad overview of department procedures and protocols for the Ion Scanner Unit. It also cites to numerous other documents and records concerning ion scanners that were not made available by DOCS.

*The NYCLU's Administrative Appeal and DOCS's Complete Failure to Respond*

27. As a result of the incomplete response and DOCS's failure to explain its nondisclosure, on January 21, 2010, the NYCLU administratively appealed the FOIL request as having been partially denied.

28. On March 15, 2010, after having received no response from DOCS for nearly two months, the NYCLU sent a letter requesting that DOCS promptly respond to its administrative appeal in order to avoid an Article 78 proceeding.

29. To date, DOCS has not responded to this letter.

**CAUSE OF ACTION: ARTICLE 78 REVIEW OF WRONGFUL DENIAL OF FOIL**

**REQUEST**

30. Article 78 is the appropriate method for review of agency determinations concerning FOIL requests.

31. Petitioner, the NYCLU, has a clear right to information about the use of ion scanning technology in DOCS facilities.

32. Respondent has not produced the information sought by the NYCLU.

33. Respondent has not provided any justification for its non-disclosure of the information sought by the NYCLU.

34. Respondent has not responded to Petitioner's administrative appeal or any attempts to follow up on that appeal.

35. Petitioner NYCLU exhausted its administrative remedies when it appealed DOCS's denial of its FOIL request and did not receive any response from DOCS. Petitioner has no other remedy at law.

**REQUESTED RELIEF**

WHEREFORE, Petitioner seeks judgment:

(1) Pursuant to C.P.L.R. § 7806, directing Respondent to comply with their duty under FOIL to perform an adequate search for the records requested in the Petitioner's September 22, 2009 FOIL request and to disclose all portions of the responsive records not subject to any exemption or other privilege;

(2) Awarding attorneys' fees and reasonable litigation costs as allowed under New York Public Officers Law § 89; and

(3) Granting such other and further relief as the Court deems just and proper.

Respectfully Submitted,



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COREY STOUGHTON  
ARTHUR N. EISENBERG  
CHRISTOPHER DUNN  
KATHARINE BODDE  
New York Civil Liberties Union Foundation  
125 Broad Street, 19<sup>th</sup> Floor  
New York, NY 10004  
(212) 607-3300

Dated: New York, NY  
May 19, 2010



VERIFICATION

STATE OF NEW YORK    )  
                                  ) ss:  
COUNTY OF NEW YORK )


Corey Stoughton, an attorney admitted to practice in the State of New York, affirms pursuant to C.P.L.R. § 2106 under the penalties of perjury:

1. I am the lead attorney for and an employee of the Petitioner in the within proceeding. I make this Verification pursuant to C.P.L.R. § 3020(d)(3).
2. I have read the attached Verified Petition and know its contents.
3. All of the material allegations of the Verified Petition are true to my personal knowledge, and all statements in the Verified Petition are true to my personal knowledge or upon information and belief. As to those statements that are based upon information and belief, I believe those statements to be true.

  
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COREY STOUGHTON

Dated: New York, NY  
May 19, 2010

Sworn and subscribed to me  
this 19<sup>th</sup> day of May 2010

  
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NOTARY PUBLIC

**CORINNE A. CAREY**  
Notary Public, State of New York  
No. 02CA6039440  
Qualified in Kings County  
Commission Expires April 17, 2014