

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the Matter of,

NEW YORK CIVIL LIBERTIES UNION,

Petitioner,

-against-

NEW YORK CITY DEPARTMENT OF
CORRECTION,

Respondent.

Index No.: _____

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

**PETITIONER’S MEMORANDUM OF LAW IN SUPPORT OF
THE VERIFIED PETITION**

Respectfully submitted,

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Dated: October 29, 2021
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PRELIMINARY STATEMENT

In the summer of 2020, high-profile incidents of police killings of Black people and other egregious forms of police violence nationwide sparked a new wave of public protest and dialogue about misconduct and accountability within law enforcement. As a result, the New York State legislature repealed Civil Rights Law Section 50-a, known to many as New York’s “secrecy law” because, for decades, it insulated a wide-range of law enforcement misconduct and disciplinary records from public access. This secrecy had a damaging effect on marginalized communities, particularly communities of color, which are disproportionately impacted by misconduct in law enforcement, as well as a damaging effect on the public’s trust in the government’s ability to hold its law enforcement agencies and officers accountable for abuse and misconduct.

While much of the attention around the repeal of section 50-a focused on misconduct and disciplinary records held by police departments, the public’s call for a new era of transparency and accountability applied with equal force to corrections officers and agencies. And rightly so. Unlike police officers, corrections officers exclusively operate outside of the public arena, while suffering from many of the same pressing institutional problems plaguing police departments and other law enforcement agencies—reports of systemic violence and abuse and high levels of impunity that disproportionately and gravely harm people from marginalized communities.

Thus, following section 50-a’s repeal, on April 30, 2021, the New York Civil Liberties Union submitted a detailed yet narrow request under the Freedom of Information Law to the New York City Department of Correction for records relating to the department’s misconduct and disciplinary databases. Specifically, the request sought electronic databases that the NYC DOC maintains to collect and organize reports of employee misconduct and discipline, including

at least one database that is partly publicly available, as well as records identifying and describing the databases. In response, the NYC DOC violated its obligations under FOIL by failing to respond to the request within a reasonable amount of time, failing to produce a single record, and failing to respond to the NYCLU's subsequent administrative appeal.

In light of the current crisis at the NYC DOC facilities on Rikers Island, the respondent's failure to adhere to its obligations under FOIL comes at a time when the public's interest in information on how the NYC DOC operates has reached a critical point. The chaotic and dysfunctional situation at Rikers Island is one in which individuals are subjected to grossly inhumane conditions, including egregious violence by staff and some detained individuals who operate in the absence of staff intervention, and deteriorating facilities that help facilitate such violence and put the health and well-being of detained individuals at high risk.¹ Thus, the NYC DOC's failure to respond to the request undermines FOIL and the repeal of section 50-a's purpose of increased transparency, as well as the public's enormous interest in monitoring and holding accountable its correctional institutions.

Having exhausted administrative remedies, the NYCLU now seeks judicial relief to compel the NYC DOC to respond to the FOIL request and produce promptly all responsive records. The NYCLU also seeks an award of attorney's fees and costs in light of the NYC DOC's failure to adhere to FOIL's statutory requirements.

¹ See Aguirre Affirmation, Exhibit I, Jan Ransom, et al., *Inside Rikers: Dysfunction, Lawlessness, and Detainees in Control*, NY Times, Oct. 11, 2021.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A. The Repeal of Section 50-a

Following the murder of George Floyd by a Minneapolis police officer, nationwide protests erupted, prompting public outrage and dialogue around the issues of violence, misconduct, and a lack of accountability within law enforcement. As a result, lawmakers across the country began to reexamine the public's interest in changing a culture of lack of transparency and accountability in law enforcement. New York State was no exception, especially given the long-standing criticism of New York's strict Civil Rights Law Section 50-a ("section 50-a"), which shielded a broad swath of law enforcement misconduct and disciplinary records from public disclosure, including those pertaining to corrections officers. In response, New York made the landmark decision to repeal the law in June 2020 (*see* Civil Rights Law § 50-a, repealed by 2020 NY Senate-Assembly Bill S8496, A10611; *Schenectady Police Benevolent Assn. v. City of Schenectady*, No. 2020-1411, 2020 WL 7978093, *6 [Sup Ct, Schenectady County, Dec. 29, 2020] ["It strikes the Court that the legislature intended not just a change in law, rather, a change in culture."]).

