SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

NEW YORK CIVIL LIBERTIES UNION, Petitioner, v. NEW YORK STATE COMMISSION OF CORRECTION, Respondent.	Index No. ____________________

MEMORANDUM OF LAW IN SUPPORT OF VERIFIED PETITION

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Dated: February 2, 2024
New York, New York

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PRELIMINARY STATEMENT

In this Article 78 proceeding, the New York Civil Liberties Union seeks to vindicate the public's right to know whether and how the New York State Commission of Correction responds to reports of physical and sexual assault perpetrated by staff against individuals incarcerated at jails statewide.

Though SCOC is the chief regulator of carceral facilities in New York State, surprisingly little is publicly known about whether and how it responds to such reports. In 2022, the NYCLU submitted a FOIL request seeking a range of records concerning the agency's handling of reports of staff-on-incarcerated individual assaults. In response, SCOC has failed and refused to release more than a tiny sliver of the records the NYCLU sought. Despite FOIL's presumption of open access and governmental transparency, the Commission continues to shield itself from scrutiny, relying on a variety of meritless arguments to withhold records responsive to the NYCLU's request. As a result, more than a year after the NYCLU's FOIL request, the NYCLU—and, by extension, the public—remain in the dark on an issue of significant societal importance.

New Yorkers have a right to understand whether their government is responding effectively to reports of staff misconduct at jail facilities around the state. SCOC's efforts to limit that right by denying the NYCLU's records request run counter to FOIL and are unlawful. Accordingly, the Court should grant this petition, affording the NYCLU the access to SCOC records that FOIL requires and awarding the NYCLU attorney's fees and costs.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

SCOC is the chief regulator of carceral facilities throughout New York State (*see generally* Correction Law art 3). In that capacity, the Commission is charged with receiving and

investigating reports of "significant correctional facility incidents" arising at county jails around the state and in New York City jails. Among other such "reportable incidents" are those involving allegations of assault perpetrated by jail staff against incarcerated individuals, which are categorized as either "personnel/incar ind assault" or "personnel/incar ind sexual offense" (NY State Commn of Corr., *Reportable Incident Manual for County Jails and the New York City Department of Correction* [2023], available at https://scoc.ny.gov/system/files/documents/2023/09/2023-reportable-incident-manual.pdf [last accessed Feb. 2, 2024]).[1]

On July 6, 2022, the NYCLU filed a FOIL request with the New York State Commission on Correction seeking "access to and copies of records concerning the [Commission's] handling of significant incident reports from county jails and the New York City Department of Correction" (Gemmell affirmation, exhibit A). The records sought in the FOIL request included:

> 1. All statements of policy and/or practice in effect during the relevant period[2] that describe or delineate SCOC's procedure and/or practice for receiving, processing, and/or responding to any incident reported to SCOC via the eJusticeNY Integrated Justice Portal or via other means;
>
> 2. All records of, referencing, or created in response to, any "reportable incident" that was reported to SCOC during the relevant period and that SCOC categorized as:
>   a. "personnel/inmate assault," or
>   b. "personnel/inmate sexual assault."
>
> 3. Of those "reportable incidents" identified in response to Request Nos. 2.a. and 2.b. of this letter, records showing the disposition or conclusion reached by SCOC regarding each incident—or the lack of any disposition or conclusion—including, without limitation:

[1] At the time of the NYCLU's FOIL request, the relevant incident categories were entitled "personnel/inmate assault" and "personnel/inmate sexual assault."

[2] For purposes of the FOIL request, the NYCLU defined the "relevant period" as "any time between January 1, 2011, and the date of [the Commission's] final response to this request" (Gemmell affirmation, exhibit A).

a. Those reports that SCOC determined were substantiated (or any disposition or conclusion with a meaning similar to "substantiated"),
b. Those reports that SCOC determined were unsubstantiated (or any disposition or conclusion with a meaning similar to "unsubstantiated"),
c. Those reports as to which SCOC reached a determination other than that the reports were substantiated or unsubstantiated, and
d. Those reports as to which SCOC reached no determination.

4. Records identifying or describing any database maintained by or on behalf of SCOC during the relevant period that contains data of, referencing, or created in response to any "reportable incident" reported to SCOC.

