STATE OF NEW YORK
COURT OF APPEALS

To be argued by:
Matthew McGowan

In the Matter of the Application of
PRISONERS' LEGAL SERVICES OF NEW YORK,

Petitioner-Appellant,

Time Requested:
15 Minutes

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules,

APL-2023-00048

-against-

NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION,

Respondent-Respondent.

BRIEF FOR APPELLANT

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Dated: June 16, 2023

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PRELIMINARY STATEMENT

This Article 78 proceeding presents an opportunity for the Court to resolve two important questions concerning the limits of agency authority to withhold routine factual records under the Freedom of Information Law (FOIL).[1] Prisoners' Legal Services of New York ("PLS" or "appellant") is a nonprofit legal services organization that represents incarcerated New Yorkers in legal matters to protect their civil and human rights. PLS's core practice areas include challenges to administrative prison disciplinary hearings and investigations of violence, including excessive force and failures to protect from foreseeable harm. Those matters require timely access to factual records generated within state prisons, including Unusual Incident (UI) reports[2] and basic surveillance video. PLS relies upon FOIL to secure and examine the public records that are essential to its oversight of prison operations.

PLS's interest in potential civil rights violations within New York State prisons is by no means unique. The public at large has a vested interest in ensuring that officials maintain fair and humane facilities that protect incarcerated individuals' fundamental rights and meet their basic needs. Indeed, there are few

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[1] Public Officers Law §§ 84 – 90.

[2] Pursuant to agency policy under DOCCS's Directive No. 4004, a UI report must be generated any time an "unusual incident" occurs within a DOCCS facility. An unusual incident is defined as "a serious occurrence that (1) may impact upon or disrupt facility operations, or (2) that has the potential for affecting [DOCCS's] public image, or (3) that might arouse widespread public interest." *Matter of Prisoners' Legal Serv. of NY v. New York Dept. of Corr. & Community Supervision*, 173 A.D.3d 8, 12 (3d Dep't 2019).

settings in which governmental transparency is more important than the cloistered prison environment. Correctional officials wield vast power over the people in their custody, by definition out of view of the public eye. New York's statutory commitment to transparency under FOIL therefore holds particular gravity in the prison context.

In the case at bar, respondent Department of Correction and Community Supervision ("DOCCS, "the Department," or "respondent") denied PLS's FOIL requests for UI reports and routine surveillance footage of a prison yard. In doing so, the agency relied upon two FOIL exemptions that were inapplicable on their face: Public Officers Law § 87(2)(e) (the "law enforcement exemption") and § 87(2)(g) (the "intra-agency materials exemption"). While this litigation was pending, DOCCS eventually produced the disputed materials to PLS. In a Decision and Order/Judgment dated February 11, 2021, Albany County Supreme Court (O'Connor, J.) held that PLS's challenge to DOCCS's improper withholdings was moot in light of its production of the records. The Appellate Division, Third Department affirmed the lower court's ruling in a Memorandum and Order decided and entered on October 27, 2022.

Appellant respectfully asks this Court to determine that DOCCS's denials of the disputed records warrant exceptions to the mootness doctrine to allow a decision on the merits, as the case presents compelling and novel issues concerning the limits

of prison officials' authority to thwart essential oversight. Absent the Court's intervention, DOCCS's improper invocation of the intra-agency materials and law enforcement exemptions will continue to evade review and hamstring the public's ability to hold its officials to account.

QUESTIONS PRESENTED

1. Does the issue of whether Unusual Incident reports are exempt from disclosure under the Freedom of Information Law's "inter/intra-agency materials exemption" warrant an exception to the mootness doctrine?[3] [4]

   Answer in Court below: No. Irrespective of the likelihood of recurrence or the novelty or substantiality of the underlying issue, it is not one that will typically evade review. (R-5-6)

2. Does DOCCS have authority to withhold factual portions of Unusual Incident reports under the Freedom of Information Law's "inter/intra-agency materials exemption" pursuant to Public Officer Law § 87(2)(g)?[5]

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[3] The letter "R" followed by a number indicates a citation to the corresponding page of the Record on Appeal.

[4] R-18; R-21-22; R-400; R-404-06.

[5] R-18; R-134-35; R-216-217; R-405-06.

Answer in Court below: The Appellate Division did not reach the merits.

3. Does the issue of whether prison surveillance video is exempt from disclosure under the Freedom of Information Law's "law enforcement exemption" warrant an exception to the mootness doctrine?[6]

   Answer in Court Below: No. Irrespective of the likelihood of recurrence or the novelty or substantiality of the underlying issue, it is not one that will typically evade review. (R-5-6)

4. Does DOCCS have authority to withhold routine video surveillance footage under the Freedom of Information Law's "law enforcement exemption" pursuant to Public Officer Law § 87(2)(e)?[7]

   Answer in Court below: The Appellate Division did not reach the merits.

JURISDICTION OF THE APPEAL

This Court has jurisdiction over the present appeal pursuant to Civil Practice Law and Rules (CPLR) § 5602(a)(1)(i). In an Order entered on March 21, 2023, (R-

[6] R-18; R-21-22; R-400; R-404-06.

[7] R-18; R-134-35; R-207-09; R-217; R-405-06.

2), this Court granted appellant leave to appeal from the Memorandum and Order of the Appellate Division, Third Department entered on October 27, 2022. (R-3).[8] The Appellate Division affirmed Orders and Decisions/Judgments of Supreme Court, Albany County (O'Connor, J), dated February 11, 2021, and June 8, 2021, that denied appellant's CPLR Article 78 petition and declaratory judgment action. The issues presented in this appeal were timely raised and preserved in the courts below, as noted in the record citations identified in the footnotes above with respect to each question.

BACKGROUND

Statement of Material Facts

On May 11, 2019, an incident occurred in the yard Auburn Correctional Facility.[9] In response, DOCCS charged numerous individuals with violating prison rules, including PLS clients Phillip Bradley and Antonion Christian. DOCCS pursued administrative disciplinary hearings against those individuals. PLS sought to review the administrative record of several such hearings for possible appeal

[8] The Third Department's decision is reported at *Matter of Prisoners' Legal Serv. of NY v. New York State Dept. Corr. & Community Supervision*, 209 A.D.3d 1208 (3d Dep't 2022).

[9] The litigation before the courts below also addressed PLS's FOIL requests for additional records concerning incidents that occurred in the yard at Clinton Correctional Facility. As the questions for which this Court granted leave to appeal are limited to the May 11, 2019, incident at Auburn Correctional Facility, appellant's recounting of the facts is limited to those pertaining to that incident.

grounds. As part of its review, PLS submitted FOIL requests for the evidence introduced at the hearings held for Mr. Bradley and Mr. Christian, including video surveillance of the prison yard (the "Auburn video") and the UI report considered at Mr. Bradley's hearing (the "Bradley UI report"). (*See* R-148; R-150). In each instance, DOCCS denied the FOIL requests with respect to the video footage and UI reports, and rejected PLS's appeals of the denials. (*See* R-173; R-163).

The Bradley FOIL Request

On July 29, 2019, PLS submitted a FOIL request to the superintendent of Auburn Correctional Facility seeking "the Superintendent's Hearing packet and copies of all evidence introduced or viewed" at Mr. Bradley's June 25, 2019, disciplinary hearing—including "[a]ny videotapes and/or photographs which were viewed at the hearing" and "[a]ll Unusual Incident Reports" (the "Bradley request"). (R-150). On July 31, 2019, a staff member at Auburn Correctional Facility notified PLS via email that several of its recent FOIL requests "stem[med] from an incident date of 5/11/19"; that "the incident is still an open criminal investigation"; and that "many of the requested FOIL items are unavailable." (R-169). The email did not identify any of the incarcerated individuals for whom PLS had requested records, nor identify any statutory exemptions in Public Officer Law § 87(2) under which the requested materials were denied.

PLS emailed DOCCS's Office of Counsel on August 1, 2019, to request review of the apparent FOIL denial reflected in DOCCS's July 31, 2019, email. (R-168). DOCCS Assistant Counsel Samantha Koolen advised via email on August 5, 2019, that she would "look into" the matter. (*Id.*). On August 29, 2019, PLS sent an additional email to Ms. Koolen, specifically advising that DOCCS's July 31 email appeared to encompass the video and UI report sought in the Bradley request. (R-167). PLS asked Ms. Koolen to provide the statutory exemption on which the Department was relying to deny the video and Bradley UI report. (*Id.*). In an email response dated August 30, 2019, Ms. Koolen directed PLS to submit a FOIL appeal. (*Id.*). She did not identify any statutory ground for denying the video or UI report sought in the Bradley request.

PLS submitted an administrative FOIL appeal on September 3, 2019, concerning DOCCS's withholding the video and the Bradley UI report. (R-166). DOCCS issued a decision dated September 18, 2019, that denied the FOIL appeal in full. (R-173-174). The appeal decision cited two grounds on which the Bradley UI report was allegedly exempt from disclosure: first, that it was "still a preliminary report. Pursuant to Public Officers Law ('POL') § 87(2)(g), non-final deliberative records are exempt from disclosure." (R-173). Second, the appeal decision stated that "the release of a preliminary investigative reports [sic] could interfere with ongoing law enforcement investigations, and therefore such records are also exempt

from release under Public Officers Law §87(2)(e)," without reference to any specific subsection. (R-173).

The appeal decision also affirmed DOCCS's denial of the video sought in the Bradley request. The decision stated, "[A]n agency can elect to deny the release of a record if it would interfere with law enforcement investigations or judicial proceedings pursuant to Public Officer's Law §87(2)(e)." (R-173). It further stated:

> The incident in question is still under investigation internally, as well as externally by law enforcement agencies... [R]elease of the video at this time would threaten to prematurely reveal law enforcement and the District Attorney's plans for the case, prematurely reveal the identity of witnesses and sources, and result in the premature release of evidence in a pending criminal investigation. Lesher V. Hynes, [sic] 19 N.Y.3d 57 (2012).

(R-173).

