SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

NEW YORK CIVIL LIBERTIES UNION,

Petitioner,

vs.

NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION

Respondent.

INDEX NO: _____

MEMORANDUM OF LAW IN SUPPORT OF VERIFIED PETITION

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PRELIMINARY STATEMENT

This proceeding concerns the New York State Department of Corrections and Community Supervision's ("DOCCS") improper partial denials of the New York Civil Liberties Union's (the "NYCLU") October 16, 2020 Freedom of Information Law ("FOIL") request (the "Request") seeking records related to DOCCS's disciplinary processes. The requested records must be produced—following the Legislature's June 2020 repeal of Civil Rights Law Section 50-a and expansion of FOIL, the purpose of which was to bring about "not just a change in law but, rather, a change in the culture." *Schenectady Police Benevolent Ass'n v. City of Schenectady*, No. 2020-1411, 2020 WL 7978093, at *6 (Sup. Ct., Schenectady Cnty. Dec. 29, 2020) ("*Schenectady PBA*").

The Request sought, *inter alia*, records pertaining to officer discipline, use of force, disciplinary actions taken against individuals who are incarcerated or on parole, complaints by individuals who are incarcerated or on parole, civilian complaints, DOCCS's Office of Special Investigations, investigative reports, diversity, policies, trainings, and collective bargaining agreements to which DOCCS has been a party from January 1, 2000 to October 16, 2020. (*See* Exhibit 2). More than two years later, DOCCS has provided certain records in response to 34 Requests—but has also issued categorical denials and blanket withholdings in response to 10 Requests, including unsupported denials of many key documents related to officer misconduct investigations and discipline.

DOCCS's denials and redactions impermissibly fail to describe the full universe of responsive records identified, the connection between redactions and their justifications, and any particularized justification for many of the agency's withholdings. DOCCS sent the NYCLU rolling productions without indicating how it was searching for and reviewing additional records or to which portions of the Request searches related. The NYCLU attempted on seven different

occasions to meet and confer with DOCCS in order to provide clarity on Requests to which DOCCS expressed objections, narrow the scope of Requests, and help prioritize Requests to alleviate any burden. DOCCS declined these offers.

While the NYCLU is appreciative of the records DOCCS has turned over and the efforts involved in locating and producing these documents, FOIL does not permit DOCCS's use of categorical recitations of FOIL exemptions to deny Requests in part or in full, its refusal to provide specific and particular justifications for its denials and redactions, and its assertion that certain Requests were unduly burdensome or not reasonably described, despite the NYCLU's dismissed attempts to narrow and clarify these Requests. The NYCLU has now exhausted its administrative remedies and has filed a Verified Petition pursuant to Article 78 of the New York Civil Practice Law & Rules seeking the production of all responsive DOCCS records—on a reasonable rolling timeline, with only those redactions permitted by FOIL and properly justified by DOCCS—as well as attorney's fees and costs.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

I. The Repeal Of Section 50-a

In New York, Section 50-a had for years categorically prevented the disclosure of law enforcement misconduct records to the public. (N.Y. Civ. Rights L. § 50-a [repealed June 12, 2020]). In the summer of 2020, responding to calls for greater police accountability and transparency from the public, the New York State Legislature approved the #Repeal50a Bill (S896/A10611) and the Governor signed the bill into law on June 12, 2020. The same day, the Legislature also amended Section 86(6) of FOIL by adding "law enforcement disciplinary records" to the "records of government" presumptively subject to disclosure under the law. *See* S.8496, 243rd Leg., Reg. Sess. § 2 (N.Y. 2020); N.Y. Pub. Off. L. § 86(6). In addition, the Legislature amended Section 87 of FOIL to add a detailed redaction scheme mandating the redaction of certain

personal information in a "law enforcement disciplinary record" (officer addresses, medical information, etc.) and permitting the redaction of material related to a narrow range of "technical infractions." N.Y. Pub. Off. Law §§ 87(4-a)-(4-b), 89(2-c).

II. The NYCLU's FOIL Request To DOCCS

On October 16, 2020, the NYCLU submitted the Request to DOCCS in connection with its investigation of DOCCS's discipline and misconduct investigation practices previously shielded by Section 50-a, including records that could reveal racially biased or otherwise discriminatory practices. The NYCLU sought, across 44 discrete portions, *inter alia*, records pertaining to officer discipline, use of force, disciplinary actions taken against individuals who are incarcerated or on parole, complaints by individuals who are incarcerated or on parole, civilian complaints, DOCCS's Office of Special Investigations, investigative reports, diversity, policies, trainings, and collective bargaining agreements to which DOCCS has been a party from January 1, 2000 to October 16, 2020. (*See* Exhibit 2).

