

**Cooper v State of New York**

2021 NY Slip Op 33977(U)

January 26, 2021

Court of Claims

Docket Number: Claim No. 131452

Judge: Frank P. Milano

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## Synopsis

Claimant's motion to compel production of Department of Correction and Community Supervision (DOCCS) records and documents in inmate claim alleging correction officer assault/use of excessive force against inmate and subsequent lack of adequate medical care by defendant, including the DOCCS Response to the New York State Commission of Correction Preliminary Report regarding the subject incident and personnel and disciplinary records of certain correction officers, and a nurse employed by defendant, is granted, with redactions, in view of repeal of Civil Rights Law § 50-a, after *in camera* review.

## Case information

UID: 2021-041-008  
Claimant(s): TRACY YVONNE COOPER as Administrator of  
the Estate of TERRY L. COOPER, JR.  
Claimant short name: COOPER  
Footnote (claimant name) :  
Defendant(s): THE STATE OF NEW YORK  
Footnote (defendant name) :  
Third-party claimant(s):  
Third-party defendant(s):  
Claim number(s): 131452  
Motion number(s): M-94718  
Cross-motion number(s):  
Judge: FRANK P. MILANO  
Claimant's attorney: JOSHUA S. MOSKOVITZ, ESQ.  
HON. LETITIA JAMES  
Defendant's attorney: NEW YORK STATE ATTORNEY GENERAL  
By: Christina Calabrese, Esq.  
Assistant Attorney General  
Third-party defendant's attorney:  
Signature date: January 26, 2021  
City: Albany  
Comments:  
Official citation:  
Appellate results:  
See also (multcaptioned case)

## Decision

Defendant moves "for an order pursuant to C.P.L.R. §§ 3101 (a) and 3124" to compel production of documents and records in this claim seeking recovery for the conscious pain and suffering and wrongful death of claimant's decedent. Defendant opposes the claimant's motion to compel.

The claim alleges that claimant's decedent "Cooper died on May 19, 2016 while he was incarcerated at Clinton Correctional Facility." The claim further alleges that Cooper was "assaulted by one or more New York State corrections officers, whose names are unknown at this time. Mr. Cooper died later that day."

The claim continues:

"The final autopsy report describes injuries to Mr. Cooper's face, left shoulder, back, left knee, and right calf. It also states that Mr. Cooper was 'escorted to the medical unit after reported altercation with guards.'

The autopsy further concluded that Mr. Cooper died due to 'cardiorespiratory arrest consistent with acute exacerbation of chronic asthma.' it states that when Mr. Cooper was 'being escorted to the medical unit ... he became short of breath while walking with sudden collapse and loss of consciousness.' The autopsy also reflects that Mr. Cooper had a '[h]istory of asthma since childhood with history on the inhaler use during incarceration.'

Mr. Cooper's death was the result of the injuries he suffered from the altercation with corrections officers and the ensuing negligence and/or indifference to his obviously serious medical need. Mr. Cooper was known to have a history of asthma, which required an inhaler, and any reasonable person would have realized that needed emergency medical attention when he collapsed and lost consciousness. Had he received that attention, he would not have died.

Mr. Cooper experienced pain and suffering before he became unconscious. His estate and decedents have and will continue to suffer substantial injury in damages from his wrongful death."

The claim thus alleges that claimant's decedent's pain and suffering and subsequent death were caused by an alleged assault and/or use of excessive force by defendant's correction officers and by the alleged failure by defendant's employees to provide reasonable and adequate medical care after the purported assault and/or use of excessive force.

Claimant served a "FIRST SET OF COMBINED DEMANDS" (Demands) which set forth specific numbered demands for names and addresses of witnesses referenced in various investigative reports of the subject incident, including for fellow inmates, correction officers, nurses and doctors. The Demands also requested various documents, including, but not limited to, Use of Force Reports, Inmate Injury Reports, Unusual Incident Reports, photographs, videotapes, audiotapes, medical records of claimant's decedent, disciplinary records, duty rosters, logbooks, grievances and/or disciplinary actions involving involved correction officers, use of force policies and directives and facility asthma and medical emergency policies. The claimant further demanded oral and written statements regarding the subject incident of claimant, claimant's decedent, correction officers, fellow inmates and certain other specifically named individuals.

In its responses, defendant made objections to certain of claimant's demands as overly broad and irrelevant and further objected that certain of the demanded documents were protected by the public interest privilege, Education Law § 6527, the privacy provisions of Public Officers Law and by Civil Rights Law § 50-a.