The Christian FOIL Request

On June 6, 2019, PLS submitted a nearly identical FOIL request to the Auburn Correctional Facility Superintendent seeking "the Superintendent's Hearing packet and copies of all evidence introduced or viewed" at Mr. Christian's May 24, 2019 Tier III hearing—including "[a]ny videotapes and/or photographs which were viewed at the hearing" and "[a]ll Unusual Incident Reports" (the "Christian request"). (R-148). DOCCS produced some records in response to the Christian request, which did not include any video footage. On June 28, 2019, PLS emailed

DOCCS regarding the records provided, noting that the materials "[did] not include the video viewed at the hearing." (R-158).

DOCCS advised PLS via email dated July 29, 2019, that "the incident in which [Mr. Christian] was involved in is still an active investigation," and the Deputy Superintendent "[would] not release the video to anyone at [that] time." (R-161). Upon follow up inquiry from PLS, DOCCS Assistant Counsel Samantha Koolen responded via email on July 29, 2019, that she agreed with the facility's denial of the requested video, and advised that the video was "denied pursuant to POL Section 87(2)(e) where release of records would interfere with law enforcement investigations." (R-160).

On August 13, 2019, PLS administratively appealed the denial of the video sought in the Christian request. (R-153-155). DOCCS's FOIL Appeals officer denied the appeal in a decision dated August 28, 2019. She stated, "an agency can elect to deny the release of a record if it would interfere with law enforcement investigations or judicial proceedings pursuant to Public Officer's Law §87(2)(e)." (R-163). She further stated:

> The incident in question is still under investigation internally, as well as externally by law enforcement agencies... [R]elease of the video at this time would threaten to prematurely reveal law enforcement and the District Attorney's plans for the case, prematurely reveal the identity of witnesses and sources, and result in the premature release of evidence in a pending criminal investigation. Lesher V. Hynes, [sic] 19 N.Y.3d 57 (2012).

(R-163).

Procedural History

On December 23, 2019, PLS submitted a petition pursuant to Article 78 of the New York Civil Practice Law and Rules seeking release of the withheld materials.[10] (R-123-137). In response, DOCCS produced the Bradley UI report and Auburn video.[11] DOCCS filed a Verified Answer and Memorandum of Law in Opposition to PLS's Verified Petition on July 3, 2020, which argued that the claims had been mooted with respect to the materials that had been produced. (R-228-238; R-375-389). On July 24, 2020, PLS filed its reply brief, arguing that the intra-agency and law enforcement exemption issues presented by the Bradley UI report and the Auburn video fell within the exception to the mootness doctrine. (R-404-406).

In an Order dated February 11, 2021, Supreme Court denied as moot the portions of appellant's petition that sought the Bradley UI report and Auburn video in light of DOCCS's subsequent production of those materials. (R-53). Supreme Court held that, although the issues would likely recur, they were not "substantial,

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[10] PLS also sought declaratory relief pursuant to CPLR § 3001 pertaining to the questions presented herein. (R-134-35). Supreme Court denied the request for such relief as having been improperly commenced as a hybrid special proceeding/declaratory judgment action for failure to file a summons. (*See* R-53-54; 56). The Appellate Division, Third Department, held that Supreme Court did not abuse its discretion in so deciding. (R-6).

[11] DOCCS asserted in its Verified Answer that "the UI report has now been finalized, and has been provided to [appellant's] counsel in this proceeding, and the May 11, 2019 Auburn video has, upon information and belief, been disclosed to defense counsel in the pending criminal proceeding related to the May 11, 2019 incident, and [appellant's] counsel now has this video. To the extent [appellant] does not possess the Auburn May 11, 2019 video, DOCCS has no objection to disclosure of this video." (R-231). PLS subsequently obtained the video directly from DOCCS.

novel, or likely to evade review," and therefore the mootness exception did not apply.[12] (R-53). PLS appealed Supreme Court's denial of its claims with respect to the Bradley UI report and Auburn video. (R-18-19). In a Memorandum and Order decided and entered on October 27, 2022, the Appellate Division, Third Department affirmed Supreme Court's denial of the Bradley UI report and Auburn video claims as moot. (R-5-6). The Third Department held that appellant "failed to establish that this issue is one that would typically evade review as these exemptions and their invocation are frequently examined by this Court." (R-6).

On December 5, 2022, PLS filed a motion seeking leave to appeal the Third Department's refusal to grant an exception to mootness with respect to the Bradley UI report and Auburn video. This Court granted leave to appeal on March 21, 2023. (R-2).

Statutory Framework

The Freedom of Information Law, codified at Public Officers Law §§ 84 to 90, was enacted "to promote open government and public accountability" by imposing "a broad duty on government to make its records available to the public." (*Matter of Gould v. New York City Police Dept.*, 89 N.Y.2d 267, 274 [1996], citing

[12] Supreme Court also ordered DOCCS to produce additional materials, not germane to the issues before this Court, for *in camera* review. (R-55-56). Supreme Court ruled on appellant's claims with respect to those additional materials in a separate Decision and Order/Judgment dated June 8, 2021. (R-65-70).

Public Officer's Law § 84 [Legislative Declaration]). All government records are "presumptively open for public inspection and copying unless they fall within one of the enumerated exemptions of Public Officers Law § 87(2)." (*Id.*). Such "exemptions are to be narrowly interpreted so that the public is granted maximum access to the records of government." (*Matter of Data Tree, LLC v. Romaine*, 9 N.Y.3d 454, 462 [2007]).

To ensure maximum access to government documents, the burden rests "on the agency to demonstrate that the requested material indeed qualifies for exemption." (*Matter of Hanig v. State of New York Dept. of Motor Vehicles*, 79 N.Y.2d 106, 109 [1992]). This Court has recognized that "[o]nly where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld." (*Matter of Fink v. Lefkowitz*, 47 N.Y.2d 567, 571 [1979]). To invoke an exemption under § 87(2), an agency must articulate a "particularized and specific justification" for withholding requested records. (*Id.*).

The FOIL exemptions under Public Officers Law § 87(2) relevant to the instant proceeding are paragraphs (e) (the "law enforcement exemption") and (g) (the "intra-agency materials exemption"). They currently[13] provide that an agency may deny access to records or portions thereof that:

[13] Notably, Public Officers Law § 87(2)(e) was amended in 2021 (L. 2021, c. 808 § 3) and 2022 (L. 2022, c. 155 § 2), after DOCCS issued the FOIL denial at issue in the instant case. Section

"(e) are compiled for law enforcement purposes only to the extent that disclosure would:

> i. interfere with law enforcement investigations or judicial proceedings, provided however, that any agency, which is not conducting the investigation that the requested records relate to, that is considering denying access pursuant to this subparagraph shall receive confirmation from the law enforcement or investigating agency conducting the investigation that disclosure of such records will interfere with an ongoing investigation;
>
> ii. deprive a person of a right to a fair trial or impartial adjudication;
>
> iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
>
> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures; or

...

(g) are inter-agency or intra-agency materials which are not:

> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations;
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government[.]"

87(2)(e)(i), as in effect at the time of the underlying denials, provided merely that an agency could deny access to records or portions thereof that "(e) are compiled for law enforcement purposes and which, if disclosed, would: (i) interfere with law enforcement investigations or judicial proceedings." The amendments thus added a requirement that when an agency, which is not itself conducting the investigation to which records relate, nonetheless considers denying such records under § 87(2)(e)(i), it must receive confirmation from the relevant law enforcement or investigating agency that disclosure would actually interfere with an ongoing investigation.

ARGUMENT

I. DOCCS's Denial of an Unusual Incident Report Under FOIL's Intra-Agency Materials Exemption Due to the Report's "Preliminary Status" Presents a Textbook Exception to the Mootness Doctrine.

DOCCS's reliance on FOIL's intra-agency materials exemption to deny the Bradley Unusual Incident report reflects the agency's consistently lawless application of that exemption to routine factual records, in contravention of a clear statutory mandate. This Court's intervention is essential to confirm the public's right of timely access to UI reports and to define the contours of the exemption with respect to objective information in public records.

Appellant recognizes that it is fundamental to New York jurisprudence that the power of a court to declare the law is limited to determining the parties' rights as actually controverted in a particular pending case. (*Matter of Hearst Corp. v. Clyne*, 50 N.Y.2d 707, 713 [1980]). That principle "ordinarily precludes courts from considering questions which, although once live, have become moot by passage of time or change in circumstances." (*Id.*). An appeal will generally "be considered moot unless the rights of the parties will be directly affected by the determination of the appeal and the interest of the parties is an immediate consequence of the judgment." (*Id.*). New York courts have long recognized, however, that certain issues warrant ruling on the merits, even if otherwise moot. To qualify for the exception to mootness, a case must satisfy three elements: "1) a likelihood of

repetition, either between the parties or among other members of the public; 2) a phenomenon typically evading review; and 3) a showing of significant or important questions not previously passed on, i.e., substantial and novel issues." (*Hearst*, 50 N.Y.2d at 714-715).

Here, Supreme Court found that appellant's claim with respect to the Bradley request—including the request for the Bradley UI report—was likely to recur. (R-53). Yet Supreme Court ultimately held, in conclusory fashion, that the issues presented by the Bradley request were not "substantial, novel, or likely to evade review," citing *Matter of Associated General Contractors of New York State, LLC, v. New York State Thruway Auth.* (173 A.D.3d 1526, 1527 [3d Dep't 2019]). The Third Department affirmed Supreme Court's denial of appellant's claim concerning the Bradley UI report, but limited its reasoning to the second prong of the exception to mootness doctrine. Citing *Matter of McGee v Putnam County Assistant Dist. Attorney David M. Bishop* (192 A.D.3d 1446, 1449-1450 [3d Dep't 2021]), as well as *General Contractors* (173 A.D.3d at 1527), the Third Department held that appellant failed to establish that DOCCS's denial of the Bradley UI report presented an issue "that would typically evade review[,] as these exemptions and their invocation are frequently examined by this Court." (R-6). For the reasons below, the Third Department's conclusion does not square with the facts of the case or the relevant caselaw.