On a rolling basis, DOCCS provided twenty-six partial responses to the Request; while stating it was "continuing to search for and review additional records potentially responsive to [the NYCLU's] request." (*See, e.g.*, Exhibit 13). DOCCS did not indicate how it was searching for additional information or to which portions of the Request the searches related. The NYCLU sent seven letters requesting to meet and confer with DOCCS to clarify any questions DOCCS may have had, address any of DOCCS's objections, negotiate the scope of DOCCS's review, and help alleviate any burden DOCCS identified. (*See* Exhibits 8, 11, 14, 29, 45, 48, and 50). DOCCS declined these offers, instead stating in its response letters, beginning with Partial Response 3, that the NYCLU would be "given an opportunity to appeal after the final production of documents." (*See, e.g.*, Exhibit 13).

The NYCLU received its final response from DOCCS on August 1, 2022. While the NYCLU appreciates and acknowledges the effort DOCCS put in to provide the records it has produced thus far, it objects to DOCCS's use of categorical assertions of FOIL exemptions to withhold documents in whole or in part, failure to use specific and particularized reasons for doing so, and improper claims that Requests were unduly burdensome or unreasonably described despite the NYCLU's attempts to clarify Requests and/or narrow the scope and provide prioritizing information that DOCCS improperly refused to acknowledge. In addition, many of DOCCS's responses did not indicate which part of its response was tied to which Request, making it impossible for the NYCLU to formulate proper objections. (*See, e.g.*, Exhibit 21) (stating DOCCS was responding to Requests 8, 9, 11, 12, 13, and 22, but failing to explain whether each of the various objections applied to all of these Requests or only specific Requests). In total, DOCCS provided certain records in response to 34 Requests and withheld records in response to 10 Requests.

The NYCLU does not dispute that certain redactions and withholdings are appropriate—indeed, as an example, there is no dispute that the NYCLU does not seek and DOCCS should redact the names and identifying information of individuals in DOCCS custody or on parole. However, because DOCCS's denials and redactions impermissibly fail to describe the full universe of responsive records identified, the connection between redactions and their justifications, or any particularized justification for many of the agency's withholdings, the NYCLU objected and continues to object. (*See* Exhibit 52) (detailing DOCCS's various withholdings, redactions, and objections in a chart).

The parties' primary disputes, though, are summarized as follows:

In response to Request No. 1 for officer disciplinary files, DOCCS did not provide any underlying files, citing vagueness and overbreadth, but provided a 60-page spreadsheet tracking thousands of officer disciplinary proceedings with all officer names improperly fully redacted. (*See* Exhibits 34 and 57). DOCCS did not respond to the NYCLU's letter clarifying and offering to narrow the Request or otherwise address any burden. (*See* Exhibit 48).

In response to Request No. 3 for records of investigations concerning officers, DOCCS issued a blanket denial, alternately asserting that the Request was either too broad or too narrow. DOCCS did not respond to the NYCLU's attempts to clarify the Request using departmental directives, or its attempts to narrow the Request to prioritize certain types of records. (*See* Exhibits 18 and 48).

In response to Request No. 12 for records concerning grievances filed by incarcerated or paroled individuals, DOCCS categorically stated that certain records were exempt pursuant to FOIL's "unwarranted invasion of privacy" exemption, Section 87(2)(b), without explaining why it could not redact such records or stating whether responsive materials exist. (*See* Exhibit 16).

In response to Request No. 5 for records related to administrative or disciplinary hearing policies concerning employee misconduct or disciplinary action of officers, DOCCS redacted records without providing specific and particularized information as to what was being redacted and why, and provided records with large-scale redactions that made it impossible for the NYCLU to determine what had been redacted to form a proper response. (*See, e.g.*, Exhibits 10 and 56).

In response to Request No. 10 for policies concerning discipline taken by officers against incarcerated or paroled individuals, DOCCS objected that the term "disciplinary action"

was unclear, despite its plain language, and then failed to respond to the NYCLU's attempt to provide clarity on this term *via* letter. (Exhibit 22). DOCCS also objected to Request No. 10 because it would be "impossible to locate and provide 20 years of any and all directions relating to the multitude of broad topics sought," but did not acknowledge the NYCLU's attempt to narrow this Request to a shorter 5-year timespan. (*See* Exhibits 22 and 48).

