

**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. _____

VERIFIED PETITION

PRELIMINARY STATEMENT

1. Through 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, the chief regulator of carceral facilities in New York State, responds to reports of physical and sexual assault perpetrated by staff against individuals incarcerated at jails statewide.

2. State law requires both that county jails report such abuses to SCOC and that SCOC investigate them. But despite these gestures towards accountability and oversight, New Yorkers remain largely in the dark about what, if anything, results.

3. In July 2022, the NYCLU sought access under the Freedom of Information Law to records concerning SCOC’s handling of reports of physical and sexual assault perpetrated by staff at county jails over the past decade. Yet despite the Freedom of Information Law’s presumption of open access to agency records, more than a year after the NYCLU’s request, SCOC had failed and refused to release more than a narrow sliver of the many relevant records it undoubtedly maintains.

4. Through its records request to SCOC, the NYCLU seeks to shed light on a matter of central public concern: our state’s capacity and willingness to combat serious misconduct by government employees. The Freedom of Information Law gives the NYCLU that right.

5. The NYCLU challenges SCOC’s denial of the July 2022 records request and seeks an order requiring SCOC to release responsive records to the full extent required under the Freedom of Information Law and to justify any withholdings.

PARTIES

6. Petitioner NYCLU is a non-partisan, not-for-profit organization that seeks to promote transparency in government and to defend the civil rights and liberties of New Yorkers. The NYCLU maintains its primary office in New York County, New York.

7. Respondent SCOC is the primary regulator of county jails located in New York State and is an “agency” within the meaning of FOIL. SCOC’s primary office is in Albany County, New York.

FACTUAL ALLEGATIONS

8. The NYCLU submitted the FOIL request at issue in this proceeding to SCOC on July 6, 2022. The request sought copies of records concerning the agency’s handling of incidents reports received from both county jails and the New York City Department of Correction. A true and accurate copy of the request is attached as Exhibit A.¹

9. On September 21, 2022, the NYCLU received an initial decision from SCOC’s Records Access Officer partially granting and partially denying the NYCLU’s request. A true and accurate copy of that decision is attached as Exhibit B.

¹ All exhibits referenced in this petition are attached to the Affirmation of Antony P. F. Gemmill, dated February 2, 2024.

10. In partially granting the NYCLU's request, the Records Access Officer released a redacted version of a single ten-page document entitled "Processing of Reportable Incidents," asserting that redacted portions of the document were exempt from disclosure under FOIL. A true and accurate copy of that document is attached as Exhibit C.

11. In denying the remainder of the request, the Records Access Officer claimed that portions of the NYCLU's request did not "reasonably describe[]" the records sought, SCOC had not located records responsive to portions of the NYCLU's request following a "diligent search," and records responsive to portions of the NYCLU's request were exempt from disclosure under FOIL.

12. On October 21, 2022, the NYCLU submitted to SCOC's FOIL Appeals Officer an appeal of SCOC's initial decision on the FOIL request. A copy of the NYCLU's appeal is attached as Exhibit D. In its appeal, the NYCLU disputed SCOC's claims about the sufficiency of the request's description of the records sought, as well as the sufficiency of the agency's search for responsive records. The NYCLU also challenged SCOC's various assertions of FOIL exemptions.

13. In a letter dated November 8, 2022, SCOC's FOIL Appeals Officer partially granted and partially denied the NYCLU's appeal. A true and accurate copy of that decision is attached as Exhibit E.

14. In partially granting the NYCLU's appeal, the FOIL Appeals Officer conceded, "It appears [a portion of the NYCLU's] request was misread by SCOC's Records Access Officer," 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."

15. In denying the remainder of the appeal, the FOIL Appeals Officer concurred with the decision of the Records Appeals Officer and asserted several further bases for denial, including that additional portions of the NYCLU’s request did not “reasonably describe[]” the records sought and that unspecified additional records “may constitute” materials exempt from disclosure under FOIL.

16. On November 14, 2022, SCOC’s Records Access Officer acknowledged the decision on the NYCLU’s appeal 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.” A true and accurate copy of the Record Access Officer’s acknowledgement and extension notice is attached as Exhibit F.