A. DOCCS's reliance on the intra-agency materials exemption to deny the Bradley UI report presents a novel issue of statewide importance that is likely to recur.

There appears to be no dispute concerning the first prong of the exception to mootness test. Supreme Court correctly found that the issues presented by DOCCS's denial of the Bradley UI report are likely to recur. UI reports are commonly generated in response to incidents of significant public interest,[14] and therefore will continue to be commonly-sought records through FOIL by various members of the public—including PLS. There is no reason to expect that the agency will voluntarily and permanently abandon its position that supposedly "preliminary" UI reports are exempt under the intra-agency materials exemption pursuant to Public Officers Law § 87(2)(g). (*See* R-173). It is therefore a near certainty that the public will again seek UI reports, and that DOCCS will again rely on the intra-agency materials exemption to deny them. The impropriety of DOCCS's reliance on that exemption with respect to UI reports is effectively guaranteed to recur.

Contrary to Supreme Court's unexplained position, however, DOCCS's wrongful denial of UI reports under the intra-agency materials exemption also

[14] Again, per DOCCS's Directive No. 4004, such reports must be generated any time an "unusual incident" occurs within a DOCCS facility, defined as "a serious occurrence that (1) may impact upon or disrupt facility operations, or (2) that has the potential for affecting [DOCCS's] public image, or (3) that might arouse widespread public interest." (*Prisoners' Legal Serv.*, 173 A.D.3d at 12).

presents a novel issue of statewide importance. As noted above, DOCCS's own policy under Directive No. 4004 defines an "unusual incident" to include any occurrence that might arouse widespread public interest. Thus, the subject matter of UI reports definitionally implicates matters of public concern. DOCCS's practice of mandating factual reports on matters important to the public, while simultaneously denying access to such materials, undermines FOIL's broad presumption of transparency on its face. DOCCS's own definition of UI reports unequivocally confirms that the agency's improper withholding of such reports is a substantial issue of public importance.

Moreover, an issue is novel if it "has not yet been considered by this Court." (*Cnty. Bd. 7 of Borough of Manhattan v. Schaffer*, 84 N.Y.2d 148, 154 [1994]). When evaluating whether an issue is novel, courts assess if it presents "questions the fundamental underlying principles of which have not already been declared." (*Hearst*, 50 N.Y.2d at 715). To counsel's knowledge, this Court has never ruled upon the applicability of Public Officer's Law § 87(2)(g) to prison UI reports—particularly when the claimed basis for the exemption is a document's supposedly "preliminary" status. (*See* R-173). Indeed, the Court of Appeals recognized nearly twenty years ago that the question of whether use-of-force forms—which, on information and belief, are factual accounts similar to UI reports—constitute exempt intra-agency materials has not been addressed, and counsel is not aware of any

subsequent ruling by the Court in that regard. (*See Matter of N.Y. Civ. Liberties Union v. City of Schenectady*, 2 N.Y.3d 657, 660–61 [2004] [noting conflict between *Matter of Gannett Co. v. James*, 86 A.D.2d 744 (4th Dep't 1982), lv. denied, 56 N.Y.2d 502 (1982), and *Matter of Gould v. New York City Police Dep't*, 89 N.Y.2d 267 (1996)]).

For reasons discussed further in Section II of appellant's brief, *infra*, the finality of an intra-agency record is immaterial to the application of Public Officers Law § 87(2)(g)(i), to the extent the record contains "statistical or factual tabulations or data." This Court has recognized that "[f]actual data... simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making." (*Gould*, 89 N.Y.2d at 276-77). That definition on its face encompasses the objective, narrative incident descriptions contained in UI reports, and therefore warrants an exception to mootness so this Court can dispense with all future instances in which DOCCS will plainly misapply the intra-agency materials exemption to UI reports—which, again, inherently implicate matters of substantial public concern.

B. The time-limited nature of DOCCS's justification for denying UI reports under the intra-agency materials exemption will uniformly evade review.

The Third Department determined that the exception to the mootness doctrine did not apply to DOCCS's denial of the Bradley UI report under Public Officer's

Law § 87(2)(g) merely because "these exemptions and their invocation are frequently examined by this Court." (R-6). The lower courts' position fails to engage with the facts of the case or the issue presented. That courts "frequently examine" FOIL's intra-agency materials exemption in general does nothing to change the inherently evasive nature of DOCCS's use of that exemption in the case at bar.

DOCCS's specific position with respect to the Bradley UI report bears repeating: the agency denied the record on the ground that it was "still a preliminary report. Pursuant to Public Officers Law ('POL') § 87(2)(g), non-final deliberative records are exempt from disclosure." (R-173). Notwithstanding the fact that DOCCS conflated two independent categories of intra-agency materials that are subject to different disclosure standards,[15] it also relied on an inherently time-limited condition to improperly deny the record sought. The factual information contained in a UI report is subject to disclosure without respect to whether it is final. Nonetheless, DOCCS' position that it will deny a UI report based on preliminary status all but guarantees that the agency will eventually "finalize" and disclose a UI report long before an aggrieved FOIL requester can obtain precedential judicial review.

The record offers no insight into why DOCCS deems UI reports to be "preliminary," nor the timeline or conditions on which they may become "final."

[15] *See, e.g.*, Section II of appellant's brief, *infra*, discussing the general structure of Public Officers Law § 87(2)(g) and its subdivisions (i) through (iv).

On information and belief, and consistent with PLS's decades of experience requesting UI reports from DOCCS through FOIL, the agency will uniformly finalize a UI report before a litigant could reasonably expect to secure a decision in an Article 78 proceeding—much less a precedential decision on appeal to the Appellate Division or this Court.[16] Moreover, when and whether DOCCS chooses to finalize a UI report is a matter entirely within the agency's control, permitting it to moot challenges to its unlawful practice at will and invariably preclude judicial review—another factor that weighs in favor of an exception to mootness. (*See, e.g.*, *Matter of Laborers' Intl. Union of N. Am., Local No. 217 v. New York State Dept. of Transp.*, 280 A.D.2d 66, 69 [3d Dep't 2001] [Appellate Division persuasively concluded that a party's substantial control over when and whether an issue will become moot weighs in favor of the exception to mootness]).

Finally, the cases the Third Department cited to conclude that the issue here will not evade review are inapposite. Indeed, *General Contractors* (173 A.D.3d at 1527) underscores the likelihood that the issues herein will typically evade review. That case involved a request from a trade association for "a due diligence study prepared to assist [New York State Thruway Authority] in deciding whether to

[16] The delays wrought by DOCCS's reliance on the so-called "preliminary" status of UI reports, however, can still be substantial, and such delays seriously undermine the public's right to timely access to such materials. Here, for example, the subject incident occurred on May 11, 2019, yet DOCCS continued to assert that the Bradley UI report was "preliminary" when it denied PLS's administrative FOIL appeal on August 18, 2019—more than four months later. (R-173).

require the use of a project labor agreement ... in a design-build project." The court, however, never decided the issue concerning Public Officers Law § 87(2)(g) on the merits because, as here, the respondent produced the records after litigation commenced. (*Id.* at 575). If anything, *General Contractors* further demonstrates the commonly evasive nature of the inter- and intra-agency materials exemption.

As DOCCS's ongoing reliance on a time-limited condition within its own control to deny records of substantial public importance is likely to recur and will typically evade review, the denial of the Bradley UI report under Public Officers Law § 87(2)(g) presents an archetypal exception to the mootness doctrine that warrants decision on the merits.

II. The Objective and Factual Portions of Unusual Incident Reports Will Always Fall Outside the Scope of FOIL's Intra-Agency Materials Exemption.

Upon determining that DOCCS's reliance on the intra-agency materials exemption to deny the Bradley UI report satisfies the exception to mootness doctrine, appellant respectfully asks that the Court issue a decision on the merits in the interest of clarity and judicial economy. As set forth in Section I of appellant's brief, *supra*, the intra-agency materials issue presented herein is a novel question of substantial, statewide public importance that would benefit from definitive resolution by this Court. Moreover, the Court routinely converts matters to declaratory judgment actions and issues decision on the merits upon determining

that the exception to mootness applies. (*See, e.g., People ex rel. Molinaro v. Warden, Rikers Island*, 39 N.Y.3d 120, 124 [2022]; *People ex rel. McManus v. Horn*, 18 N.Y.3d 660, 672-73 [2012]).

To that end, appellant respectfully asks that the Court to exercise its authority pursuant to CPLR § 103(c) to convert the instant Article 78 proceeding to a declaratory judgment action and issue a declaration that 1) DOCCS UI reports are not exempt intra-agency materials as a matter of law, and 2) DOCCS's specific denial of the Bradley UI report under § 87(2)(g) was unlawful. PLS originally sought comparable declarations in this matter, wherein it sought declaratory relief before Supreme Court. That court dismissed the declaratory claims for failure to serve a summons and combined petition-complaint. (R-53-54; 56). To the extent the Court determines that an exception to mootness is warranted here, its further exercise of discretion to convert the proceeding would serve the interests of justice in light of the substantial public importance of the question presented.

Turning to the merits, DOCCS's position with respect to the applicability of the intra-agency materials exemption to the Bradley UI report is grounded in a plain misreading of the statute. Public Officers Law § 87(2)(g) has a two-part structure: inter- and intra-agency materials are generally exempt from production under FOIL—but four enumerated categories of such materials are excluded from that general exemption. Records fall within the exemption only if they "are inter-agency

or intra-agency materials *which are not*" one of the four categories of records identified in paragraphs (i) through (iv) of § 87(2)(g) (emphasis added). Put differently, to the extent a record contains any of the four kinds of material defined by paragraphs (i) through (iv), such portions categorically fall beyond the scope of the intra-agency materials exemption.

