

**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: _____

VERIFIED PETITION

PRELIMINARY STATEMENT

1. 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’s”) October 16, 2020 Freedom of Information Law (“FOIL”) request (the “Request”) seeking records related to DOCCS’s disciplinary processes.

2. Here, the NYCLU seeks an order requiring DOCCS to comply with its obligations under FOIL to turn over the records requested by the NYCLU on a reasonable rolling timeline and with only those redactions permitted by FOIL and properly justified.

3. 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.

4. 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.

5. Over the course of twenty months, DOCCS provided twenty-six partial responses to the Request. DOCCS repeatedly stated that it was continuing to search for and review additional records potentially responsive to the Request and would produce documents on a "rolling basis."

6. DOCCS did not, however, indicate how it was searching for additional information or to which portions of the Request the searches related.

7. 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 had identified.

8. DOCCS declined these offers.

9. The NYCLU received its twenty-sixth and final response from DOCCS on August 1, 2022.

10. After receiving the final response, the NYCLU filed an administrative appeal on September 13, 2022, requesting those responsive records that had not been produced by DOCCS and asserting that those redactions that had not been properly justified.

11. The NYCLU argued that (i) DOCCS failed to provide particularized justification for the nondisclosure of the requested records; (ii) DOCCS applied overly-broad redactions to the documents it did produce without providing a particularized and specific reason for doing so; (iii) DOCCS's use of the "personal privacy" exemption fails due to the existence of other means

to protect individuals' privacy interests (*e.g.*, targeted redactions consistent with FOIL); and (iv) DOCCS's invocation of the intra-agency exemption and other FOIL exemptions were improper.

12. On September 28, 2022, the Acting FOIL Appeals Officer at DOCCS denied the NYCLU's appeal in full, (the "Denial") violating DOCCS's FOIL obligations.

13. After the Denial, several binding judicial opinions were issued that provided additional guidance in relation to the Denial, which the NYCLU provided to DOCCS via letter on January 9, 2023, and January 23, 2023.

14. DOCCS did not respond to these letters or return the NYCLU's follow-up telephone calls on January 26 and 27, 2023.

15. Having exhausted its administrative remedies, the NYCLU now seeks judicial relief to require DOCCS to produce records responsive to its FOIL Request on a reasonable rolling timeline, with only those redactions permitted by FOIL and properly justified by DOCCS.

16. In addition, the NYCLU seeks an award of reasonable attorneys' fees and costs stemming from DOCCS's unjustified failure to adhere to FOIL's statutory requirements.

VENUE

17. Pursuant to New York's Civil Practice Law and Rules ("CPLR") §§ 7804(b) and 506(b), venue in this proceeding lies in Albany County, in the judicial district in which DOCCS took the actions challenged here and where the offices of DOCCS are located.

PARTIES

18. Petitioner, the New York Civil Liberties Union, is a not-for-profit corporation that seeks to defend civil rights and civil liberties on behalf of individuals who have experienced injustice, and to promote transparency in government. For more than seventy years, the NYCLU

has been involved in litigation and public policy advocacy on behalf of New Yorkers to demand government accountability and transparency.

19. Respondent DOCCS is a public agency subject to the requirements of the Freedom of Information Law, New York Officers Law § 84, *et seq.*

FACTUAL BACKGROUND

A. The Repeal of Section 50-a

20. The repeal of Section 50-a and the simultaneous amendment of FOIL in June 2020 corresponded with a public outcry for greater police accountability and transparency. In response to protests across the nation, including in New York State, lawmakers revisited the laws on police accountability and transparency. In New York, Section 50-a had been used for years to prevent disclosure of police misconduct records to the public (N.Y. Civ. Rights L. § 50-a [repealed June 12, 2020]).

21. The repeal of Section 50-a was intended to effect “not just a change in law but, rather, a change in 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*”).

22. While the scope of Section 50-a was narrow when it was initially codified, by the time of the 2020 repeal, it had “expanded in the courts to allow police departments to withhold from the public virtually any record that contains any information that conceivably could be used to evaluate the performance of a police officer,” according to a report issued by the Committee on Open Government. (*See Exhibit 1*). In other words, prior to its repeal, Section 50-a made “all records of police conduct or misconduct essentially invulnerable.” *Schenectady PBA*, 2020 WL 7978039, at *3 (emphasis in original).

23. Responding to calls for action from the public, the Legislature debated and approved the #Repeal50a Bill (S896/A10611) and the Governor signed the bill into law on June 12, 2020. The Bill was intended to be expansive, as illustrated by the fact that the Legislature considered, but ultimately rejected, other, narrower proposals, including S.4213, a bill that would have only allowed the release of records in situations where the allegations were substantiated. *See* S.4213, 242nd Leg., Reg. Sess. (N.Y. 2019).