The NYCLU filed an administrative appeal with DOCCS on September 13, 2022. (*See* Exhibit 52). On September 28, 2022, DOCCS's Acting FOIL Appeals Officer ("Appeals Officer") denied the appeal (the "Denial"). (*See* Exhibit 53). On January 9, 2023, and January 23, 2023, the NYCLU informed DOCCS of new binding case law that stood in opposition to DOCCS's assertions and requested DOCCS inform the NYCLU whether it would continue to stand on its prior responses or agree to produce additional records that were previously withheld or overly redacted, and offered to enter a short tolling agreement to provide DOCCS with time to consider its response. (*See* Exhibits 54 and 55). The NYCLU followed up on this request *via* telephone on January 26 and 27, 2023. DOCCS did not respond. Having exhausted its available administrative remedies, the NYCLU filed this Article 78 Petition seeking the production of all responsive DOCCS records—on a reasonable rolling timeline, with only those redactions permitted by FOIL and properly justified by DOCCS—as well as attorneys' fees and costs.

ARGUMENT

While DOCCS has provided the NYCLU with some responsive records, it has not met its burden to prove that certain records it withheld and/or redacted were proper. DOCCS has no valid basis to withhold production of the requested records in which it asserted categorical assertions of FOIL exemptions, applied redactions without providing particularized and specific reasons for doing so, and claimed Requests were unduly burdensome or not reasonably described while ignoring the NYCLU's proposed narrowing and clarifications.

Government records are "presumptively open for public inspection [] unless they fall within one of the enumerated exemptions of [FOIL]." *Gould v. N.Y.C. Police Dep't*, 89 N.Y.2d 267, 274-75 (1996). The burden is on the agency to justify any denial or redaction based on a FOIL exemption, with exemptions construed narrowly, and "those agencies [invoking the exemptions] 'must articulate particularized and specific justification for not disclosing requested documents.'" *N.Y. Civ. Liberties Union v. City of Syracuse*, 210 A.D.3d 1401, 1403 (4th Dep't 2022) (citation omitted). Because DOCCS has not met this burden, it should be ordered to produce the records in dispute, redacted only as permitted by statute, on a reasonable rolling timeline, and with remaining redactions or withholdings properly supported by a particularized and specific justification.

I. DOCCS's Conclusory Assertions Cannot Justify The Denial Of Access To Records

DOCCS improperly withheld records by using generic invocations of FOIL exemptions in response to Requests for disciplinary records regarding officers, disciplinary actions taken against individuals who are incarcerated or on parole, the Correctional Emergency Response Team, crisis intervention activities, and training materials. (*See* Exhibits 16, 17, 18, 21 and 43).[1] DOCCS's purported justifications do not meet its "burden of demonstrating that the requested material falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access" and therefore must be rejected. *Cap. Newspapers Div. of Hearst Corp. v. Burns*, 67 N.Y.2d 562, 578 (1986).

DOCCS concedes that "FOIL requires that the agency provide a particularized and specific justification for such denial" but contends that "FOIL does not require DOCCS to

[1] DOCCS withheld records responsive to these Requests based on claims including personal privacy, public safety, and the intra-agency exemptions.

specifically identify each withheld document and the reason for denial." (Exhibit 53). This is incorrect. In the context of two similar requests for law enforcement disciplinary records—also submitted by the NYCLU in the wake of Section 50-a's repeal and involving voluminous sets of officer disciplinary files covering the same time period as the Request here—the Fourth Department Appellate Division recently **rejected** two lower court rulings that held that "Public Officers Law § 87(2)(b) allow[ed] respondents to categorically withhold the law enforcement disciplinary records." *N.Y. Civ. Liberties Union v. City of Syracuse*, 210 A.D.3d 1401, 1404 (4th Dep't Nov. 10, 2022); *see also N.Y. Civ. Liberties Union v. City of Rochester*, 210 A.D.3d 1400, (4th Dep't 2022).[2] In *Syracuse*, the petitioner sought law enforcement disciplinary records of "unsubstantiated" and "open" complaints against officers. *See Syracuse*, 210 A.D.3d at 1402. The respondents categorically withheld requested documents from disclosure based on a claim that the documents fell within the personal privacy exemption of Public Officer's Law § 87(2)(b). *Id.* The Fourth Department rejected this blanket withholding of requested documents, stating that "respondents must review *each record* responsive to petitioner's FOIL request and determine whether any portion of the specific record is exempt as an invasion of personal privacy," then redact and turn over the remainder. *Syracuse*, 210 A.D.3d at 1405-05 (emphasis added). Without more, DOCCS has not met its high burden to prove the requested documents are exempt from disclosure under FOIL in whole or in part.