5. The contents of all databases maintained by or on behalf of SCOC during the relevant period that contain data of, referencing, or created in response to any "reportable incident" reported to SCOC.

(*id.*).

On September 21, 2022, SCOC's Records Access Officer responded, partially granting and partially denying the NYCLU's Request (*id.*, exhibit B). The Records Access Officer partially granted Request No. 1, releasing a single 10-page document entitled "Processing of Reportable Incidents" (*see id.*, exhibit C.). The Records Access Officer redacted portions of the document pursuant to Public Officers Law ("POL") § 87 [2] [b], citing the statutory language of that exemption without further elaboration (*id.*, exhibit B). The Commission denied Request No. 2.a. as not "reasonably describ[ing]" the records sought (*id.*). The Commission denied Request Nos. 2.b. and 5 on the basis of various privacy exemptions that the officer claimed applied to responsive records (*id.*). And the Officer claimed that a "diligent search" for records responsive to Request Nos. 3 and 4 had revealed no responsive records (*id.*).

In a letter dated October 21, 2022, the NYCLU appealed SCOC's initial decision on the NYCLU's FOIL request (*id.*, exhibit D). In particular, the NYCLU highlighted the inadequacy of the Commission's productions in response to Request Nos. 2 through 4 (*id.*).

In a letter dated November 8, 2022, SCOC's FOIL Appeals Officer issued a decision partially granting and partially denying the NYCLU's appeal (*see id.*, exhibit E). With respect to Request No. 2.a., the FOIL Appeals Officer conceded, "[R]ecords 'of' reported incidents categorized . . . as a 'personnel/inmate' assault can be located and retrieved," and stated, "I will immediately return this request to SCOC's Records Access Officer, who will promptly advise you as to the availability of such records" (*id.*). The FOIL Appeals Officer otherwise denied the remainder of the NYCLU's appeal, concluding variously that portions of the request were not "reasonably described"; that the Commission's "diligent search" had revealed no records responsive to certain portions of the request; and that records responsive to portions of the request were—or, if they existed, would be—exempt from disclosure under federal state privacy protections (*id.*). The FOIL Appeals Officer also denied the appeal "to the extent that records, or portions thereof, responsive to any portion of your request may constitute" records exempt under various provisions of FOIL (*id.*).

On November 14, 2022, SCOC's Records Access Officer acknowledged the decision of the FOIL Appeals Officer and notified the NYCLU that SCOC had identified 2,281 records responsive to the NYCLU's request. The Records Access Officer stated, "[T]hese records will need to be retrieved and reviewed for applicable exemptions and legal privileges" and estimated that SCOC would "complete [the NYCLU's] request and provide a response in writing by December 8, 2022" (*id.*, exhibit F).

SCOC did not turn over the responsive subset of those records by December 8, 2022. Instead, on September 21, 2023—a year after SCOC's decision on the NYCLU's initial FOIL request—SCOC released supplemental records pursuant to the appeal with redactions for personal privacy and protected information (*see id*., exhibit G). Those records contained 1,382 incident reports from the New York City Department of Correction dating back to 2017, but omitted incident reports from any agency or county jail anywhere else in New York State (*see id*., exhibit G). On October 2, 2023, the NYCLU contacted SCOC's FOIL Appeals and Records Access Officers regarding SCOC's omission of incident reports concerning jails outside of New York City from the agency's September 2023 second production (*see id.*, exhibit J). The NYCLU requested that SCOC correct its production by releasing the omitted records (*see id.*).

Later the same day, SCOC's Records Access Officer responded, conceding "County [j]ail records were inadvertently not attached to the records that were sent to you in September" (*id.*). In the same response, the Records Access Officer released to the NYCLU partially redacted records containing 12 incident reports from county jails outside New York City, and asserted that the redacted portions of those records were exempt from disclosure under POL § 87 [2] [b] because "disclosure would constitute an unwarranted invasion of personal privacy . . . ." (*id.*, exhibits I, J).

In a subsequent email to the NYCLU, also on October 2, 2023, the Records Access Officer confirmed that this third production constituted SCOC's completed response to the NYCLU's FOIL request (*see id.*, exhibit J).