24. On the day the Legislature repealed Section 50-a, it 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). The language of § 86(6) now states:

[L]aw enforcement disciplinary records” include: [A]ny record created in furtherance of a law enforcement disciplinary proceeding, including, but not limited to: (a) the complaints, allegations, and charges against an employee; (b) the name of the employee complained of or charged; (c) the transcript of any disciplinary trial or hearing, including any exhibits introduced at such trial or hearing; (d) the disposition of any disciplinary proceeding; and (e) the final written opinion or memorandum supporting the disposition and discipline imposed including the agency’s complete factual findings and its analysis of the conduct and appropriate discipline of the covered employee.

N.Y. Pub. Off. L. § 86(6). “‘Law enforcement disciplinary proceeding’ means the commencement of any investigation and any subsequent hearing or disciplinary action conducted by a law enforcement agency.” N.Y. Pub. Off. L. § 86(7).

25. At the same time, the Legislature also amended Section 87 of FOIL to add two provisions about privacy protections afforded to “a law enforcement agency responding to a request for law enforcement disciplinary records.” S.8496, 243rd Leg., Reg. Sess. § 3 (N.Y. 2020). The first states that “[a] law enforcement agency responding to a request for law enforcement disciplinary records . . . shall redact any portion of such record containing the information specified

in subdivision two-b of section eighty-nine of this article prior to disclosing such record under this article.” N.Y. Pub. Off. Law § 87(4-a).

26. To address privacy concerns, an agency is required to redact: (i) medical history information; (ii) the home addresses, personal telephone numbers, personal cell phone numbers, personal e-mail addresses of the employee and their family members; (iii) any social security number; and (iv) the use of an employee assistance program, mental health service, or substance abuse assistance service. *See id* § 89(2-b).

27. The second additional privacy provision allows—but does not require—agencies to redact portions of law enforcement disciplinary records that pertain to “technical infractions.” *See* N.Y. Pub. Off. Law §§ 87(4-b), 89(2-c). Technical infractions are defined narrowly, and “(a) do not involve interactions with members of the public, (b) are not of public concern, and (c) are not otherwise connected to such person’s investigative, enforcement, training, supervision, or reporting responsibilities.” *See id* § 86(9).

B. Petitioner’s FOIL Request to Respondents

28. 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 engaged in by DOCCS in fulfilling its rehabilitation mission, which is “to enhance public safety by having incarcerated persons return home under supportive supervision less likely to revert to criminal behavior.” *See* <https://doccs.ny.gov/departamental-mission> (last accessed January 30, 2023).

29. 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*).

30. On October 19, 2020, DOCCS acknowledged the receipt of the NYCLU's Request via letter and stated a "determination as to whether [the NYCLU's] request is granted or denied will be reached in approximately 20 business days or we will notify [the NYCLU] in writing if the responsible program area(s) should require additional time to locate, assemble and review documents that may be responsive to [the NYCLU's] request." (*See Exhibit 3*).

31. On November 19, 2020, DOCCS wrote to the NYCLU that they "require[d] additional time to process [the NYCLU's] request" because it was "still conducting a diligent search for responsive records." DOCCS estimated it would complete the Request and provide a response by February 17, 2021. (*See Exhibit 4*).

32. On November 25, 2020, the NYCLU wrote to DOCCS to reiterate its request that DOCCS provide documents on a rolling basis prior to the February 17, 2021 date on which DOCCS had stated it would provide documents. (*See Exhibit 5*).

33. On January 14, 2021, the NYCLU wrote to DOCCS to reiterate its request that DOCCS "provide documents on a rolling basis" and its willingness to work with DOCCS to "find a reasonable accommodation." (*See Exhibit 6*).

34. On February 19, 2021, DOCCS wrote that it was continuing to collect records and planned to provide records in response to the NYCLU's Request by April 1, 2021. (*See Exhibit 7*).

35. On February 26, 2021, the NYCLU wrote to DOCCS in the “hope that [DOCCS was] willing to work with [the NYCLU] to find a reasonable accommodation,” and to reiterate its belief that “a rolling production” was a sensible path. (*See* Exhibit 8).

36. On March 12, 2021, the NYCLU received DOCCS’s first partial response to its request. (Exhibit 9).

37. Over the course of twenty months following the Request, DOCCS provided twenty-six partial responses; all the while stating that it was “continuing to search for and review additional records potentially responsive to [the NYCLU’s] request” and would produce documents on a “rolling basis.” (*See, e.g.*, Exhibit 13).

38. DOCCS did not, however, indicate how it was searching for additional information or to which portions of the Request the searches related. After receiving the first two productions, the NYCLU wrote to DOCCS on April 6, 2022 seeking to arrange a call to discuss the strategy for the remaining collection, review and production of documents and DOCCS’s improper redactions. (*See* Exhibit 11).