[2] These cases are binding on the Albany Supreme Court in the absence of a contrary Court of Appeals or Third Department precedent. *See In re Police Benevolent Ass'n of the N.Y. State Troopers, Inc.*, No. 907274-21, N.Y. Misc. LEXIS 8031 at *19 (Sup. Ct. Albany Cnty. Nov. 23, 2022); *see also Mountain View Coach Lines, Inc. v. Storms*, 102 A.D.2d 663, 664 (1984) (explaining trial courts must follow precedent set by Appellate Divisions of other departments until the Court of Appeals or the Appellate Division within that department issue a contrary ruling).

A. The "Unwarranted Invasion of Privacy" Exemption Cannot Justify DOCCS's Categorical Denials

DOCCS justifies its blanket withholding of material associated with officer disciplinary files, complaints and grievances filed by incarcerated or paroled individuals, disciplinary actions taken against incarcerated or paroled individuals, parole revocation hearings, and crisis intervention activities in response to Request Nos. 1, 8, 11-13, 15-17, 22, and 30 based on a conclusory invocation of Public Officers Law § 87(2)(b) and an assertion that "disclosure would constitute an unwarranted invasion of personal privacy without a signed authorization from the subject individuals." (*See, e.g.*, Exhibit 21). DOCCS's denials must fail both because (i) they paraphrase the statutory language of the exemptions without describing the records withheld or providing any factual basis for its conclusory assertions that disclosure would constitute an unwarranted invasion of personal privacy," *McFadden v. Fonda*, 148 A.D.3d 1430, 1433 (3d Dep't 2017), and (ii) the substance of DOCCS's argument cannot be reconciled with the statute and binding case law.

To the extent that DOCCS is invoking the personal privacy of its officers to shield the release of misconduct investigations and disciplinary records as a blanket matter, the Fourth Department in *Syracuse* and *Rochester* squarely rejected that position as inconsistent with FOIL's plain language as amended in 2020 and with the longstanding requirement that an agency consider redactions that would address any legitimate privacy concerns instead of blanket withholding. *See Syracuse*, 210 A.D.3d at 1405 ("[T]o the extent that any portion of a law enforcement disciplinary record . . . can be disclosed *without* resulting in an unwarranted invasion of personal privacy, respondents must release the non-exempt, i.e. properly redacted, portion of the record to petitioner."); *Rochester*, 210 A.D.3d at 1401 (same).

And—separate from DOCCS's blanket withholdings of underlying disciplinary files—to the extent that DOCCS appears to have redacted all officer names associated with disciplinary investigations in the spreadsheet produced in response to Request No. 1 and attached as Exhibit 57, such a categorical redaction cannot be justified by the generic privacy exemption in light of the more specific plain language of the amended FOIL defining the "law enforcement disciplinary records" subject to presumptive disclosure as including "the name of the officer complained of or charged." N.Y. Pub. Off. Law Section 86(6); *see also N.Y. Civ. Liberties Union v. N.Y.C. Dep't of Correction*, No. 159851/2021, 2022 WL 1156208, at *1 (Sup. Ct., NY County, Apr. 19, 2022) (ordering NYC Department of Corrections to produce a similar spreadsheet, presuming that the officer "name, position, and duty station" columns would not be withheld, subject only to limited redactions that could be specifically justified).

To the extent DOCCS is invoking the personal privacy of individuals who are incarcerated or paroled, the NYCLU is not seeking any material that would identify those individuals and is interested only in material that has been redacted to avoid identifying incarcerated or paroled individuals. With such a qualification, DOCCS cannot invoke the personal privacy exemption to justify its blanket withholdings, since FOIL states that "disclosure shall not be construed to constitute an unwarranted invasion of personal privacy . . . when identifying details are deleted." N.Y. Pub. Off. L. § 89(2)(c)(i). DOCCS's insistence that it cannot "release records without an authorization from the individuals involved in the incident[,] [w]ithout more, . . . is patently inadequate." *See Newsday LLC v. Nassau Cnty. Police Dep't*, 42 Misc. 3d 1215(A) (Sup. Ct., Nassau Cnty. 2014). In *Newsday*, the respondent objected to a FOIL request on the grounds that records relating to certain criminal cases could not be provided without authorization from those involved in the incident and that § 87(2)(b) exempted the records because their disclosure

would constitute an invasion of personal privacy. *Id.* The court required disclosure, finding that the department failed to address any of the categories in § 89(2)(b) that specify the basis for redactions, provide any other specific explanations about how producing the documents could lead to an "unwarranted invasion" of personal privacy, or mention § 89(2)(c)(i), which declares there is no invasion of personal privacy when identifying details are deleted. *Id.*