DOCCS asserted that the Bradley UI was exempt under Public Officer Law § 87(2)(g) because it was "still a preliminary report," and because "non-final deliberative records are exempt from disclosure." (R-173). DOCCS's position misrepresents the statutory provision. Section § 87(2)(g) affords no blanket exemption for intra-agency materials merely because they are "non-final."[17] Rather, material encompassed by any one of the four exclusions under paragraphs (i) through (iv) are non-exempt, as those exclusions operate independently of one another by their own terms. The agency's apparent rationale—that deliberative records are categorically exempt—is simply beside the point, as the records at issue are factual, not deliberative. Factual records are not exempt from disclosure, regardless of finality. DOCCS has taken a factor that is relevant only to one of the four provisions under § 87(2)(g) and sought to import it to another where it has no bearing.

[17] At best, DOCCS's position represents a clear misreading of § 87(2)(g)(iii), which excludes "final agency policy or determinations" from the general exemption for intra-agency materials. But the inverse of that paragraph is not true: although final policies and determinations are non-exempt, a record does not fall within the exemption merely because it is non-final.

The independent exclusion under Public Officers Law § 87(2)(g)(i) governs DOCCS Unusual Incident reports. It provides that "statistical or factual tabulations or data" are beyond the scope of the exemption, even where such factual data is otherwise contained within intra-agency materials. This Court has recognized that the plain text of the statute means precisely what it says. As noted in Section I of appellant's brief, *supra*, "[f]actual data... simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making." (*Matter of Gould v. New York City Police Dept.*, 89 N.Y.2d 267, 276-77 [1996]).

Gould assessed the applicability of the intra-agency materials exemption to "complaint follow-up reports" generated by the New York City Police Department. (89 N.Y.2d at 276). Such reports consisted of "a form document on which a police officer 'report[s] additional information concerning a previously recorded complaint.'" (*Id.*). With respect to such reports, the Court concluded:

> [C]omplaint follow-up reports contain substantial factual information available pursuant to the provisions of FOIL. Sections of the report are devoted to such purely factual data as: the names, addresses, and physical descriptions of crime victims, witnesses, and perpetrators; a checklist that indicates whether the victims and witnesses have been interviewed and shown photos, whether crime scenes have been photographed and dusted for fingerprints, and whether neighborhood residents have been canvassed for information; and a blank space denominated "details" in which the officer records the particulars of any action taken in connection with the investigation.

(*Id.*).

DOCCS Unusual Incident reports are so similar to the complaint follow-up reports addressed in *Gould* that respondent's position is irrational. Indeed, UI reports are primarily objective, factual documents generated pursuant to DOCCS Directive No. 4004 in response to "a serious occurrence that (1) may impact upon or disrupt facility operations, or (2) that has the potential for affecting [DOCCS's] public image, or (3) that might arouse widespread public interest." *Prisoners' Legal Serv. of NY*, 173 A.D.3d at 12. Just like the complaint follow-up reports in *Gould*, a UI report contains sections that are "devoted to such purely factual data" as the date of an incident; the location of an incident; the time of an incident; whether the incident involved a use of force or the use of a weapon; a description of the incident; a summary of the events causing the incident; and a statement of the action taken by DOCCS staff in response. (*See* R-328-343).[18]

DOCCS has not disclosed what effect, if any, the "preliminary" status of a UI report purportedly has on the factual data contained within—nor even what such status means. The agency's statement in the underlying FOIL appeal that "deliberative records" are exempt under § 87(2)(g) appears to reference this Court's

[18] The cited pages of the record contain a UI report that DOCCS disclosed to PLS in response to a FOIL request that was partially at issue in an earlier stage in this litigation. The report offers a direct illustration of the objective, factual information that constitutes a DOCCS UI report. Notably, portions of the cited report are redacted. PLS does not concede the propriety of such redactions, does but not challenge them herein.

recognition that the underlying purpose of the intra-agency exemption is "to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers." (*Matter of Xerox Corp. v. Town of Webster*, 65 N.Y.2d 131, 133 [1985] [citation and internal quotation marks omitted]). Such purpose is plainly inapplicable to factual data, which neither requires nor permits deliberation. The idea that objective information could somehow be "deliberative" is absurd. The date, time, location, and essential facts of an event are static data points. Any suggestions that facts can be sufficiently malleable to permit a secret "deliberative" process to determine, all while shielded from public scrutiny, is alarming and anathemic to FOIL's core purpose. The *Gould* Court recognized as much in differentiating "factual data" from "opinion, ideas, and advice." The bulk of a UI report is devoid of subjective or analytic content provided for internal assessment by agency decisionmakers, and therefore falls outside the relevant FOIL exception.

The concept of a "preliminary" record means something far different with respect to policy decisions and agency determinations, as opposed to factual information. Policy decisions properly benefit from a deliberative process that facilitates the reasoned judgment necessary to produce a final policy or determination. Factual information, by contrast, is complete when it is initially recorded. Changing factual information through a so-called "deliberative" process

is inherently dubious, and suggests the possibility of fraudulent or other improper activity by government actors. While a factual document could contain a good-faith mistake, nothing in FOIL suggests that records are exempt from disclosure because of the possibility they could contain inaccuracies. The statute therefore limits the condition of finality under § 87(2)(g) to only policies and determinations—and expressly excludes factual data from that category.

Finally, to the extent some limited portion of a UI report contains material that is not mere factual data—or contains material otherwise validly subject to a different exemption under § 87(2)(a) through (f)—an agency may redact such material. But it must otherwise produce the balance of the record that is non-exempt under § 87(2)(g)(i). (*See, e.g., Xerox Corp.*, 65 N.Y.2d at 133 ["To the extent the reports contain 'statistical or factual tabulations or data' (Public Officers Law § 87[2][g][i]), or other material subject to production, they should be redacted and made available to (the FOIL requestor)"]). In light of the above, DOCCS's withholding of the Bradley UI report was wholly improper, and appellant respectfully asks that the Court determine the underlying interpretation of the intra-agency materials exemption is unlawful and unsupported by the statute.

III. DOCCS's Denial of Routine Video Surveillance Footage Under FOIL's Law Enforcement Exemption Warrants an Exception to the Mootness Doctrine.

The standard for mootness, and its exception, are set forth in Section I of appellant's brief, *supra*. Here, Supreme Court held, in conclusory terms, that the issues presented by the Auburn video were not "substantial, novel, or likely to evade review." (R-53). Like the Bradley UI report, the Third Department affirmed Supreme Court's denial of appellant's claim concerning the Auburn video as moot—but again limited its reasoning to the second prong of the exception to mootness doctrine. The Third Department held that PLS failed to establish that Auburn video presented an issue "that would typically evade review[,] as these exemptions and their invocation are frequently examined by this Court." (R-6).

For the reasons below, appellant respectfully requests that this Court exercise its discretion to grant an exception to the mootness doctrine with respect to the issues presented by the Auburn video.

A. DOCCS's reliance on the law enforcement exemption to deny routine prison surveillance video presents an issue that is likely to recur.

Again, there appears to be no dispute concerning the first prong of the exception to mootness test. Supreme Court correctly found that the issues presented by DOCCS's denial of the Auburn video are likely to recur. Surveillance video of prison common areas will routinely capture events of significant public interest,

including prison officials' performance of their job duties in all important respects. Such videos will continue to be commonly-sought records through FOIL by various members of the public—including PLS. There is no reason to expect that the agency will voluntarily abandon its position that the possibility of eventual review of video by law enforcement officials renders such footage exempt under FOIL's law enforcement exemption pursuant to Public Officers Law § 87(2)(g). (*See* R-173). It is thus a near certainty that the public will again seek surveillance video, and that DOCCS will commonly rely on the law enforcement exemption to deny it. The impropriety of DOCCS's reliance on that exemption with respect to video footage is effectively guaranteed to recur.

B. DOCCS's reliance on the law enforcement exemption to deny routine prison surveillance video presents substantial and novel issues.

Contrary to Supreme Court's unexplained position, DOCCS's wrongful denial of video of prison common areas presents two closely-related issues that are both substantial and novel: first, the threshold definition of "compiled for" law enforcement purposes under Public Officers Law § 87(2)(e), and second, whether routine prison surveillance video is, in fact, compiled "for such purpose." Again, when evaluating whether an issue is novel, the Court will assess if it presents "questions the fundamental underlying principles of which have not already been declared." (*Hearst*, 50 N.Y.2d at 715). To counsel's knowledge, this Court has never

ruled upon either of the above questions, which have far-reaching implications for the public's right to access a broad swath of public records, both within prison walls and beyond.

i. The baseline meaning of "compiled for" law enforcement purposes under FOIL remains undefined under New York law.

Public Officers Law § 87(2)(e) operates in two stages. To fall within the law enforcement exemption, a record must meet the threshold requirement of having been "compiled for law enforcement purposes." Only upon meeting that requirement does analysis move to the next step, which permits an agency to withhold such records—but "only to the extent that disclosure would" give rise to the consequences set forth in any of the four paragraphs under § 87(2)(e)(i)–(iv).

The Court has previously assessed the definition of "law enforcement purposes" under FOIL. (*See Matter of Madeiros v. New York State Educ. Dept.*, 30 N.Y.3d 67, 75 [2018] [Observing that "the phrase 'law enforcement purposes' is not defined in the FOIL statutes"). Yet to counsel's knowledge, the Court has not considered a more foundational question: the meaning of the phrase "compiled for" itself. That phrase contains an embedded timing element—specifically, whether a record must have been assembled for a law enforcement purpose at the time of its initial creation, or merely drawn into a compilation records considered by law enforcement officials at some later point before a FOIL request is made. Lower

courts,[19] as well as the Committee on Open Government—which issues advisory opinions on FOIL matters—have assessed the definition of "compiled for" with respect to this timing concern and reached opposing results. (*Compare Matter of Newsday, LLC v. Town of Oyster Bay*, 2016 NY Slip Op 32749[U] [Sup Ct, Nassau County 2016] and Comm. on Open Govt. FOIL-AO-19480 [2016] [each holding that records not initially generated for a law enforcement purpose do not meet the threshold requirement under § 87(2)(e), despite later use for such purposes], with *Matter of New York Times Co. v. New York State Exec. Chamber*, 57 Misc 3d 405, 425 [Sup Ct, Albany County 2017] [adopting the U.S. Supreme Court's reasoning in *John Doe Corp. v. John Doe Agency*, 493 U.S. 471 (1989) (discussed *infra*) that the definition of "compiled for" does encompass documents originally collected by the government for non-law-enforcement purposes]).