17. For almost a year after the NYCLU submitted this appeal, SCOC repeatedly extended the agency’s anticipated timeline for completing the NYCLU’s request on the grounds that the records identified following the decision on the NYCLU’s appeal remained “under review for applicable exemptions, legal privileges, and responsiveness.

18. On September 21, 2023—over a year after SCOC’s initial decision on the NYCLU’s FOIL request and over nine months after SCOC’s original estimated delivery date—SCOC released partially redacted records containing 1,382 incident reports from the New York City Department of Correction. These records omitted incident reports from any agency or county jail anywhere else in New York State. A true and accurate copy of this second production is attached as Exhibit G.

19. In an email accompanying the first supplemental production on September 21, 2023, SCOC's Records Access Officer asserted that redacted portions of the production were exempt from disclosure under FOIL. A true and accurate copy of that email is attached as Exhibit H.

20. 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 supplemental production. The NYCLU requested that SCOC correct its production by releasing the omitted records.

21. Later the same day, SCOC's Records Access Officer conceded, "County [j]ail records were inadvertently not attached to the records that were sent to you on September 21, 2023," released to the NYCLU partially redacted records containing 12 incident reports from county jails outside New York City, and asserted that redacted portions of those records were exempt from disclosure under FOIL. A true and accurate copy of this third production is attached as Exhibit I.

22. In a subsequent email to the NYCLU, also on October 2, 2023, the Records Access Officer confirmed that this second supplemental production constituted SCOC's completed response to the NYCLU's FOIL request. A true and accurate copy of the NYCLU's correspondence with SCOC on October 2, 2023, is attached as Exhibit J.

CAUSE OF ACTION

Article 78 Review, CPLR § 7801 *et seq.*

23. Article 78 is the appropriate vehicle for reviewing SCOC's final decision of a FOIL request.

24. The NYCLU has a clear legal right to production of the records it requested from SCOC, subject only to the narrow exemptions permitted by FOIL.

25. SCOC's obligation under FOIL to produce records responsive to the NYCLU's request is mandatory.

26. No factual or legal basis exists for SCOC to withhold the records requested by the NYCLU, or any portion of those records, without providing sufficient justification under FOIL's narrow exemptions to disclosure.

27. The NYCLU exhausted its administrative remedies when it appealed SCOC's denial of the FOIL request and SCOC partially denied that appeal.

28. The NYCLU has no other remedy at law.

JURISDICTION AND VENUE

29. The Court has jurisdiction over this matter under CPLR § 7801.

30. Under CPLR § 7804(b), venue lies in Albany County, where SCOC's principal office is located and where Respondent's actions at issue in this litigation took place.

REQUEST FOR RELIEF

WHEREFORE, Petitioner seeks judgment under CPLR § 7806:

- a. Requiring SCOC to produce, on a rolling basis and within a reasonable timeframe, all records that are responsive to the NYCLU's FOIL request dated July 6, 2022, with only those narrow withholdings permitted under FOIL;
- b. Requiring, as to every record or portion thereof withheld under claim of exemption or privilege, that SCOC either:
 - i. Produce a written log describing the material withheld and setting forth the specific and particularized basis for withholding; or

- ii. Submit the withheld material to the Court for *in camera* review;
- c. Awarding the NYCLU its reasonable attorney's fees and litigation costs pursuant to Public Officers Law § 89(4)(c); and
- d. Granting any other relief the Court deems appropriate.

Dated: February 2, 2024
New York, New York

Respectfully submitted,

NEW YORK CIVIL LIBERTIES UNION FOUNDATION

/s/ Antony P. F. Gemmell

Antony P. F. Gemmell

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VERIFICATION

I, Antony Gemmell, an attorney admitted to practice law in the State of New York, hereby affirm under penalty of perjury as follows:

1. I am an attorney at the New York Civil Liberties Union Foundation, counsel for the Petitioner in this proceeding.
2. I have read the foregoing Verified Petition and know its contents.
3. The contents of the Verified Petition are true to the best of my own knowledge.

Dated: February 2, 2024
New York, New York

/s/ Antony P. F. Gemmell
Antony P. F. Gemmell