Prior to the repeal, the law "had been expanded in the courts to allow . . . departments to withhold from the public virtually any record that contains any information that could conceivably be used to evaluate the performance of a[n] . . . officer" and was described by many as the most secretive in the country (*see* Committee on Open Government, 2014 Annual Report 3–6, available at <https://video.dos.ny.gov/coog/pdfs/2014AnnualReport.pdf> [last accessed Oct. 28, 2021]; Senate Bill S8496, *Justification*, <https://www.nysenate.gov/legislation/bills/2019/s8496> [last accessed Oct. 28, 2021] ["S8496 Justification"]). Though many of these legal developments had occurred in the context of police

records, the law applied equally in other law enforcement contexts, including corrections, and lawmakers leading the section 50-a repeal efforts recognized the need for transparency in law enforcement generally (*see, e.g.*, S8496 Justification [stating that the public’s inability to access “complaints or findings of law enforcement misconduct” was the primary purpose behind the repeal]). Consequently, when the bill was signed into law, New York State effected a complete rejection of the prior regime of default categorical secrecy within New York’s law enforcement agencies. (*See id.*)

Since the repeal, some law enforcement agencies have published narrow sets of data and records that were previously covered by section 50-a. The NYC DOC itself maintains a public database, published in March of 2021, related to a narrow universe of disciplinary records that appear to cover only substantiated complaints of misconduct. In addition to omitting non-substantiated allegations, the NYC DOC’s website indicates that the public database does not include records related to cases involving drug smuggling or sexual violence and only covers cases resolved in 2019 and 2020 (*see* New York City Dept. of Corrections, Statistics and Compliance, *Uniform Staff Discipline Reports*, <https://www1.nyc.gov/site/doc/about/statistics-and-compliance.page> [last accessed Oct. 28, 2021]). Long-standing issues within the NYC DOC, including years-long delays in the resolution of complaints, issues of impunity, and a lack of consistent corrective disciplinary action imply a large universe of unresolved and unsubstantiated complaints within the NYC DOC (*see, e.g.*, Steve Martin et al., Eleventh Report of the *Nunez* Independent Monitor 221-258 [May 11, 2021], available at https://www1.nyc.gov/assets/doc/downloads/pdf/11th_Monitor_Report.pdf [last accessed Oct. 28, 2021] “[T]he lack of timely accountability allows Staff to act with impunity and the culture of violence to persist.”). Thus, in all likelihood, the NYC DOC’s public database covers only a

small portion of the NYC DOC's misconduct and disciplinary records, and any non-published internal version of that same database could reveal a great deal about the numbers of unresolved, unsubstantiated, or abandoned misconduct complaints that have yet to see the light of day.

B. Background of the Petition

On April 30, 2021, following the publication of the NYC DOC's 2019 and 2020 databases, the NYCLU sent a FOIL request to the NYC DOC's Foil Officer seeking four categories of records relating to those databases—plus any other similar databases of misconduct complaints and discipline maintained by the agency:

1. Documents sufficient to identify all databases maintained by or on behalf of the Department that include information about (a) complaints or reports of misconduct against Department employees, or (b) discipline of Department employees in response to a complaint or set of complaints.
2. For each database identified in request 1 (above), please provide any documents that include the following:
 - a. A description of the database's structure or format;
 - b. A description of each field or column in the database;
 - c. An explanation of all abbreviations or acronyms in the database.
3. Any databases maintained by or on behalf of the Department that include information about complaints or reports of misconduct against Department employees, including the following data regarding each complaint or report of misconduct:
 - a. The name, position, and duty station of the Department employee;
 - b. The type of complaint (e.g. use of force, discourtesy, racial profiling or bias, etc.);
 - c. The date and location of the alleged incident that is the subject of the complaint or report;
 - d. Whether the complaint or report of misconduct was investigated;
 - e. The division of the Department or the name of the entity that investigated the complaint or report;
 - f. What the outcome of the investigation was (e.g. substantiated/found to be true and not compliant with policy; exonerated/found to be true and compliant with policy; unfounded/found to be untrue; unsubstantiated/insufficient evidence to determine truth or falsity or compliance with policy); and
 - g. For each substantiated complaint, whether the investigation resulted in the

initiation of a disciplinary process, any disciplinary settlement, or the imposition of discipline.