The timing element reflected in these competing interpretations of "compiled for" merits this Court's attention, as it implicates the breadth of FOIL's law enforcement exemption in important respects. If public records with no connection to law enforcement activities at the time of creation can be swept within the scope of § 87(2)(e) merely by their later placement in an investigatory file or consideration

[19] To counsel's knowledge, the Appellate Division has not ruled on the meaning of "compiled for" under Public Officers Law § 87(2)(e).

in the course of an investigation, the scope of the exemption will be cast so wide as to swallow untold swaths of information to which the public is rightly entitled.

This Court routinely considers the federal Freedom of Information Act (FOIA) (5 U.S.C. § 552[b][7][f]) when interpreting parallel provisions under New York's own transparency statute. (*See, e.g., Matter of Abdur-Rashid v. New York City Police Dept.*, 31 N.Y.3d 217, 231 [2018] ["Given that our statute was modeled after FOIA, we have repeatedly looked to federal precedent when interpreting FOIL, particularly in relation to the law enforcement exemptions."]; *Matter of Friedman v. Rice*, 30 N.Y.3d 461, 480 [2017] ["Federal case law and legislative history... are instructive when interpreting a FOIL provision patterned after the Federal analogue"] [internal citation and quotations marks omitted]). Thus, in the interest of full transparency, appellant directs the Court to the controlling decision on the federal analogue to FOIL's law enforcement exemption: *John Doe Corp.*, 493 U.S. 146 (1989). There, the U.S. Supreme Court analyzed the meaning of the words "compiled for" under FOIA's law enforcement provision, which exempts from production "records or information compiled for law enforcement purposes," to the extent that such production meets any one of six specified conditions or enumerated harms.

As under FOIL, federal FOIA creates a threshold requirement that records be "compiled for law enforcement purposes" to fall within the relevant exemption.

Relying on the plain language of the federal statute, the Second Circuit Court of Appeals initially held in *John Doe Corp.* that responsive records did not fall within the law enforcement exemption because "[t]he records were compiled in 1978, seven years before the investigation began in 1985. They were thus not 'compiled for law-enforcement purposes' and are not exempted...." (850 F.2d 105, 108-109 [1988]). The Second Circuit necessarily concluded that the phrase "compiled for" refers only to the purpose for which records were initially created. (*Id.*). The Supreme Court reversed, holding:

> We thus do not accept the distinction the Court of Appeals drew between documents that originally were assembled for law enforcement purposes and those that were not so originally assembled but were gathered later for such purposes... Under the statute, documents need only to have been compiled when the response to the FOIA request must be made.

493 U.S. at 155. The Court grounded its reasoning in its observation that "the plain words [of the statute] contain no requirement that compilation be effected at a specific time." (*Id.* at 153).

In a dissent joined by Justice Marshall, Justice Scalia recognized that the word "compile" is inherently ambiguous as used under FOIA, as Congress could reasonably have intended to use the word in a "generative sense" that applies only to "material that the Government has acquired or produced for [law enforcement] purposes—and not material acquired or produced for other reasons, which it later shuffles into a law enforcement file." (*John Doe Corp.*, 493 U.S. at 161-62, Scalia,

J., dissenting). In light of the principle that FOIA exemptions are to be "narrowly construed," the dissent concluded that the latent ambiguity in the meaning of "compiled for" must necessarily be "resolved in favor of disclosure." (*Id.*).

Despite the instructive nature of federal case law, this Court is by no means bound by the U.S. Supreme Court's interpretation of FOIA provisions when interpreting a statute passed by the separate sovereign New York Legislature. In interpreting Public Officers Law § 87(2)(e), appellant therefore respectfully urges this Court to join with the logic of the Committee on Open Government (FOIL-AO-19480), Albany County Supreme Court (*Matter of Newsday, LLC*, 2016 NY Slip Op 32749[U] at *15), and the Second Circuit Court of Appeals (*John Doe Corp. v. John Doe Agency*, 850 F.2d 105, 108-09 [2d Cir. 1988]) to adopt the compelling reasoning behind the narrower meaning of "compiled for" as endorsed in Justice Scalia's dissent.

Indeed, like FOIA, this Court has confirmed time and again that the FOIL exemption under Public Officers Law § 87(2) must "be narrowly interpreted so that the public is granted maximum access to the records of government" (*Matter of Data Tree, LLC*, 9 N.Y.3d at 462). To borrow from the *John Doe Corp.* dissent, "Narrow construction of an exemption means, if anything, construing ambiguous language of the exemption in such fashion that the exemption does not apply" (*John Doe Corp.*, 493 U.S. at 161, Scalia, J., dissenting). In light of the competing reasonable

interpretations of "compiled for" under FOIL's law enforcement exemption, this Court will best maintain fidelity to the purpose of the statute and the compelling public interest in robust governmental transparency by adopting the narrower reading of those words. The Court will be able to reach this most substantial and novel issue, however, only upon exercising its discretion to grant an exception to the mootness doctrine.

ii. Whether prison surveillance video is compiled for "law enforcement purposes" is an open question.

To the extent the original purpose for which a record is created is the controlling factor under the threshold prong of Public Officers Law § 87(2)(e), this case presents a second issue that is both substantial and novel: whether routine prison surveillance video is created in the first place for "law enforcement purposes." The issue is novel, as this Court has never addressed it. It is also substantial, in that prison video definitionally falls outside the scope of the law enforcement exemption if it is not generated for such reason (i.e., to the extent the Court adopts appellant's position in Section III[A][i] of its brief above).

In *Madeiros* (30 N.Y.3d at 75-76), the Court considered both the plain language of FOIL and the parallel FOIA provision to conclude that "law enforcement purposes" includes both criminal and civil enforcement actions. "[T]he exemption set forth in Public Officers Law § 87(2)(e) does not apply solely to

records compiled for law enforcement purposes in connection with criminal investigations and punishment of violations of the criminal law," but also encompassed records concerning audits plans "specifically targeted at ferreting out the improper and potentially illegal or fraudulent" conduct of preschool providers. (*Id.* at 77). The Court held that "the obvious inference arising from the statutory requirement" that the relevant agency issue guidelines for municipalities in conducting such audits—which called for the creation of audit plans that the petitioner then requested through FOIL—"is that the legislature sought to increase the efficacy of audit procedures in an effort to strengthen enforcement measures." (*Id.*). Finally, the *Madeiros* Court cautioned, "Our decision should not be read to hold that every audit necessarily serves 'law enforcement purposes,'" as the audits there at issue were "not simply routine fiscal audits." (*Id.* at 76).

Madeiros reflects this Court's recognition that records will fall within the scope of Public Officers Law § 87(2)(e) only if they are compiled in a context or framework with the central aim of facilitating enforcement proceedings—whether civil or criminal. Where a record's use in an enforcement proceeding is possible, but not the defining element of framework through which the record is generated, the record will not categorically fall within the scope of § 87(2)(e).

Appellant reserves discussion of the manner in which the above framework applies to prison surveillance video for its discussion of the merits in Section IV of

its brief, *infra*, but one thing is clear: Whether or not prison surveillance footage sufficiently implicates the Court's careful interpretation of the phrase "law enforcement purposes" constitutes a novel question at the core of the threshold requirement under FOIL's law enforcement exemption, and therefore meets those essential prongs of the exception to mootness test.

C. The time-limited nature of DOCCS's denial of video surveillance under the law enforcement exemption will typically evade review.

As with the Bradley UI report, the Third Department determined that the exception to the mootness doctrine did not apply to DOCCS's denial of the Auburn video merely because "these exemptions and their invocation are frequently examined by this Court." (R-6). Again, the Third Department failed to assess the routinely effervescent nature of the relevant FOIL exception within the context of the protracted timeline required to secure appellate law, and DOCCS's demonstrated inclination to moot challenges to its improper FOIL denials by producing records upon commencement of litigation.

While there is indeed caselaw that addresses certain contours of the law enforcement exemption, the mere existence of such decisions does not establish that DOCCS's approach to surveillance video here will not typically evade review. Indeed, to counsel's knowledge, none of the relevant precedent from this Court arises from FOIL denials by the specific agency at issue. Preliminarily, there can be

no dispute that the time required to submit a FOIL request, exhaust administrative remedies, file an Article 78 proceeding in Supreme Court, and then obtain a precedential decision from the Appellate Division will routinely take well over a year. When accounting for the additional time required to secure review by the Court of Appeals, final resolution of a novel issue will almost uniformly require multiple years, and sometimes far longer. (*See, e.g.*, *Abdur-Rashid*, 31 N.Y.3d at 222 [FOIL request submitted in October 2012, this Court's decision issued in March 2018]; *Lesher*, N.Y.3d at 60-61 [FOIL request submitted October 2007, this Court's decision issued in April 2012]). In this case alone, more than four years have already passed since the subject incident, and many months lie ahead before the Court will issue its decision. Moreover, "Public Officers Law § 87(2)(e)(i) ceases to apply after enforcement investigations and any ensuing judicial proceedings have run their course... And criminal cases are typically wound up within a reasonable time after a crime is committed." (*Lesher*, N.Y.3d at 68).

Given these routinely extended timelines for final resolution of novel FOIL litigation, the relatively prompt resolution of most law enforcement investigations, and the presumptive mootness of the relevant issues upon conclusion of an investigation, it is fair to conclude the issues presented herein will indeed "typically" evade review. Moreover, DOCCS's approach in the instant case reveals why improper denials by this specific agency may warrant mootness more than most: As

noted above, the Third Department has fairly recognized that an agency's near total control over when and whether a claim will become moot weighs in favor of an exception to mootness. (*Laborers' Intl. Union of N. Am.*, 280 A.D.2d at 69). And there is no dispute that an agency's production of disputed records will moot a challenge to a FOIL denial.