ARGUMENT

I. SCOC Has Failed to Conduct the Diligent Search that FOIL Requires.

FOIL requires an agency's search for records be "diligent" (POL § 89 [3] [a]). SCOC has fallen short of that standard here, failing to release a range of responsive records that the agency's obviously—and demonstrably—maintains (*see Jackson v Albany County Dist. Attorney's Off.*, 176 AD3d 1420, 1421–22 [3d Dept 2019] ["[E]ven where an entity properly certifies that it was unable to locate requested documents after performing a diligent search, the [party] requesting the documents may nevertheless be entitled to a hearing on the issue where he or she can 'articulate a demonstrable factual basis to support the contention that the requested documents existed and were within the entity's control'"] [citations omitted]).

Request No. 3 seeks "records showing the disposition or conclusion . . . or the lack of any disposition or conclusion" regarding any "reportable incident" identified in response to Request Nos. 2.a. and 2.b (*see* Gemmell affirmation, exhibit A). The Commission purports not to have identified any records response to this request.

The Commission's assertion that a diligent search has uncovered no records responsive to Request No. 3 is implausible. Request No. 3 encompasses both those reportable incidents that resulted in *any* disposition or conclusion and those that resulted in no disposition or conclusion at all. The Commission's response to Request No. 3 thus rests on the dubious notion that the Commission's search has surfaced not a single record regarding the outcome of any incident report categorized as "personnel/inmate assault" or "personnel/inmate sexual assault"—despite the Commission's role as the chief regulator of jails statewide and the mandatory nature of incident reporting.

Belying the Commission's assertion are the agency's own publicly available documents reflecting the obvious existence of records responsive to Request No. 3. The Commission's most

recent Annual Report, for example, confirms that the Commission not only reaches a disposition on the incident reports it receives—it deems many of them closed—but also collects and aggregates detailed information on the disposition of each report (*see e.g. id.*, exhibit K at 47) (providing “average timeframes” from “Report Submission to Submission Closure”). Records of these incident report closures, which form the basis of the information contained in the Commission’s Annual Report, are undoubtedly responsive to Request No. 3.

Similarly, the Commission’s “Processing of Reportable Incidents” procedure, released to the NYCLU on September 21, 2022, confirms that the Commission’s routine handling of reportable incidents involves various levels of review, investigation, and, ultimately, determination (*see e.g. id*., exhibit C, § C.4 [requiring determination whether formal investigation is warranted]; *id.*, exhibit C, § E [requiring supervisory determination whether “further action is needed”], *id.*, exhibit C, § G [referencing “open” and “closed” reportable incident reports]; *id.*, exhibit C, § H [requiring that Commission staff draft “investigation request letter” if “formal investigation” is deemed warranted]; *id.*, exhibit C, § J [requiring determination whether “any Minimum Standards were violated” or a “Notice of Violation is warranted.”]). Each stage of this process is tracked (*see generally id.*, exhibit C). And the procedure enumerates several documents that are created and transmitted when, for example, the Commission reaches a determination that “any Minimum Standards were violated” or a “Notice of Violation is warranted” (*id.*, exhibit C, § J). The Commission’s failure to locate or release any of these records undermines the claim that the agency conducted a minimally adequate search for records responsive to Request No 3.

Request No. 4 seeks “records identifying or describing any database maintained by or on behalf of SCOC during the relevant period that contains data of, referencing, or created in

response to any ‘reportable incident’ reported to SCOC.” The Commission purports not to have identified any records responsive to this request (*see id.*, exhibit E).

The Commission’s assertion that a diligent search has uncovered no records responsive to Request No. 4 is likewise implausible. For purposes of the NYCLU’s FOIL request, the definition of “database” encompasses “*any* tabulated electronic records” (*id.*, exhibit A [emphasis added]). Consistent with its ordinary meaning, to “tabulate” means “to count, record, or list systematically” (Merriam-Webster.com Dictionary, tabulate [https://www.merriam-webster.com/dictionary/tabulate] [last accessed Feb 2, 2024]). The Commission’s response to Request No. 4 thus rests on the incredible assertion that the Commission has neither counted, recorded, nor listed systematically any data related to any reportable incident — again, despite the mandatory nature of significant incident reporting and the Commission’s role in receiving such reports from jails statewide.