4. Any databases maintained by or on behalf of the Department that include information about discipline of Department employees in response to a complaint or set of complaints, including the following data regarding each instance in which a disciplinary process was initiated other than for a technical infraction that did not involve a member of the public:
 - a. The name, position, and duty station of the Department employee;
 - b. The type of disciplinary charges (e.g. use of force, discourtesy, racial profiling or bias, etc.);
 - c. The date and location of the alleged incident that is the subject of the disciplinary charges;
 - d. The outcome of the disciplinary charges (e.g. sustained, not sustained, settled); and
 - e. The discipline, if any, imposed (e.g. termination, suspension, loss of pay or vacation days, admonition).

(Aguirre Affirmation, Exhibit A, FOIL Request by the NYCLU dated April 30, 2021 [“FOIL Request”].)

On May 5, 2021, the NYC DOC acknowledged the NYCLU’s FOIL request and set an expected response date of June 7, 2021² (Aguirre Affirmation, Exhibit B, FOIL Request Acknowledgment dated May 5, 2021 [“Acknowledgment Letter”]).

On June 3, 2021, the NYC DOC provided an “interim response” to the FOIL request seeking an additional two months, until August 2021, to respond to the request (Aguirre Affirmation, Exhibit D, NYC DOC Interim Response dated June 3, 2021 [“Interim Response”]).

On June 10, 2021, the NYCLU timely filed an administrative appeal in accordance with Public Officers Law 89 [4] [a] (Aguirre Affirmation, Exhibit E, NYCLU Administrative Appeal Letter dated June 10, 2021 [“Administrative Appeal Letter”]). The appeal noted that the proposed

² The acknowledgement letter also sought clarification on two discrete aspects of the request, which the NYCLU provided in two follow up emails dated the same day (Aguirre Affirmation, Exhibit C, NYCLU Emails Clarifying FOIL Request).

response date, in August 2021,³ which was about three months after the May 5, 2021 date of acknowledgment, was not reasonable under the circumstances “[g]iven that the request is sufficiently narrowed to existing *electronic* databases that the Department maintains or has access to.” (*Id.* [emphasis in original]).

On June 22, 2021, after the NYCLU contacted the NYC DOC to request an acknowledgement and the status of the administrative appeal, the NYC DOC requested that the appeal be submitted to Adjuwa Thomas and provided an email for Ms. Thomas (*see* Aguirre Affirmation, Exhibit F, NYC DOC June 22, 2021 Response Email). The NYCLU submitted the appeal to Ms. Thomas, as directed, that same day (Aguirre Affirmation, Exhibit G, NYCLU Email to Adjuwa Thomas dated June 22, 2021). To date, the NYCLU has received no response to its June 22 appeal.

The NYC DOC also failed to provide any further response in August 2021, the timeframe it originally proposed as a deadline to respond to the NYCLU’s FOIL request, or at any point thereafter.

Having exhausted administrative remedies, the NYCLU files this Petition pursuant to Article 78 of New York’s Civil Practice Law and Rules seeking immediate production of responsive records as well as attorneys’ fees and costs.

ARGUMENT

I. THE NYC DOC VIOLATED FOIL BY FAILING TO PRODUCE RECORDS OR RESPOND TO THE APPEAL WITHIN THE STATUTORY TIME.

Under FOIL, an agency responding to a FOIL request may not ignore a request or unreasonably delay its response (*see* Public Officers Law § 89 [3] [a]). Here, the NYC DOC’s

failure to provide any response to the NYCLU's appeal—and its failure to produce any responsive records before or after its own self-imposed deadline—constitute an unwarranted denial of the NYCLU's request and undermine the purpose of FOIL and the repeal of section 50-a. This Court should order the NYC DOC to immediately provide responsive records.

A. The NYC DOC Violated FOIL By Failing to Respond to the NYCLU's Administrative Appeal Within the Statutorily Mandated Period.

The NYC DOC's failure to respond to the NYCLU's administrative appeal—now over three months past the statutory deadline to do so—constitutes a denial of the appeal (*see* Public Officers Law § 89 [4] [a]; 21 NYCRR 1401.7[f] [“A failure to determine an appeal within 10 days of its receipt by granting access to the records sought or fully explaining the reasons for further denial in writing shall constitute a denial of the appeal.”]; *Council of Council of Regulated Adult Liquor Licensees v City of New York Police Dept.*, 300 AD2d 17, 18-19 [1st Dept 2002] [“Petitioners exhausted all administrative remedies when, after submitting their appeal of the Department's initial denial of their request, they received no reply from the Department within the statutorily mandated 10-day response period.”]). The NYCLU is, thus, entitled to bring this action in state court (*see* Public Officers Law § 89 [4] [b].).