Here, DOCCS voluntarily produced the Auburn video once PLS commenced litigation—even though it appears that enforcement proceedings were still pending. (*See* R-231, Verified Answer [noting that the Auburn video had "been disclosed to defense counsel in the [related] pending criminal proceeding," and "To the extent Petitioner does not possess the... video, DOCCS has no objection to disclosure..."]). DOCCS thus voluntarily produced the video prior to resolution of the criminal proceeding once this litigation was commenced—which immediately mooted the claims, despite no clear indication that the ostensible grounds for withholding had resolved. Notably, as a FOIL requestor, PLS had no special entitlement to the materials sought beyond that of any member of the public, such that disclosure to defense counsel has no clear bearing on the applicability of claimed exemption with respect to appellant's request.

DOCCS' cavalier approach to FOIL shrouds an agency that inherently operates in greater secrecy than most from the meaningful oversight that the statute demands. For the reasons above, it is fair to conclude the specific issues pertaining

to the law enforcement exemption herein meet all three prongs of the exception to the mootness doctrine, such that this Court can and should grant the exception and rule on the merits.

IV. DOCCS Failed to Establish that the Auburn Video Fell Within the Scope of FOIL's Law Enforcement Exemption.

Appellant respectfully requests that, upon determining that the issues raised herein concerning FOIL's law enforcement exemption warrant an exception to mootness, the Court convert this matter to a declaratory judgment action and grant a declaration on the merits for the reasons set forth in Section II, *supra*. Specifically, appellant requests declarations that 1) routine prison surveillance video is not compiled for law enforcement purposes within the meaning of Public Officers Law § 87(2)(e); and 2) DOCCS's withholding of the Auburn video under § 87(2)(e)(i) and (iii) was unlawful.

On the merits, this Court will need to decide two questions under the two-part structure of Public Officers Law § 87(2)(e). First, whether the Auburn video met the threshold requirement of having been "compiled for law enforcement purposes," and second, whether disclosure of the video would lead to any of the consequences identified by paragraphs (i) through (iv) of that subsection.

A. The Auburn video, like all routine prison surveillance video, was not compiled for a law enforcement purpose within the meaning of § 87(2)(e).

First, for the reasons set forth in Section III(B)(i) of its brief, *supra*, appellant maintains that materials are "compiled for" law enforcement purposes only if they were originally generated for such purposes, rather than later assembled or reviewed for such purposes by a law enforcement agency. Second, as set forth in Section III(B)(ii), this Court's decision in *Madeiros* (30 N.Y.3d at 75-77) elucidates the meaning of "law enforcement purposes" under FOIL: it encompasses only records that were compiled in a context or framework with the central aim of use in civil or criminal enforcement proceedings.

Prison surveillance video cannot be said to be compiled inherently for "law enforcement purposes" to a sufficient degree to fall within Public Officers Law § 87(2)(e). Video recordings of common areas in a prison setting manifestly serve a myriad of diverse purposes independent of criminal and civil enforcement—from monitoring and evaluating staff job performance, to enhancing institutional security by maintaining a visual record of incarcerated peoples' activities and whereabouts, to monitoring general conditions of confinement. While such video can, no doubt, be called upon in civil enforcement proceedings for excessive uses of force by staff, or for use in criminal proceedings concerning any party within the facility, such functions are far from the singular (or even central) aim of surveillance video. (*See*

generally Prisoners' Legal Serv. of NY, 173 A.D.3d at 12 [holding that comparably factual materials—DOCCS Unusual Incident reports and Use of Force reports—"are mixed use material with various facility uses... [that] are generated to, among other things, document facility occurrences." Such records can then be "reviewed for overall quality control"]).

Indeed, routine prison surveillance video of common areas is primarily a factual, archival material that can be used in a wide variety of contexts as needed. As such, it is not an inherent mechanism of ferreting out improper or potentially unlawful conduct. (*See Madeiros*, 30 N.Y.3d at 76). At most, surveillance video is more akin to a routine fiscal audit—something that can uncover unlawful conduct, but is not inherently designed to do so—than a specific subset of audits legislatively designed to uncover known fraud, as in *Madeiros*. (*Id.*). Just as this Court's decision in *Madeiros* "should not be read to hold that every audit necessarily serves 'law enforcement purposes,'" neither should the Court conclude that prison video footage inherently serves law enforcement purposes within the meaning of § 87(2)(e). (*Id.* at 77). Accordingly, the Auburn video must not be held to be compiled for law enforcement purposes, in light of the breadth of routine uses for such material.

B. Even if the Court finds that the Auburn video was compiled for law enforcement purposes, DOCCS failed to articulate a legitimate factual basis through which disclosure would implicate § 87(2)(e)(i)–(iv).

To the extent the Court does determine that the Auburn video was "compiled for law enforcement purposes," DOCCS nonetheless failed to justify withholding under the law enforcement exemption. Again, upon meeting the threshold showing, an agency next bears the burden of demonstrating that requested materials fall within the scope of at least one of the four paragraphs under Public Officers Law § 878(2)(e)(i)–(iv). In its FOIL appeal denial of the Auburn video, DOCCS did not specifically identify any of the relevant statutory provisions. Rather, it provided a boilerplate statement that "release of the video at this time would threaten to prematurely reveal law enforcement and the District Attorney's plans for the case, prematurely reveal the identity of witnesses and sources, and result in the premature release of evidence in a pending criminal investigation," citing *Lesher v. Hynes* (19 N.Y.3d 57 [2012]). (R-163).

Charitably construed, DOCCS's bare-bones justification appears to be an attempt to invoke § 87(2)(e)(i) (which provides that materials may be withheld only to the extent that disclosure would "interfere with law enforcement investigations or judicial proceedings"), and § 87(2)(e)(iii) (which provides that materials may be withheld only to the extent that disclosure would "identify a confidential source or disclose confidential information relating to a criminal investigation").

With respect to § 87(2)(e)(i) this Court held in *Lesher* that "[a] criminal prosecution is a particular kind of enforcement proceeding where disclosure of particular kinds of investigatory records while a case is pending would generally interfere with enforcement proceedings." (19 N.Y.3d at 67) (internal citation and quotation marks omitted). The Court emphasized that "not every document in a law enforcement agency's criminal case file is automatically exempt from disclosure simply because kept there," and that "the agency must identify the generic kinds of documents for which the exemption is claimed, and the generic risks posed by disclosure of these categories of documents." (*Id.*). In other words, "the agency must still fulfill its burden under Public Officers Law § 89(4)(b)[20] to articulate a factual basis for the exemption." (*Id.*)

DOCCS's haphazard attempt to raise the § 87(2)(e)(i) exemption is absurd. First, a video is a purely factual record depicting events in a particular place at a particular time. It is not an "investigatory record," as contemplated by *Lesher*, but merely a direct record of what transpired in the location filmed. Moreover, the agency's apparent attempt to identify a "generic risk" posed by disclosure here borders on frivolous. A surveillance video cannot possibly "prematurely reveal law enforcement and the District Attorney's plans for the case," as a static visual

[20] The statute provides, in relevant part: "In the event that access to any record is denied pursuant to the provisions of [§ 87(2)] of this article, the agency involved shall have the burden of proving that such record falls within the provisions of such subdivision two."

depiction does not and cannot reveal the subsequent mental processes of people investigating or pursuing a criminal case at some later time.

That fact stands in stark contrast to *Lesher*, wherein the petitioner sought "[a]ny and all records, files, notes, correspondence, memoranda or other documents pertinent in any way" to a pending criminal indictment. (19 N.Y.3d at 61). The District Attorney there sought to withhold "correspondence... consis[ting] of crime summaries, timelines of when and where each crime occurred, witness names and personal information, and witness statements." (*Id.*). He "identified the generic harm that disclosure would cause—i.e., disclosure would necessarily interfere with law enforcement proceeding" because the requested materials were "replete with information about the crimes committed... so its release posed an obvious risk of prematurely tipping the District Attorney's hand." (*Id.* at 67-68).

The records at issue in *Lesher* thus consisted of an extensive compilation of detailed materials that the DA had affirmatively assembled in the course of evaluating a potential criminal prosecution—which in turn could reflect his strategy and assessment of the evidence. That context is inapposite to a simple, objective video recording that exists independently of any investigation. Both the nature of the underlying records, and the facial plausibility of the generic risks cited, therefore diverge drastically between the case at bar and *Lesher*. Accordingly, DOCCS failed

to meet its burden of articulating a factual basis for the exemption with respect to § 87(2)(e)(i).

Moreover, as noted above, the Legislature has since amended § 87(2)(e)(i) to expressly require confirmation from an outside law enforcement or investigating agency that disclosure would actually interfere with an ongoing investigation (to the extent the entity invoking the exemption is not itself conducting the allegedly-imperiled investigation). Although the law did not explicitly contain that requirement in 2019, DOCCS's actions here fall far short of the current standard. The agency provided nothing more than a conclusory statement that disclosure would give rise to a series of facially-implausible impacts on an outside criminal case—yet offered no insight at all into how they determined that disclosure could be so damaging to another entity's investigation. There is no evidentiary support for the alleged determination that disclosure of the Auburn video could interfere with law enforcement, and such determination should not be credited. As the law now stands, DOCCS's invocation of § 87(2)(e)(i) was therefore categorically deficient.

DOCCS's apparent reliance on § 87(2)(e)(iii), by way of its vague reference to "prematurely reveal[ing] the identity of witnesses and sources," is similarly deficient. The relevant statutory provision requires a set of facts wholly absent from the instant case. Namely, an agency can withhold information under that paragraph

only if it could "identify a *confidential* source" or result in disclosure of "*confidential* information" (emphasis added).

The Court of Appeals has held that an agency can use the confidential sources or information exemption only where a confidential source has been given "an express promise of confidentiality" or "the confidentiality of the source or information can be reasonably inferred." (*Matter of Friedman v. Rice*, 30 N.Y.3d 461, 481 [2017]). Whether the confidentiality of information can be reasonably inferred is fact specific: a court may consider "the nature of the crime, the source of the information in relation to the crime, and the content of the statements or information." (*Id.* at 482).