Here again, the agency’s own documents demonstrate that records responsive to Request No. 4 obviously exist, belying the Commission’s claim that a “diligent search” uncovered no such records (*cf. Gould v New York City Police Dept.*, 89 NY2d 267, 279 [1996] [“[A]rticulat[ing] a demonstrable factual basis to support [the requestor’s] contention that the requested documents existed and were within the [agency’s] control” could rebut a claim that a diligent search turned up no results]). The Commission’s 2022 Annual Report contains detailed statistics on reportable incidents, including statistics on incident category; average timeframe from time of incident to submission of an incident report; average timeframe from submission of a report to submission closure; date and time of the reported incident; and the gender, race, ethnicity, and age range of the incarcerated individual involved in the incident (Gemmell aff., exhibit K at 47). Calculation of these statistics necessarily depends on underlying data that is

likely maintained in tabulated electronic records such as a database. Any records reflecting how or where any such datasets are stored are thus responsive to Request No. 4. Moreover, Appendices 2b and 3b to the Annual Report appear to contain images of precisely the sort of database encompassed by Request No. 4 (*id.*, exhibit K, Appendices 2b, 3b).

Even as to those portions of the NYCLU's request to which the Commission has not neglected to produce records entirely, glaring omissions in the agency's productions betray the Commission's failure to perform a minimally adequate search.

Request No. 2.a. seeks "all records of, referencing, or created in response to, any 'reportable incident' that was reported to SCOC during the relevant period and . . . categorized as . . . 'personnel/inmate assault" (*id.*, exhibit A). After partially granting the NYCLU's administrative appeal, the Commission ultimately released redacted versions of 1,382 incident reports from the New York City Department of Correction and 12 incident reports from eight of the jail systems in New York State's 57 counties outside of New York City for the entire decade-plus period preceding the agency's final response to the NYCLU's FOIL request (*id.*, exhibit E, G, I).

This minimal production reflects two ways in which the Commission failed to perform a diligent search for records responsive to Request No. 2.a., each of which independently warrants the relief the NYCLU seeks in this proceeding.

First, the incident reports released by the Commission reflect an obvious and demonstrable undercount of the "personnel/inmate assault" incident reports submitted to the Commission during the relevant period. For the year 2022 alone, the Commission's Annual Report reflects 244 "Personnel/Incar Ind" incident reports from NYC DOC and seven such reports from county jails (*id.*, exhibit K at appendices 3b, 2b). Yet the records released by the

Commission in response to Request No. 2.a. contain just 164 reports from NYC DOC and zero reports from county jails from the same year (*id.*, exhibit G, I). This error, combined with the low number of responsive incident reports gives rise to the unmistakable implication that the Commission has omitted records from other years during the relevant period. And indeed, while the NYCLU's requests seeks records as far back as January 1, 2011, the Commission's production does not include *any* incidents reports whatsoever from NYC DOC for the years 2011 through 2016 and from county jails for the years 2011 through 2018—another startling remarkable omission given the mandatory nature of the incident reporting process statewide (*id.*, exhibit A, G, I).

Second, the Commission's production in response to Request No. 2.a. includes no other type of record regarding responsive incidents besides the brief, two-to-three-page incident report document itself. Request No. 2.a. seeks "*all* records of, referencing, or created in response to" relevant incidents," not just the incident report summaries released by the Commission (*id.*, exhibit A [emphasis added]). As discussed *supra*, the Commission's own Processing of Reportable Incidents procedure describes a host of records that are created in response to the submission of a reportable incident (*id.*, exhibit C). And as discussed *infra*, those documents are traceable to the particular incident report in question via the unique number the Commission assigns to each incident report (*e.g. id*. at § B.). The Commission's failure to release any of these additional records thus reflects the Commission's failure to conduct the diligent search that FOIL requires.

II. SCOC Has Failed to Show that the FOIL Request Does Not Reasonably Describe the Records Sought.

In denying the NYCLU's request, the Commission relies in part on its claim that portions of the NYCLU's request do not "reasonably describe" the records the NYCLU seeks. But the Commission bears the burden of establishing that the NYCLU's request does not permit the Commission to locate responsive records (*See Konigsberg v Coughlin*, 28 NY2d 247, 249–250 [1986]). The Commission has fallen well short of meeting that burden here.