Here, as in *Newsday*, DOCCS failed to explain why the redaction of identifying details of incarcerated people and people on parole pursuant to § 89(2)(c)(i) would not alleviate the issue they claim production of these documents would create. And, DOCCS has not established why it could not remove such identifying details. Accordingly, DOCCS's invocation of the "unwarranted invasion of privacy" exemption must fail.

B. The Intra-Agency Exemption Cannot Justify DOCCS's Categorical Denials

DOCCS improperly withheld documents in response to Request No. 30 for records concerning crisis intervention activities of officers and other DOCCS staff, and improperly redacted documents in response to Requests for disciplinary actions taken against incarcerated or paroled individuals, complaints by incarcerated and paroled individuals, and civilian complaints (Request Nos. 8, 9, 11, 12, 13, 21, 22, and 23) based on the intra-agency exemption. (*See* Exhibits 21, 25, and 43). Again, DOCCS's conclusory and vague invocation of a FOIL exemption is inadequate and must be rejected at this stage.

The intra-agency exemption, which protects "inter-agency and intra-agency materials," is meant to shield "communications exchanged for discussion purposes not constituting final policy decisions." *Russo v. Nassau Cnty. Cmty. Coll.*, 81 N.Y.2d 690, 699 (1993). But this exemption does *not* apply to "factual" data or "final agency policy or determinations." N.Y. Pub. Off. Law § 87(2)(g)(i); *see also Gould*, 89 N.Y.2d at 276 ("intra-agency documents that contain 'statistical or factual tabulations or data' are subject to FOIL disclosure, whether or not embodied

in a final agency policy or determination"). "Factual data" has been defined by the Court of Appeals to mean "objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making." *Id.* at 277.

In withholding or redacting documents pursuant to the intra-agency exemption, DOCCS asserted without explanation that those documents "consist of intra-agency materials which are not factual tabulations of data, instructions to staff affecting the public, or final agency policy," (*see, e.g.*, Exhibit 21), "do not constitute final agency determinations" (Exhibit 41), and "are not statistical tabulations of data, final determinations, or external audits." (Exhibit 43). The Denial found DOCCS "has properly withheld documents that do not constitute a final agency determination," which included "documentation prepared and considered in connection with potential employee discipline." (*See* Exhibit 53).

To the extent DOCCS argues that all of its officer investigation and disciplinary records are exempt intra-agency material, DOCCS's argument has been soundly rejected by New York courts since the repeal of Section 50-a. In *Syracuse*, the Fourth Department rejected a similarly cursory invocation of the exemption to justify a blanket withholding of an open and "unsubstantiated" investigatory and disciplinary materials. 210 A.D.3d at 1406; *see also Schenectady PBA*, No. 2020-1411, 2020 WL 7978093 at *5 (finding intra-agency exemption did not shield investigatory and disciplinary material).

To the extent that DOCCS seeks to redact specific material pursuant to the exemption, it must first "meet [its] burden of establishing that the exemption applies" with a specific and particularized justification. *Syracuse*, 210 A.D.3d at 1406 (citation omitted). Its Denial to date has failed to do so.

II. FOIL Does Not Permit DOCCS To Justify Its Denial By Claiming Undue Burden

While the NYCLU acknowledges that its Request includes several voluminous categories of documents, DOCCS's blanket refusal to produce records pertaining to Requests for disciplinary records regarding officers, use of force, policies concerning disciplinary action, lawsuits or arbitrations filed by incarcerated or paroled individuals, and civilian complaints against officers (Request Nos. 1-5, 6, 10, 18, and 23) based on burden cannot be squared with the law or with the record here. FOIL states that "[a]n agency shall not deny a request on the basis that the request is voluminous or that locating or reviewing the requested records or providing the requested copies is burdensome . . . ." N.Y. Pub. Off. Law § 89(3)(a). In other words, DOCCS "cannot evade the broad disclosure provisions of [FOIL] . . . upon the naked allegation that the request will require review of thousands of records." *Konigsberg v. Coughlin*, 68 N.Y.2d 245, 249 (1986).