Here, each of the *Friedman* factors points in favor of disclosure. DOCCS has not explained how confidential sources could possibly be revealed by the Auburn video, nor has it claimed that any such sources were given express promises of confidentiality. DOCCS similarly articulated no basis, even in general terms, to conclude that disclosure of routine surveillance video of a large communal area (i.e., the prison yard) could reveal confidential information. Moreover, the justification set forth in the FOIL denial concerning the Auburn video strongly suggests that DOCCS was not the agency pursuing the criminal investigation, but it offered no specificity as to what, if anything, the investigating agency may have communicated to DOCCS with respect to any possible effect of disclosure on a law enforcement

investigation. DOCCS's justification is therefore plainly inadequate under § 87(2)(e)(i) as subsequently amended in 2022.

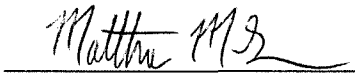
In sum, DOCCS has failed in every respect to meet the requirement of identifying even generic risks posed by disclosure in a manner that is remotely plausible. Accordingly, the Auburn video fell beyond the scope of the law enforcement exemption, even to the extent it met the threshold of having been "compiled for law enforcement purposes" at all.

CONCLUSION

For the reasons set forth above, appellant respectfully requests that the Court determine that the questions presented herein warrant an exception to the mootness doctrine; convert this matter to a declaratory judgment action pursuant to CPLR § 103(c); and issue declarations concerning the applicability of Public Officers Law §§ 87(2)(e) and (g) with respect to Unusual Incident reports and surveillance video as presented herein, as well as grant such other and further relief as the Court deems just.

Dated: June 16, 2023
Albany, New York

Respectfully submitted,



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CERTIFICATION PURSUANT TO 22 NYCRR § 500.13(c)(1)

I, Matthew McGowan, affirm under penalty of perjury pursuant to C.P.L.R. 2106 that the total word count for all printed text in the body of the foregoing brief, is 11,324 In determining the number of words in the foregoing Memorandum of Law, I have relied upon the word count of the word processing system used to prepare this document.

Matthew McGowan

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

----------X

In the Matter of the Application of

NEWSDAY, LLC,

Petitioner,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules

-against-

TOWN OF OYSTER BAY, TOWN BOARD OF THE TOWN OF OYSTER BAY, ZONING BOARD OF APPEALS OF THE TOWN OF OYSTER BAY, and JAMES ALTADONNA, JR. in his capacity as Town Clerk for the Town of Oyster Bay,

Respondents.

----------X

IAS Part 23
Index No.: 001484/16
Motion Seq. No.: 001

DECISION AND ORDER

LEONARD D. STEINMAN, J.

The following submissions, in addition to any memoranda of law submitted by the parties, were reviewed in preparing this Decision and Order:

Petitioner's Notice of Petition, Verified Petition, Affidavits & Exhibits----------1
Respondents' Verified Answer with Objections in Points of Law ----------2
Affirmation of Matthew M. Rozea, Esq. in Opposition & Exhibits ----------3
Affidavit of James Altadonna, Jr. in Opposition----------4
Reply Affirmation of Dina Sforza, Esq. ----------5
Reply Affidavit of Thomas Phillips & Exhibits ----------6
Reply Affidavit of Amy Wolf, Esq. & Exhibits ----------7

Petitioner, Newsday, LLC, has brought this Article 78 proceeding for a determination that the respondents (collectively referred to as "the Town") violated various portions of the Public Officers Law in failing to properly respond to certain requests submitted by Newsday

pursuant to the Freedom of Information Law ("FOIL") and for an order directing the Town to immediately produce the documents requested. Newsday further seeks an order directing that the Town participate in a training session as a result of repeated violations of the Open Meetings Law ("OML") and directing the Town to pay Newsday's counsel fees and costs. The Town asserts that Newsday delayed too long in bringing this proceeding and that it is barred by the statute of limitations. The Town further denies any wrongdoing and contends that it is in full compliance with FOIL and OML.

I. FOIL AND OML

FOIL and OML are two statutory pillars upon which the public may rely to ensure that their government is not only "of the people and by the people," but "*for the people.*" Both statutes recognize and advance the principle that "the public is vested with an inherent right to know and that official secrecy is anathematic to our form of government." *Fink v. Lefkowitz*, 47 N.Y.2d 567, 571 (1979). FOIL and OML are intended "to open the workings of government to the public, including through a free press, which is cast as the public representative's for that purpose." *Newsday LLC v. Nassau County Police Department*, 42 Misc.3d 1215(A)(Sup.Ct. Nassau Co. 2013); Public Officers Law §84 .

FOIL requires government agencies to make available for public inspection and copying all records, subject to a number of exemptions. *Harbatkin v. New York City Dept. of Records and Information Services*, 19 N.Y.3d 373, 379 (2012); Public Officers Law §87(2). The Legislature intended FOIL to guarantee "[t]he people's right to know the process of governmental decision-making and to review the documents and statistics leading to determinations." Public Officers Law §84; *Perez v. City University of New York*, 5 N.Y.3d 522, 528 (2005). It permits the electorate to make informed choices regarding governmental activities and facilitates exposure of waste, negligence and abuse. *Encore College Bookstores, Inc. v. Auxiliary Service Corp. of SUNY at Farmingdale*, 87 N.Y.2d 410, 416 (1995). Public policy favors disclosure and the vast majority of government documents are presumptively discoverable. *Id* at 417; *see also Data Tree LLC v. Romaine,* 9 N.Y.3d 454, 462 (2007)("FOIL is based on a presumption of access" to records).

Not every government record, however, is subject to disclosure under FOIL. Although "the balance is presumptively struck in favor of disclosure...in eight specific,

narrowly constructed instances where the governmental agency convincingly demonstrates its need, disclosure will not be ordered." *Fink v. Lefkowitz*, 47 N.Y.2d 567, 571 (1979); *see also Data Tree LLC v. Romaine,* 9 N.Y.3d at 463 (burden rests solely with responding government agency to establish exemption); Public Officers Law, §87(2). The responding agency is required to articulate particularized and specific justification and, if necessary, submit the requested materials to the court for *in camera* inspection, to exempt its records from disclosure. *Fink v. Lefkowitz*, 47 N.Y.2d at 571; *see also Church of Scientology of N. Y. v. State of New York*, 46 N.Y.2d 906, 908 (1979). Only where the material requested falls squarely within the ambit of a statutory exemption, however, may disclosure be withheld. *Fink v. Lefkowitz*, 47 N.Y.2d at 571.

The Open Meetings Law "was intended—as its very name suggests—to open the decision-making process of elected officials to the public while at the same time protecting the ability of the government to carry out its responsibilities." *Gordon v. Village of Monticello, Inc.*, 87 N.Y.2d 124, 126 (1995). As set forth in Public Officers Law §100, OML sought to ensure that "public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy." Like FOIL, its provisions are to be liberally construed in accordance with the statute's purposes. *Perez v. City University of New York*, 5 N.Y.3d at 528.

As relevant in this proceeding, OML requires that agency records that are subject to FOIL and scheduled to be the subject of discussion at an open meeting be made available upon request prior to or at the meeting to the extent practicable. Public Officers Law §103(e). It further requires that minutes be taken at all open meetings, which "shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon." Public Officers Law §106(1). Minutes are also to be taken of executive sessions as well, and the minutes of all sessions are to be available to the public for inspection upon request within one (for executive sessions) or two (for open meetings) weeks. Public Officers Law §106(2) and (3).

The importance of FOIL and OML as citizenry tools to discourage and expose governmental abuse is reflected in part in the remedial scheme designed to enforce them. If

a violation of these laws is found to occur a party may obtain not only the document or information improperly kept secret, but in a proper case may also recover attorneys' fees incurred in successfully obtaining the information. A court may exercise its discretion and award reasonable counsel fees to a party that "substantially prevailed" in a FOIL proceeding if the record involved was of clearly significant interest to the general public and the agency lacked a reasonable basis in law for withholding the document. *Matter of Beechwood Restorative Care Center v. Signor*, 5 N.Y.3d 435, 441 (2005); Public Officers Law §89(4)(c). Such fees may also be properly awarded when a violation of OML is found, and there is no requirement as found in FOIL that the information withheld be of clear significant interest; nor must there be a lack of a reasonable basis for the government action. Public Officers Law §107(2); *Gordon v. Village of Monticello, Inc.*, 87 N.Y.2d at 127. It has been recognized that the possibility of recovering counsel fees in these proceedings may give citizens the impetus needed to bring meritorious lawsuits and advance the public interest. *Id.* at 128. Violations of OML may also lead to a court order requiring the government agency to participate in a training session concerning its obligations under OML. Public Officers Law §107(1).

This court now turns to Newsday's requests and the claimed violations. [1]

II. NEWSDAY'S FOIL REQUESTS

A. The Requests

Request Nos. 1 and 2 (24703 and 24704)

On December 2, 2014, Newsday, by its reporter Ted Phillips, requested of the Town copies of "all agreements and amendments to those agreements made between the town and concessionaire SRB Concession, Inc. as referred to in board resolution 254 for the purpose of operating a food and beverage concession at TOBAY Beach, which the town board passed on April 8, 2014....copies of the review by an independent firm for capital improvements that, according to resolution 254, were completed....[and] copies of the proposal and/or proposals by SRB Concession, Inc. to make an additional $4.1 million in capital improvements."

[1] Newsday has withdrawn its claims as to certain requests, specifically Request Nos. Eight and Nine, since the Town provided sufficient certification of its efforts to respond to these requests.

On that same date Newsday by Phillips also requested "copies of all agreements and amendments to those agreements between the town and concessionaire HR Singletons and its successor SRB Convention and Catering Corp. as referred to in board resolution 253 for purpose of operating a food and beverage concession at the Town Golf Course Facility which the town board passed on April 8, 2014....copies of the review by an independent firm for capital improvements that, according to resolution 253, were completed....[and] copies of the proposal and/or proposals by SRB Convention and Catering Corp. to make an additional $3.9 million in capital improvements."