Request No. 2.a. and 2.b. seek "all records of, referencing, or created in response to, any 'reportable incident' that was reported to SCOC during the relevant period and . . . categorized," respectively, as "personnel/inmate assault" or "personnel/inmate sexual assault" (Gemmell affirmation, exhibit A). The Commission partially denied Request No. 2.a. and fully denied Request No. 2.b. as "not 'reasonably described'" on grounds that "SCOC does not, under its current system of recordkeeping, maintain its records in a manner which would allow it to locate records 'referencing, or created in response to' an individual reported incident'" (*id.*, exhibit E).

In the first place, the Commission's concession that it has identified records for withholding in response to Request No. 2 contradicts its claim that Request No. 2 is insufficiently described to locate responsive records (*id.*).

And further disproving the Commission's claim that Request No. 2 is not reasonably descriptive is the agency's own "Processing of Reportable Incidents" procedure, which reflects the existence a wealth of responsive records that the Commission routinely maintains and has the ready ability to locate based on a unique incident number identifier it assigns to each reported incident (*id.*, exhibit C). That number can be used to search for a given incident in the eJusticeNY Integrated Portal (*id.*, exhibit C, § A). Under each incident in the portal, a variety of information about the incident is stored (*id.*, exhibit C, § B). Commission staff routinely create, transmit, and store records about particular reportable incidents, each of which is tied to a unique

incident number. For example, the Commission drafts and issues investigation letters concerning reported incidents, which it stores in a specifically identified electronic folder (*id*., exhibit C, §§ C4, D, H2). Some incident reports are converted to PDF and transmitted via email to the Commission's Triage and Metropolitan Supervisors (*id*., exhibit C, § D). Any Notice of Violation concerning a reportable incident is emailed to a Triage Unit Supervisor (*id*., exhibit C, § J). Each of these records "references" or is "created in a response to" a particular reportable incident (*id.*, exhibit A). And the Commission is readily able to locate these responsive records using the incident number it assigns to each reported incident.

Request No. 4 seeks "records identifying or describing any database maintained by or on behalf of SCOC during the relevant period that contains data of, referencing, or created in response to any 'reportable incident' reported to SCOC" (*id.*, exhibit A). And *Request No. 5* seeks the contents of such databases (*id.*, exhibit A). In addition to claiming that a "diligent search" revealed no records responsive to Request No. 4, the Commission claims that neither Request No. 4 nor Request No. 5 "reasonably describe" the records the NYCLU seeks (*id.*, exhibit E).

In the first place, the Commission's grounds for denying Request No. 4 are self-contradictory: The Commission cannot simultaneously maintain that it conducted a "diligent search" and that such a search is not possible.

Even setting aside this facial contradiction, the Commission's grounds for denying Request Nos. 4 and 5 still would fail. FOIL "requires only that [requested] records be 'reasonably described' so that the respondent agency may locate the records in question" (*M. Farbman & Sons, Inc. v NYC Health & Hosps Corp.*, 62 NY2d 75, 83 [1984], quoting POL § 89 [3]). The Court of Appeals has explained that this standard is lower than the civil discovery

standard requiring a requestor to “specifically designated” the records sought (*M. Farbman & Sons, Inc.*, 62 NY2d at 80–83). Importantly, the burden lies with the respondent agency to “establish[] that the descriptions were insufficient for purposes of locating and identifying” the requested records (*id.* at 83). The Commission fails to carry that burden here.

Request Nos. 4 and 5 offer a clear and specific term—“database”—to identify the records sought. The request goes on to specify that “database” encompasses “any tabulated electronic records” (Gemmell affirmation, exhibit A). And in its appeal, the NYCLU went further still, clarifying that “tabulate” carries its ordinary meaning for purposes of the FOIL request: “to count, record, or list systematically” (*id.*, exhibit D). The Commission offers nothing at all to explain how this description precludes a search for records responsive to Request No. 4. Nor could the Commission do so. As described *supra*, the Commission’s Annual Report itself evinces the existence of records that are responsive to Request Nos. 4 and 5. And the Commission’s limited explanation for denying Request No. 5 on these grounds is also unavailing. The Commission cites a single advisory opinion of the Committee on Open Government for the proposition that “a request for ‘all’ records, without limitation, that include a certain name . . . might not be found to reasonably describe the records’” (*id.*, exhibit E). But Request No. 5 is not similarly expansive: Rather than “all records, without limitation,” Request No. 5 extends only to those databases maintained by or on behalf of SCOC (*id.*, exhibit A).