Recent court decisions issued after the repeal of Section 50-a based on similar FOIL requests also rejected arguments similar to DOCCS's here. In *New York Civil Liberties Union v. New York City Department of Corrections*, the court ordered New York City to produce redacted disciplinary records involving tens of thousands of complaint records on a rolling basis. 2022 WL 1156208, at *4 (Sup. Ct., NY Cnty. Apr. 19, 2022). In *NYP Holdings, Inc. v. New York City Police Department*, a court similarly rejected the argument that the production of officers' disciplinary files in bulk—as opposed to requested individually—was inappropriate, noting this was "not a reason to deny the request." No. 159132/2021, 2022 WL 17492349, at *3 (Sup. Ct., NY Cnty. 2022). And, in *Syracuse*, the NYCLU's FOIL request covered a similar range of electronic and physical law enforcement records spanning the years 2000-2020, *see* NYSCEF Doc. No. 36 (Verified Answer in *N.Y. Civ. Liberties Union v. City of Syracuse*) Index No. 002602/2021, at 12 (describing the "massive" investment of time required to collect "all law enforcement disciplinary

records collected by the Syracuse Police Department for an over 500 officer police force over the span of 20 years"), and there the Fourth Department required the agency to "review each record" responsive to the broad and voluminous request and produce all responsive material. 210 A.D.3d at 1405.

To be sure, the NYCLU acknowledges that a full production will take time, and it has always been the NYCLU's position that the parties should negotiate a reasonable rolling timeline, and engage so as to possibly narrow certain Requests and so that the NYCLU can provide assistance in addressing any burden. However, DOCCS rejected the NYCLU's multiple repeated attempts to meet and confer to "discuss options to alleviate any burden and costs DOCCS would incur in locating, reviewing and producing these records," (*see* Exhibit 48), to prioritize and narrow Requests (*see* Exhibit 48 (proposing a 5-year time span for certain Requests that DOCCS had claimed to be unduly burdensome due to the 20-year time limitation)) and to otherwise address any legitimate concerns on this issue.[3]

Accordingly, given the plain language of FOIL, the availability of rolling productions, and the NYCLU's multiple offers of assistance to address legitimate concerns, *see* § 89(3)(a) (requiring an agency to consider using an outside service to address voluminous requests), DOCCS's burden argument should be rejected.

III. The NYCLU Reasonably Described The Records Sought

DOCCS improperly objected that the NYCLU's Requests did not reasonably describe the records sought regarding officer discipline, use of force, disciplinary actions against incarcerated and paroled individuals, complaints by incarcerated and paroled individuals, civilian

[3] This included but was not limited to, Request Nos. 2, 5, 6, 10-13, 15-19, 23-29, 31-33, 35, 36, and 39-41.

complaints, the office of special investigations, certain trainings and collective bargaining agreements (Requests Nos. 1-13, 15-17, 20, 23-36, 39(a), 41, 43, and 44). (*See, e.g.*, Exhibits 22, 25, 26, 27, 30, 34, 35, 37, 38, 39, 41, 49, and 51).[4] The Denial found that DOCCS "denied requests where they are so broad that such request cannot be considered reasonably described for purposes of FOIL" and that DOCCS had noted where its systems made it impossible to provide the records. (*See* Exhibit 53). DOCCS's sweeping denial must fail because the Requests at issue were reasonably described on their face, and the NYCLU's subsequent explicit clarifications eliminated any reasonable basis for DOCCS to argue that it did not understand the Requests' meaning.

DOCCS bears the burden of establishing the descriptions in the NYCLU's Requests "were insufficient for purposes of locating and identifying the documents sought." *See M. Farbman & Sons, Inc. v. N.Y.C. Health & Hosps. Corp.*, 62 N.Y.2d 75, 83 (1984) (quoting N.Y. Pub. Off. Law § 89(3)). Further, when subsequent letters filed by a FOIL requestor narrow or clarify a request, an agency cannot stand by its original rejection without considering the modification or clarification. In *Puig v. New York State Police*, the respondent denied a petitioner's post-50-a request for voluminous records related to New York State Police officer discipline, stating that the review of files would constitute a "monumental task." 2023 WL 305875, at *1 (3d Dep't 2023). The petitioner administratively appealed, and in that letter provided narrower requests. *Id*. The Supreme Court dismissed the petition, but on appeal the Third Department determined that petitioner's narrowing of the request provided a request detailed enough to allow respondent "to locate and identify the requested records." *Id*.