B. The NYC DOC's Failure to Provide a Threshold Response to the NYCLU's Request Violates FOIL.

The NYC DOC separately and independently failed to meet its obligations under FOIL by failing to respond to the NYCLU's request within a reasonable amount of time and by failing to adhere even to its own self-imposed deadline. In response to a written request for records, “an agency must either disclose the record sought, deny the request and claim a specific exemption to disclosure, or certify that it does not possess the requested document and that it could not be located after a diligent search” (*Legal Aid Socy. v New York State Dept. of Corr. & Community*

Supervision, 105 AD3d 1120, 1121 [3d Dept 2013] [quoting *Matter of Beechwood Restorative Care Ctr. v Signor*, 5 NY3d 435, 440-441 [2005]]; *see also* Public Officers Law § 89 [3] [a]). An agency is required to respond to a FOIL request within five business days, or provide a statement of the approximate date, which should be reasonable under the circumstances, when such request will be granted or denied (Public Officers Law § 89 [3] [a]). Here, leaving aside the reasonableness of the NYC DOC's original proposed deadline of August 2021, or three months after the initial acknowledgment,⁴ the NYC DOC failed to provide a response by that self-imposed deadline, thus failing to meet its obligations under FOIL.

The failure of an agency to comply with its own imposed deadlines constitutes a denial of the request (*see* 21 NYCRR 1401.5 [e]; *Kohler-Hausmann v New York City Police Dept*, 133 AD3d 437, 437 [Sup Ct, New York County 2015]). It has now been nearly three months since past the NYC DOC's proposed deadline in August 2021, and the NYC DOC has neither produced responsive records nor followed up on the NYCLU's FOIL request in any manner. By constructively denying the NYCLU's request without making threshold determinations required under FOIL (*see Legal Aid Socy. v New York State Dept. of Corr. & Community Supervision*, 105 AD3d 1120, 1121 [3d Dept 2013]; *see also* Public Officers Law § 89 [3] [a]) or producing a single record, the NYC DOC has flouted its obligations under FOIL and undermined the important policy goals of FOIL and the repeal of section 50-a. Therefore, this Court should order the NYC DOC to produce promptly all records responsive to the request.

⁴ The unreasonableness of that proposed deadline was the subject of the NYCLU's administrative appeal (*see* Administrative Appeal Letter), which the NYC DOC ignored.

II. THE NYCLU IS ENTITLED TO ATTORNEYS' FEES.

The petitioner respectfully requests an award of reasonable attorneys' fees and litigation costs on the ground that the NYC DOC had no reasonable basis for ignoring the NYCLU's appeal, categorically denying access to the requested records, and failing to produce any responsive records (Public Officers Law § 89 [4] [c] [ii]).

Courts are required to assess reasonable attorneys' fees and costs when a party has "substantially prevailed" and the agency had "no reasonable basis for denying access to the records in dispute." (*Id.*) If this Court orders the NYC DOC to disclose requested documents in response to this petition, or if the NYC DOC voluntarily provides documents after the filing of the petition, the NYCLU will have "substantially prevailed" for the purposes of this provision (*see Madeiros v. New York State Educ. Dept.*, 30 NY3d 67, 79 [2017] [finding that the petitioner "substantially prevailed" when the respondent had made "no disclosures, redacted or otherwise, prior to petitioner's commencement of [a] CPLR article 78 proceeding"]; *Powhida v. City of Albany*, 147 AD2d 236, 239 [3d Dept 1989] [finding that the petitioner substantially prevailed when it was "the initiation of this proceeding which brought about the release of the documents"]). With the NYC DOC having made no disclosures to the NYCLU's request, should the NYCLU obtain records it sought, the NYCLU would be statutorily entitled to its attorney's fees and costs.

CONCLUSION

For the foregoing reasons, the petitioner, the NYCLU, respectfully requests that the Court order the New York City Department of Correction to abide by Article 6 of the New York Public Officers Law and disclose immediately the records the petitioner requested in its April 30, 2021 FOIL request.

Respectfully Submitted,



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CERTIFICATION PURSUANT TO 22 NYCRR § 202.8-b

I, Guadalupe V. Aguirre, an attorney duly admitted to practice law before the courts of the State of New York, hereby certify that this Memorandum of Law complies with the word count limit set forth in 22 NYCRR § 202.8-b because it contains 2971 words, excluding the parts exempted by § 202.8-b(b). In preparing this certification, I have relied on the word count of the word-processing system used to prepare this affidavit.

Dated: October 29, 2021
New York, New York



Guadalupe V. Aguirre