39. On April 12, 2021, DOCCS replied and stated it was “unable to provide a specific strategy other than [its] ongoing search, review, and production of records responsive to each section of the request,” and otherwise failed to provide specific and particularized justifications for its redactions. (*See* Exhibit 12).

40. On April 27, 2021, the NYCLU wrote to DOCCS seeking to discuss the timeline and strategy for DOCCS’s production and the improper scope of DOCCS’s redactions. (*See* Exhibit 14).

41. On May 11, 2021, DOCCS declined the opportunity to meet with the NYCLU, stating it was unable to provide a strategy for production, and that DOCCS believed that it had met its burden with respect to redactions. (*See* Exhibit 18).

42. On July 7, 2021, the NYCLU wrote to DOCCS requesting a call to discuss options to alleviate the burden and costs DOCCS claimed it would incur in providing responsive documents in Partial Responses 9, 12, 13, 14, and 15. (*See* Exhibit 29).

43. On July 14, 2021, DOCCS replied to the NYCLU's July 7, 2021 correspondence, declining the NYCLU's request for a discussion and reiterating DOCCS's belief that it had properly met its burden to produce documents. (*See* Exhibit 32).

44. On January 25, 2022, the NYCLU wrote to DOCCS requesting a meet and confer to discuss the records that remained to be reviewed and produced in order to prioritize the production of certain documents and find a "reasonabl[e] path forward to ensure that DOCCS completes its production and responses to each of NYCLU's FOIL requests." (*See* Exhibit 45).

45. On February 18, 2022, DOCCS replied to the NYCLU's January 25, 2022 letter, declining the opportunity to meet and confer and stating that "the Department will continue to produce documents responsive to your request on a rolling basis, in multiple productions." (*See* Exhibit 46).

46. On April 20, 2022, the NYCLU wrote to DOCCS requesting a meet and confer to "clarify, prioritize, and if necessary, narrow some of the Requests." The NYCLU also proposed a more limited, five-year timeframe for the Requests DOCCS had claimed would be unreasonable to compile over a twenty-year time frame, which included, but was not limited to, Requests for records of disciplinary actions taken regarding officers, use of force, complaints by incarcerated

or paroled individuals, civilian complains, Office of Special Investigations, investigative reports, and trainings. (*See Exhibit 48*).

47. In addition, the NYCLU explicitly clarified and narrowed several requests in response to DOCCS's objections, and it sought again to meet and confer with DOCCS to discuss the agency's classification systems in response DOCCS's objections to requests for records pertaining to disciplinary records regarding officers, use of force, complaints by incarcerated or paroled individuals, civilian complaints, and investigative reports. (*See Exhibit 48*).

48. On May 2, 2022, the NYCLU followed up on its April 20, 2022 letter and noted that DOCCS had not acknowledged the April 20, 2022 communication, and requested a meet and confer to "clarify and prioritize the Requests." (*See Exhibit 50*).

49. DOCCS never acknowledged the April 20, 2022 or May 2, 2022 letters, except to the extent that the Denial's statement 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'" can be interpreted as a response. (*See Exhibit 53*).

50. In addition, despite the NYCLU's requests to discuss document productions and timelines that DOCCS repeatedly declined, DOCCS sent the NYCLU nine letters (on November 19, 2020, February 19, 2021, May 28, 2021, July 12, 2021, September 9, 2021, November 8, 2021, November 22, 2021, January 25, 2022, and March 11, 2022) stating that it required additional time to process the NYCLU's Request and extending its own self-created deadlines. (*See Exhibits 4, 7, 20, 31, 36, 40, 42, 44, and 47*).

51. On August 1, 2022, DOCCS abruptly stated that it was producing its "final response" and that the NYCLU had 30 days to appeal any denial in writing. (*See Exhibit 51*).

52. While the NYCLU appreciates and acknowledges the effort DOCCS put in to the provide 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 and narrow the scope of Requests and provide prioritizing information that DOCCS improperly refused to acknowledge.

53. In addition, many of DOCCS's responses did not indicate which part of the 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).

54. In total, DOCCS provided records in response to 34 Requests and withheld records in response to 10 Requests.

55. 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, and 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).

56. 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 Exhibit 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*).

57. 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, 48, and 57*).

58. 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*).

59. 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 in order to form a proper response. (*See, e.g., Exhibits 10 and 56*).

60. 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 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 five-year timespan. (*See* Exhibits 22 and 48).

61. Given the improper partial denial of the Request, the NYCLU filed an administrative appeal with DOCCS on September 13, 2022. (*See* Exhibit 52).