[4] Specifically, DOCCS objected to the use of the following words: "all," "any," and "each" in Requests 1-5; "officer" in Request 1; "disciplinary action" in Requests 8-10; "concerning" in Requests 31, 35, 36, and 44; and "involving" in Request 42.

Here, DOCCS cannot meet its burden. As an initial matter, the NYCLU provided Requests that were clear on their face such that DOCCS in fact located responsive records. (*See, e.g.*, Exhibit 57) (spreadsheet detailing DOCCS's electronic indexing of thousands of disciplinary records). Further, the NYCLU also explicitly narrowed or clarified several of its Requests, including those relating to disciplinary records regarding officers and disciplinary actions taken against people who are incarcerated or on parole to aid DOCCS in its search, but DOCCS did not acknowledge these attempts in any correspondence or the Denial. (*See* Exhibit 48) (clarifying and narrowing Requests 1-7, 10-13, 20, 21, 35, and 36). Instead, the Denial states that "courts have held that 'nothing in the FOIL statute requires an agency to interpret a request in a more limited form than the description provided in the original request.'"[5]

DOCCS appears to have partly relied on *Reclaim the Records v. N.Y. State Department of Health* in support of those denials ignoring the NYCLU's narrowed and clarified Requests. 185 A.D.3d 1268 (3d Dep't 2020). In that case, the respondent "established that its indexing system did not permit searching either its paper or electronic records by the name of an entity, and that it had no method of searching its correspondence records . . . for the terms provided in petitioners' request," and on appeal, the petitioner claimed "their request should have been interpreted in a much more limited form" but "[n]either the language of the original request nor that of the administrative appeal demonstrate[d] that the limitations . . . proposed were previously enunciated or provided." *Id*. at 1272.

Here, unlike *Reclaim*, the NYCLU explicitly clarified and narrowed the Requests *prior* to the administrative appeal using language employed by DOCCS itself and plain language.

[5] The Appeals Officer did not provide a citation for this quote; however, it appears to be quoting its own summary of *Reclaim the Records v. N.Y. State Dep't of Health*, which contains no such quote. (*See* Exhibit 43).

(*See* Exhibit 48) (stating, for example, the NYCLU was "referring to the term 'Correctional Emergency Response Team' as used by DOCCS under the 'Correctional Facilities' heading on the DOCCS Subject Matter List."). And like the petitioner in *Puig*, the NYCLU also narrowed several Requests to make it easier for DOCCS to locate these records. (*See* Exhibit 48) (specifying, for example, how the NYCLU was willing to narrow Request No. 5, among others, to records of disciplinary hearings concerning employee use of force or sexual abuse). The NYCLU also clarified and narrowed its Requests in response to DOCCS's claim that DOCCS's records were not properly indexed to allow it to locate responsive records, but DOCCS ignored these Requests. (*See* Exhibit 48).

For all these reasons, the NYCLU has provided DOCCS with descriptions that were "reasonably described" and should have "enable[d] the agency to locate the records in question." *Konisberg*, 68 N.Y.2d at 249. DOCCS's arguments to the contrary all fail.

IV. DOCCS's Redactions Are Overly Broad And Unjustified

DOCCS's production of redacted documents in response to Requests 1, 5-6, 8-17, 19, 21-23, 24(a), 25, 32, 33, and 38-41 are improper because DOCCS failed to provide specific and particularized reasons for the redactions. When producing redacted material, it is DOCCS's burden to demonstrate "'that material requested falls squarely within the ambit of the exemptions,'" and "[a]ny claimed redactions . . . are to be documented in a manner that allows for review by a court." *Syracuse*, 210 A.D.3d at 1403, 1407; *see also Villalobos v. N.Y.C. Fire Dep't*, 130 A.D.3d 935, 937 (2d Dep't 2015) (requiring an agency to "articulate a particularized and specific justification for any of the redacted information at issue"); *Forsyth v. City of Rochester*, 185 A.D.3d 1499 (4th Dep't 2020) (holding that the lower court was correct in its determination that the respondent agency must provide the petitioner a log detailing aspects of a video the agency had redacted).

While the NYCLU acknowledges that records responsive to its Request may be redacted—for example, to eliminate identifying details of incarcerated people—without specific and particularized information as to what was redacted and why, the NYCLU is unable to fully object to the redactions that have been made. Here, as in *Forsyth*, DOCCS could meet its burden to show that its redactions fall within the cited statutory exemptions by providing the NYCLU with redaction logs detailing the reasons for specific redactions.