Because the Commission fails to explain how Request Nos. 4 and 5 are insufficiently descriptive for purposes of locating and identifying responsive records, the Commission’s denial of Requests 4 and 5 on these grounds was erroneous.

III. SCOC Has Withheld Responsive Materials on Grounds and in a Manner That FOIL Does Not Permit.

In partially denying the NYCLU’s FOIL request, the Commission asserts, on a

sweeping basis, that various disclosure exemptions under FOIL apply—or, in some cases, only *could* apply—to broad categories of the records the NYCLU seeks. But FOIL requires that an agency "articulate 'particularized and specific justification' for not disclosing requested documents" (*Gould*, 89 NY2d at 275, quoting *Fink v Lefkowitz*, 47 NY2d 567, 571 [1979)]). The Commission has failed to do so here, and its reliance instead on "blanket exemptions for particular types of documents" is "inimical to FOIL's policy of open government," and, thus, unlawful (*Gould*, 89 NY2d at 275).

Request No. 2.b. seeks "all records of, referencing, or created in response to, any 'reportable incident' that was reported to SCOC during the relevant period and that SCOC categorized as . . . 'personnel/inmate sexual assault'" (Gemmell affirmation, exhibit A). In denying this request, the Commission asserted that responsive records "are being withheld pursuant to POL §87(2)(a), to protect information exempt from disclosure under state statute in accordance with New York State Civil Rights Law §50-b" (*id.*, exhibit B).

The Commission's denial of Request No. 2.b. on this basis is erroneous. Section 50-b shields from disclosure "[t]he *identity* of any victim of a sex offense . . . ." (Civ Rights Law § 50-b [1] [emphasis added]). It does not shield from disclosure all records related to sex offenses. And neither Section 50-b nor any provision of FOIL requires or allows the assertion of a blanket exemption as to records that are responsive to Request No. 2. and do not disclose the victim of a sexual offense (*See Gould*, 89 N.Y.2d at 275).[3]

[3] Moreover, to the extent records responsive to Request No. 2.b. contained exempt material, as discussed *infra*, the proper course would be for the Commission to produce the responsive records with the exempt portions redacted (*see Schenectady County Socy. for Prevention of Cruelty to Animals, Inc. v Mills,* 18 NY3d 42, 46 [2011]).

Request No. 5 seeks "[t]he contents of all databases maintained by or on behalf of SCOC during the relevant period that contain data of, referencing, or created in response to any 'reportable incident' reported to SCOC" (Gemmell affirmation, *exhibit* A). The Commission denied this request on the grounds that the Commission is "entitled access to" confidential mental health, HIV/AIDS, medical, and sexual assault records that may be protected from disclosure under various state and federal laws and whose disclosure would constitute an unwarranted invasion of personal privacy (*id.*, exhibit E).

The Commission's denial of Request No. 5 on this basis is similarly erroneous. While repeatedly highlighting its entitlement to access purportedly protected mental health, HIV/AIDS, medical, and sexual assault records, the Commission does not actually claim any such records are contained in any database maintained by or on behalf of the Commission and does not even acknowledge that such a database exists (*see id.*).

Similarly, though even further afield from the requirements of FOIL, the Commission attempts to assert a "catch-all" exemption "*to the extent* that records, or portions thereof . . . *may*" be exempt from disclosure under any one of six additional provisions of FOIL (*id.* [emphasis added]). Here again, the Commission does not actually assert that exempt records exist and does not explain whether or how any exemption applies.

Bald speculation that the NYCLU's request *could* reach records that are exempt from disclosure is insufficient to satisfy the Commission's burden to "articulate [a] 'particularized and specific justification'" for nondisclosure based on an exemption to FOIL (*Gould*, 89 NY2d at 275, quoting *Fink*, 47 NY2d at 571). A contrary result would vitiate FOIL's presumption of open access, affording the Commission virtually unfettered discretion to deny any FOIL request based

solely on the hypothetical existence of some exempt record to which the request could conceivably apply.