While the claimant's motion to compel was pending, the parties entered into a Stipulated Protective Order:

"To govern all disclosure conducted in this action that is designated as defined in paragraphs 2 and 3 pursuant to the New York Civil Practice Law and Rules and all other information exchanged by the parties or produced by any third party in response to discovery requests or subpoenas."

Subsequent to submission of claimant's motion to compel and the execution of the Stipulated Protective Order, the parties continued to engage in disclosure of records and documents demanded by claimant.

Consequently, the following two items of disclosure demanded by claimant remain in dispute: Production of an unredacted copy of the New York State Department of Correction and Community Supervision Response (DOCCS Response) to the New York State Commission of Correction Preliminary Report regarding the incident underlying the claim and unredacted personnel and disciplinary records of correction officers, and a DOCCS nurse, allegedly involved in the incident alleged in the claim.

The defendant provided to the Court for *in camera* review, via electronic transmission, proposed redacted and unredacted copies of the DOCCS Response and proposed redacted and unredacted copies of personnel and disciplinary records of correction officers and a DOCCS nurse allegedly involved in the incident alleged in the claim.

The repeal of Civil Rights Law § 50-a and the amendment of Public Officer's Law §§ 86, 87 and 89 was enacted on June 12, 2020 and went into "effect immediately." Civil Rights Law § 50-a had previously prohibited the disclosure of police personnel and disciplinary records in litigation or pursuant to the New York Freedom of

Information Law (FOIL) without the affected officer's written consent or a court order. The defined scope of the repeal and statutory amendments includes the personnel and disciplinary records of correction officers.

Public Officers Law § 86 provides definitions of terms relevant to the newly acted amendments and §§ 87 and 89, respectively, define the personnel and disciplinary records subject to FOIL disclosure and set forth parameters of both mandatory and permissive redaction of certain information contained in such personnel and disciplinary records.

Public Officers Law § 87 provides, at relevant part:

"4-a. A law enforcement agency responding to a request for law enforcement disciplinary records as defined in section eighty-six of this article 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.

4-b. A law enforcement agency responding to a request for law enforcement disciplinary records, as defined in section eighty-six of this article, may redact any portion of such record containing the information specified in subdivision two-c of section eighty-nine of this article prior to disclosing such record under this article." (NY Pub Off Law § 87).

Public Officers Law § 89 provides, at relevant part:

"2-b. For records that constitute law enforcement disciplinary records as defined in subdivision six of section eighty-six of this article, a law enforcement agency shall redact the following information from such records prior to disclosing such records under this article:

(a) items involving the medical history of a person employed by a law enforcement agency as defined in section eighty-six of this article as a police officer, peace officer, or firefighter or firefighter/paramedic, not including records obtained during the course of an agency's investigation of such person's misconduct that are relevant to the disposition of such investigation;

(b) the home addresses, personal telephone numbers, personal cell phone numbers, personal e-mail addresses of a person employed by a law enforcement agency as defined in section eighty-six of this article as a police officer, peace officer, or firefighter or firefighter/paramedic, or a family member of such a person, a complainant or any other person named in a law enforcement disciplinary record, except where required pursuant to article fourteen of the civil service law, or in accordance with subdivision four of section two hundred eight of the civil service law, or as otherwise required by law. This paragraph shall not prohibit other provisions of law regarding work-related, publicly available information such as title, salary, and dates of employment;

(c) any social security numbers; or

(d) disclosure of the use of an employee assistance program, mental health service, or substance abuse assistance service by a person employed by a law enforcement agency as defined in section eighty-six of this article as a police officer, peace officer, or firefighter or firefighter/paramedic, unless such use is mandated by a law enforcement disciplinary proceeding that may otherwise be disclosed pursuant to this article.

2-c. For records that constitute "law enforcement disciplinary records" as defined in subdivision six of section eighty-six of this article, a law enforcement agency may redact records pertaining to technical infractions as defined in subdivision nine of section eighty-six of this article prior to disclosing such records under this article." (NY Pub Off Law § 89).

Here, of course, the Court is not considering a FOIL request, but rather, is exercising its judicial role in supervising the scope of disclosure which requires, pursuant to CPLR 3101 (a),:

"(F)ull disclosure of all matter material and necessary in the prosecution or defense of an action."

It is well-settled law that a "party seeking discovery must satisfy the threshold requirement that the request is reasonably calculated to yield information that is 'material and necessary'--i.e., relevant" Forman v Henkin, 30 NY3d 656, 661 [2018]; Catlyn & Derzee, Inc. v Amedore Land Developers, LLC (166 AD3d 1137, 1141 [3d Dept 2018]).