DOCCS may not, however, merely cite to exemptions in the statute and fail to describe the withheld material in a manner sufficient for the NYCLU to evaluate the proposed redaction, as it has done to date. For example in response to the NYCLU's Request for directives concerning employee misconduct, DOCCS stated it was redacting information under § 87(2)(e), (f), and (i) "where public disclosure would reveal non-routine criminal investigative techniques or procedures, could endanger life or safety, or would jeopardize the capacity of an agency or an entity that has shared information with an agency to guarantee the security of its information technology assets," and without further explanation produced records with full-page redactions that make it impossible to determine what material has been withheld and which exemption applies. (*See* Exhibits 10 and 56). DOCCS's other redactions are similarly summarily described.[6]

Without a redaction log, or some other form of more detailed review, DOCCS has failed to meet its burden to show that "[a]ny claimed redactions . . . are . . . documented in a manner

[6] Elsewhere, DOCCS stated it "has noted in its responses that material in certain DOCCS Directives has been redacted because such directives contain classified security material that, if disclosed, would constitute an unwarranted risk to the safety, security, and good order of DOCCS correctional facilities." (Exhibit 53). Such conclusory statements do not meet the agency's burden to articulate a legitimate and specific concern about releasing the redacted information. (*See also* Exhibit 28) ("Certain forms have been withheld pursuant to Public Officers Law § 87(2)(f) and (e), where disclosure could endanger the life or safety or would reveal criminal investigative techniques or procedures, except routine techniques and procedures.").

that allows for review by a court." *Syracuse*, 210 A.D. at 1403. Accordingly, the Court should order DOCCS to provide the NYCLU with a redaction log including basic details about the material redacted, which exemptions apply to which redactions, and why. Alternatively, the Court should order an *in camera* review to determine if these redactions fall within the exemptions DOCCS claims.

V. The NYCLU Is Entitled To Attorneys' Fees

When a party has "substantially prevailed" and the agency had "no reasonable basis for denying access to" the requested records, courts must assess reasonable attorneys' fees. N.Y. Pub. Off. Law § 89(4)(c). A petitioner is deemed to have "substantially prevailed" if an Article 78 proceeding prompts the agency to produce the documents requested. *See N.Y. Civ. Liberties Union v. City of Saratoga Springs*, 87 A.D.3d 336, 338 (3d Dep't 2011). Thus, if DOCCS produces additional material as a result of this proceeding, the NYCLU will have substantially prevailed.

On the second prong—analyzing whether DOCCS had a "reasonable basis" for its denial—the NYCLU respectfully submits that, while DOCCS may have had a reasonable basis for certain disputes at issue here, its refusal to reconsider its denials in light of the binding appellate precedent of *Syracuse*, *Rochester*, and *Puig* (as communicated by the NYCLU to DOCCS by letter on January 9, 2023, and January 23, 2023) (*see* Exhibits 54 and 55) was not reasonable. The NYCLU's January 23 letter also offered to enter into a tolling agreement to provide DOCCS additional time in which to consider its denials of the Request based on this additional precedent. (*See* Exhibit 55). DOCCS did not respond to either letter, nor did it return the NYCLU's follow up telephone calls and messages on January 26 and 27, 2023.

For these reasons, if this proceeding results in DOCCS producing additional responsive materials implicated by the letters described above, the agency will not have had a "reasonable basis" on which to base its continued denials, and fees would be appropriate and

allowed under CPLR Sections 8101 and 8601 as well as New York Public Officers Law Section 89(4)(c). (*See* CPLR §§ 8101, 8106; *see also* N.Y. Pub. Off. L. § 89(4)(c)).

CONCLUSION

For the foregoing reasons, the NYCLU respectfully requests that this Court: (i) order DOCCS to produce the requested records, subject to only the narrow redactions permitted by FOIL, on a reasonable rolling timeline; (ii) order DOCCS to pay the NYCLU's reasonable attorneys' fees and costs; and (iii) grant such further relief as the Court determines to be just and proper.

Dated: New York, New York
January 30, 2023

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CERTIFICATION PURSUANT TO 22 NYCRR § 202.8-b

I, Linton Mann III, an attorney duly admitted to practice law before the courts of the State of New York hereby certify that this Verified Petition complies with the word count limit set forth in 22 NYCRR § 202.8-b because it contains 5,988 words exclusive of the parts exempted by § 202.8-b. I relied on the word count of the word-processing system used to draft this petition in making this determination.

Dated: New York, New York
January 30, 2023

/s/ Linton Mann III
Linton Mann III