Moreover, to the extent exempt records were to exist, the appropriate response by the Commission would be to withhold *those records*, not to assert a blanket exemption as to an entire category of records to which the NYCLU's requests apply (*see Gould*, 89 NY2d at 275). By the same token, where only portions of a responsive record are exempt from disclosure, the Commission "cannot refuse to produce the whole record simply because some of it may be exempt from disclosure." (*Schenectady County Socy. for Prevention of Cruelty to Animals,* 18 NY3d at 46). Instead, the "obvious" solution required by FOIL is production of the record with the exempt material redacted (*see id. at* 45–46).

And even where the Commission does employ redaction in the limited records released, it does so improperly. When producing redacted materials, it is the agency's "burden to demonstrate that 'the material requested falls squarely within the ambit of . . . the exemptions'" (*NY Civ Liberties Union v City of Syracuse*, 210 AD3d 1401, 1403 [4th Dept 2022]). "Any claimed redactions . . . are to be documented in a manner that allows for review by a court" (*id.*; *see also Villalobos v NYC Fire Dept*, 130 AD3d 935, 937 [2d Dept 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 AD3d 1499 [4th Dept 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 has redacted]).

Here, the Incident Reports released by the Commission in response to Request No. 2.a. are replete with redactions on hundreds of pages. Among the redactions are those appearing to cover portions of Incident Reports detailing the manner in which jail staff responded to the

incident in question (*see e.g.* Gemmell affirmation, exhibit G at 2). In many instances, the Commission appears to have applied redactions inconsistently (*compare id.*, exhibit G at 2 [redacting everything in the "Staff action in response to the Incident" section] *with id.*, exhibit G at 14 [redacting nothing] *and id.*, exhibit I at 2 [redacting one entry but leaving "Chemical Agent," "Disciplinary Action Initiated," and "Restraints" unredacted]). The only justification offered by the Commission for these reactions is a bare citation to POL § 87 [2] [b] which exempts those records whose "disclosure would constitute an unwarranted invasion of personal privacy" (*id*., exhibits H, J).

This falls short the Commission's obligation under FOIL to explain the redactions it applies. DOCCS may not merely cite to exemptions in the statute while failing to describe the withheld materials in a manner sufficient for the NYCLU to evaluate the redaction.
While the NYCLU acknowledges that portions of the records produced in response to Request No. 2.a. may well be redacted under POL § 89 (2) — 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 Commission's redactions.

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 to be documented in a manner that allows for review by a court" (*Syracuse*, 210 AD3d at 1403). Accordingly, the Court should order DOCCS to provide the NYCLU with a redaction log including basic details about the material redacted and basis for the redaction. Alternatively, the Court should order an *in camera* review to determine if the Commission's redactions fall within the exemption the Commission claims

IV. The NYCLU Is Entitled to Attorney's Fees and Costs.

When a party has "substantially prevailed" and the agency had "no reasonable basis for denying access" to the requested records, courts must assess reasonable attorney's fees and costs (POL § 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 NY Civ Liberties Union v City of Saratoga Springs*, 87 AD3d 336, 338 [3d Dept 2011]). Thus, if SCOC produces additional material as a result of this proceeding, the NYCLU will have substantially prevailed.

As the NYCLU has established, the Commission has withheld or otherwise failed to produce a variety of responsive records that are subject to release under FOIL. Because the Commission's arguments against further disclosure are erroneous and unreasonable, the Court should require the Commission to release additional responsive records, rendering the NYCLU a prevailing party for purposes of this proceeding.

CONCLUSION

For all these reasons, the Court should grant the NYCLU's petition.

Dated: February 2, 2024
New York, New York

Respectfully submitted,

NEW YORK CIVIL LIBERTIES UNION FOUNDATION

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CERTIFICATION PURSUANT TO 22 N.Y.C.R.R. § 202.8-b

I hereby certify that this memorandum of law complies with the word-count limit of 22 N.Y.C.R.R. § 202.8-b because it contains 5,363 words, excluding those parts exempted by 22 N.Y.C.R.R. § 202.8-b [b].

Dated: February 2, 2022
New York, New York

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