62. On September 28, 2022, DOCCS’s Acting FOIL Appeals Officer (“Appeals Officer”) denied the appeal, finding DOCCS had: (i) articulated a particularized and specific justification for denials and redactions; (ii) properly redacted documents; (iii) properly withheld documents under the personal privacy exemption; and (iv) properly invoked the inter-agency exemption. (*See* Exhibit 53).

63. On January 9, 2023, the NYCLU sent a letter to DOCCS alerting it to recent, binding precedent that provided additional guidance regarding the Request and Denial and asked DOCCS whether it would provide the NYCLU with the requested documents or continue to stand on its decision. (*See* Exhibit 54).

64. On January 23, 2023, the NYCLU sent another letter to DOCCS alerting it to additional, recent binding precedent that provided additional guidance regarding the Request and the Denial, offering to enter into a short tolling agreement to allow DOCCS time to consider whether these recent decisions would change its denial of the Request, and alerting DOCCS to the NYCLU’s intention to file an Article 78 Petition if it did not receive a response. (*See* Exhibit 55).

65. DOCCS did not respond to these letters.

66. The NYCLU also sought to reach DOCCS *via* telephone on January 26 and 27, 2023 to discuss these letters and the proposed tolling agreement, but DOCCS did not return these calls and messages.

67. Having exhausted its available administrative remedies, the NYCLU files this Petition pursuant to Article 78 of New York's Civil Practice Law & Rules seeking an order requiring DOCCS to produce records responsive to the NYCLU's Request on a reasonable rolling timeline, with only those redactions permitted by FOIL and properly justified by DOCCS, as well as reasonable attorneys' fees and costs.

CAUSE OF ACTION UNDER ARTICLE 78

68. Petitioner repeats and realleges paragraphs 1 through 67 hereof as if fully forth herein.

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

70. Petitioner has a right to the records sought, redacted only as permitted by FOIL and produced on a reasonable rolling basis where necessary.

71. There is no basis in law or fact for DOCCS to withhold the records requested or redact large-scale portions of records without providing the necessary justifications for such redactions.

72. DOCCS has a mandatory obligation under FOIL to produce responsive documents.

73. Petitioner exhausted its administrative remedies with DOCCS when it appealed DOCCS's denial of the Request, and DOCCS denied Petitioner's appeal.

74. Petitioner has no other remedy at law.

75. This Petition is timely under CPLR § 217 because it is filed within four months of DOCCS's denial of Petitioner's appeal on September 28, 2022.

REQUESTED RELIEF

WHEREFORE, Petitioner seeks judgment:

(1) Pursuant to CPLR § 7806, directing DOCCS to comply with its duty under FOIL to disclose the records sought by Petitioner in Request parts 1 through 44 in the FOIL Request dated October 16, 2020. Specifically, Petitioner seeks an order:

a) Requiring DOCCS to produce all documents responsive to the Request, on a reasonable rolling timeline, with only those redactions and withholdings permitted by FOIL and properly justified by DOCCS;

b) For those responsive materials identified but withheld or redacted, requiring DOCCS to provide a log including basic details about the material in dispute, which exemptions apply to which withholdings/redactions, and why. This log should be written "in a manner that allows for a review by a court" (*see N.Y. Civ. Liberties Union v. Syracuse*, 120 A.D.3d 1400, 1403 [4th Dep't 2022]), or in the alternative, the disputed materials should be subject to an *in camera* review;

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

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

Dated: New York, New York
January 30, 2023

SIMPSON THACHER & BARTLETT LLP

By: /s/ Linton Mann III

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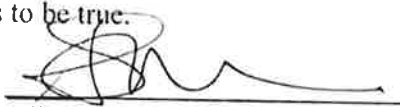
VERIFICATION

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

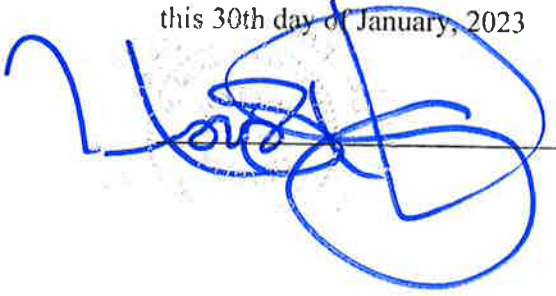
Alison M. Sher, an attorney admitted to practice in the state of New York, affirms pursuant to CPLR § 2106 under the penalties of perjury:

1. I am an attorney for 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 or upon information and belief. As to those statements that are based upon information and belief, I believe those statements to be true.

Dated: New York, New York
January 30, 2023


Alison M. Sher

Sworn and subscribed to me
this 30th day of January, 2023



This notarial act involved the use of communication technology

HAROLD RAY DARLING
NOTARY PUBLIC, STATE OF NEW YORK
Registration No. 01DA6436367
Qualified in New York County
Commission Expires JULY 11, 2026