In that regard, the Court's inquiry is guided by the well established rule that it has "broad discretion in managing disclosure, and absent an abuse of discretion or unreasonable interference with the disclosure of relevant and necessary material," that discretion will not be disturbed (Czarnecki v Welch, 23 AD3d 914, 915 [3d Dept 2005]).

It is equally clear that "[w]hile disclosure provisions are to be liberally construed, the trial court is vested with broad discretion to supervise discovery and determine what is 'material and necessary' under CPLR 3101 (a)" (Mora v RGB, Inc., 17 AD3d 849, 851 [3d Dept 2005]). The standard of materiality is "one of usefulness and reason," with the goal of "sharpening the issues and reducing delay and prolixity" (Allen v Crowell-Collier Publ. Co., 21 NY2d 403, 406 [1968]).

With those principles in mind, the Court has carefully reviewed, *in camera*, the submitted materials and considered whether, in the context of the claim's allegations, the repeal of Civil Rights Law § 50-a, the amendment of Public Officers Law §§ 86, 87 and 89 and the Court's role in supervising disclosure, the defendant's need to protect its methods and manner of insuring the privacy, safety and security of inmates, correction officers and the public outweighs the claimant's right to disclosure of information potentially relevant and material to the claim.

Initially, the Court orders defendant to produce to claimant an unredacted copy of the DOCCS Response. Defendant's reliance on Education Law § 6527 (3) is misplaced because DOCCS is not a "medical review committee . . . performing [a] quality assurance review function." The DOCCS Response is directly relevant to the issues raised in the claim.

Next, the Court rejects the defendant's assertion that disclosure of the personnel and disciplinary records sought by claimant remains shielded by Civil Rights Law 50-a, despite its repeal, because the repeal is not "retroactive." The legislation went into "effect immediately" and, by its plain reading and intent, applies to records then existing and not simply to records created at a time subsequent to the enactment of the legislation on June 12, 2020.

The defendant's proposed redactions in the submitted personnel and disciplinary records concern information not relevant to the claim and comport with commonsense notions of privacy and with the required and permissive redactions set forth in the amendments to the Public Officers Law.

The defendant is ordered to provide the *in camera* materials to the claimant, as redacted, with one exception, in addition to providing the unredacted DOCCS Response:

The personnel and disciplinary records of correction officer Nichols, relating to the Notice of Discipline dated November 3, 2015 and the Disciplinary Settlement Agreement dated February 22, 2016, are ordered to be disclosed to the claimant unredacted as those records are arguably temporally and substantively similar to the conduct alleged in the claim. In so ordering, the Court makes no finding as to the relevance and admissibility of such records at trial.

Claimant is instructed and ordered that any unredacted material disclosed after the Court's *in camera* review is to be used solely for the purpose of this claim to the extent necessary for the litigation of the claim and shall be disclosed only to counsel, personnel employed to assist counsel, claimant, experts, court personnel, court reporters and/or monitors.

Claimant is further instructed and ordered that any unredacted material disclosed after the Court's *in camera* review is subject to the terms, limitations and restrictions of the Stipulated Protective Order filed September 24, 2020.

Claimant's motion for an order compelling defendant to produce certain documents and records is granted to the extent set forth above.

January 26, 2021

Albany, New York

FRANK P. MILANO

Judge of the Court of Claims

## Papers Considered:

1. Claimant's Notice of Motion, filed October 7, 2019;
2. Affirmation of Joshua S. Moskovitz, dated October 7, 2019, and attached exhibits;
3. Affirmation in Opposition of Christina Calabrese, dated November 7, 2019, and attached exhibits;
4. Reply Affirmation of Joshua S. Moskovitz, dated December 10, 2019, and attached exhibits;
5. Letter of Christina Calabrese, dated February 10, 2020, and attached exhibits for *in camera* review;
6. The Court's letter of February 21, 2020 regarding *in camera* review materials;
7. Letter of Christina Calabrese regarding repeal of Civil Rights Law 50-a, dated July 13, 2020;
8. Letter of Joshua Moskovitz regarding repeal of Civil Rights Law 50-a, dated July 28, 2020;
9. Stipulated Protective Order, filed September 24, 2020;
10. Affirmation in Opposition of Christina Calabrese, dated January 4, 2021;
11. The Court's letter regarding submission of *in camera* documents and records, dated January 7, 2021;
12. Affirmation in Reply of Joshua S. Moskovitz, dated January 11, 2021;
13. Letter of Christina Calabrese, dated January 12, 2021.

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