It is undisputed that on January 20, 2015, the Town provided some documents to Phillips. In May 2015, Phillips identified certain documents and document pages he believed were missing from the Town's production and requested such documents and pages or a certification from the Town that they did not exist. Among the documents identified as missing were further independent reviews of capital improvements at the golf course concession since, according to Newsday, the review(s) provided by the Town only referred to $4.29 million of improvements completed whereas an April 8, 2014 Board resolution stated that $8.2 million of capital improvements had been completed. This led Newsday to believe that certain reviews had not been produced.

On May 29, 2015, counsel to Newsday repeated its request for missing documents to the Town Clerk. The Town Clerk responded that day, stating "upon receipt of the documents from the Town Attorney we will promptly make them available for Ted Phillips' review." On July 20, 2015, Phillips again emailed the Town Clerk seeking the requested documents. On August 31, 2015, Newsday administratively appealed the "constructive denial" of the two requests.

On September 2, 2015, the Town provided additional responsive documents to Newsday. Thereafter, Newsday sought a certification from the Town that a diligent search had been conducted for all requested documents and that no other documents could be located. When the certification was not forthcoming, Newsday administratively appealed the refusal to certify (Petition, Exhibit E), which the Town asserts it received on October 16, 2015.

The Town contends that all responsive documents have been provided. The Town further relies on a September 2, 2015 letter to Newsday from its outside counsel, Jonathan Pickhardt, Esq., that the Town argues provides an explanation of such documents and goes beyond its statutory obligations.

Newsday contends that after additional conversations between Phillips and the Town Clerk, the Town Clerk produced on January 6, 2016 three documents in further response to the First and Second Requests, but that these documents were merely duplicates of documents previously produced. Newsday asserts it never received the required certification from the Town.

Request No. 3 (25038)

On February 24, 2015, Newsday submitted a FOIL request to the Town seeking a copy of a report prepared by Thomas Sabellico, Esq., Deputy Town Attorney, regarding allegations concerning certain Town employees made by Robert Ripp, a resident of the Town. On March 4, 2015, the Town acknowledged receipt of the request and informed Newsday that "a determination will be made concerning the availability of these records under the Freedom of Information Law and this Office will notify you within twenty (20) business days."

On July 31, 2015, after no response was received, Newsday contacted Sabellico, regarding the status of the request. On August 13, 2015, Sabellico corresponded by email to Newsday's counsel stating that the "document has been forwarded to the Nassau County District Attorney and remains the subject of an ongoing investigation. As such it is our position is that it is currently exempt from being disclosed." The very next day, on August 14, 2015, the Town Clerk sent a letter to Mr. Phillips informing him of the denial on the same basis.

On September 10, 2015, Newsday administratively appealed the denial of this request. No determination with respect to this appeal was ever received by Newsday.

Request No. 4 (25188)

Newsday submitted a FOIL request to the Town on March 18, 2015 seeking "[a]n electronic database containing all entries in the Town of Oyster Bay's check register or claims system." The Town Clerk acknowledged the request on March 25, 2015, and

informed Newsday that "a determination will be made concerning the availability of these records under the Freedom of Information Law and this Office will notify you within twenty (20) business days." On June 10, 2015, the Town Clerk notified Newsday that it "required more than twenty (20) business days to furnish the information sought, due to the extraordinary volume of Freedom of Information Requests being processed and the number of documents involved."

When no response was forthcoming, on July 31, 2015 Newsday emailed the Town seeking a status of the responses. On August 13, 2015, the Town responded that the request was overbroad because it failed to "contain a time period." The very next day this denial was reasserted in a letter from the Town Clerk to Newsday in which the request was denied. Newsday filed an administrative appeal on September 10, 2015. Newsday never received a response to the appeal.

Request No. 5 (25180)

On March 21, 2015, Newsday submitted a FOIL request to the Town seeking to "inspect all contracts currently in effect between the Town of Oyster Bay and Carlo Lizza & Sons Paving." On May 21, 2015, and again on June 10, 2015, the Town sought an additional twenty business days to furnish the information "due to the extraordinary volume of Freedom of Information Requests being processed and the number of documents involved." After two email requests from Newsday to the Town went unanswered, on August 31, 2015 Newsday submitted an appeal.

On September 18, 2015, the Town responded to the appeal stating that "additional time was required to provide the requested documents." On October 16, 2015, Newsday appealed the failure by the Town to produce the documents or a certification that no documents could be located after a diligent search.

Request No. 6 (25181)

On March 21, 2015, Newsday submitted a FOIL request to the Town seeking to inspect "all contracts between the Town of Oyster Bay and Carlo Lizza & Sons Paving for projects and work completed since Jan. 1, 2008" as well as "all change work orders and extensions for said contracts." The Town acknowledged receipt of the request and informed Newsday that a response would be provided within twenty days. On May 21, 2015, and

again on June 10, 2015, the Town sought an additional twenty business days to furnish the information "due to the extraordinary volume of Freedom of Information Requests being processed and the number of documents involved." After two email requests from Newsday to the Town went unanswered, on August 31, 2015 Newsday submitted an appeal.

On September 18, 2015, the Town responded to the appeal stating that "additional time was required to provide the requested documents." After the Town thereafter failed to produce the documents or a certification that no documents could be located after a diligent search, Newsday filed an appeal on October 16, 2015.

Request No. 7 (25196)

On March 23, 2015, Newsday submitted a FOIL request to the Town seeking copies of "all annual financial disclosure forms filed by Frederick Ippolito with the town since the year 2000." The Town Clerk acknowledged receipt and stated that twenty days was required to respond. On June 10, 2015, the Town sought an additional twenty business days to furnish the information "due to the extraordinary volume of Freedom of Information Requests being processed and the number of documents involved." After two emails requesting the status of the response went unanswered by the Town, Newsday filed an appeal of the constructive denial of the request on August 31, 2015.

On September 18, 2015, the Town responded that additional time was needed to provide the requested documents. After the Town thereafter failed to produce the documents or a certification that no documents could be located after a diligent search, Newsday filed an appeal on October 16, 2015.

Request No. 10 (25462)

On May 13, 2015, Newsday sought to "personally inspect all building permits issued by the town [sic] of Oyster Bay in the months of February 2015 and March 2015." The Town acknowledged receipt of the request and indicated that twenty days would be required to process the request. After Newsday sent two emails requesting the status of the request that went unanswered, it filed an appeal of the constructive denial on August 31, 2015.

On September 18, 2015, the Town responded to Newsday indicating that "additional time was required in order to provide the requested documents." After the Town failed to

produce the documents or a certification that no documents could be located after a diligent search, Newsday filed another appeal on October 16, 2015.

Request No. 11 (25866)

On August 14, 2015, Newsday submitted a FOIL request to the Town seeking "copies of all income and balance sheets provided to the town by concessionaires SRB Concessions, S.R.B. Convention and Catering, SRB Woodlands, HVS Seafood Shack, HVS Salsa Shack, HVS Dock and Dine, HVS Burger Shack, HVS Centre Island, HVS Stehli Beach, HVS Tappen Beach and any other company owned in part or whole by Harendra Singh or Ruby Singh that has had a concessions agreement with Oyster Bay to operate food and beverage service at the Joseph Colby golf course in Oyster Bay, Tobay Beach, Tappen Beach, Centre Island Beach and Stehli Beach."

Newsday contends that the Town sent a letter acknowledging the request. On October 16, 2015, after no additional response was received, Newsday appealed the constructive denial of the request. No response to the appeal was provided by the Town.

Request No. 12 (25864)

On August 14, 2015, Newsday sought from the Town copies of all records "indicating payment to the town by concessionaires SRB Concessions, S.R.B. Convention and Catering, SRB Woodlands, HVS Seafood Shack, HVS Salsa Shack, HVS Dock and Dine, HVS Burger Shack, HVS Centre Island, HVS Stehli Beach, HVS Tappen Beach and any other company owned in part or whole by Harendra Singh or Ruby Singh that has had a concessions agreement with Oyster Bay to operate food and beverage service at Joseph Colby golf course in Oyster Bay, Tobay Beach, Tappen Beach, Centre Island Beach and Stehli Beach."

Newsday contends that the Town acknowledged the request. On October 16, 2015 after no additional response was received, Newsday appealed the constructive denial of the request. No response to the appeal was provided by the Town.

Request No. 13 (25865)

On August 14, 2015, Newsday requested from the Town copies of all "agreements, amendments for concessions agreements approved by the town board in December 2012 to operate food and beverage service [at] Tappen Beach, Centre Island Beach and Stehli

Beach....[and] copies of any reviews or reports of capital improvements made at these facilities since the town entered into the concessions agreement."

Although Newsday contends that the Town sent a letter on August 21, 2015 acknowledging the request and indicating that twenty days was required to respond, no such letter has been annexed to the Petition reflecting same. On October 16, 2015, after no additional response was received, Newsday appealed the constructive denial of the request. Newsday contends that no response to the appeal was provided by the Town.

B. Statute of Limitations

This proceeding was commenced on February 26, 2016, by the filing of the Petition. CPLR 304(a). The Town argues that Newsday's Petition as it relates to Newsday's FOIL claims is untimely because each of the FOIL requests were denied or deemed denied more than four months prior to the commencement of the proceeding. Newsday asserts that its Petition is not time-barred because as late as January 11, 2016, the Town communicated to Newsday that it was still considering the FOIL requests.

An Article 78 proceeding challenging the denial of a FOIL request must be commenced within four months after a petitioner receives notice of a final and binding denial of its appeal. CPLR 217(1); *Church of Scientology of N. Y. v. State of New York*, 46 N.Y.2d at 908; *Berkshire Nursing Center, Inc. v. Novello*, 13 A.D.3d 327 (2d Dept. 2004). Public Officers Law §89(4)(b) provides that an agency's failure to respond to an appeal within ten days shall constitute a denial of the appeal. But this section is not absolute, as courts have recognized that an agency's ambiguous actions and communications following an appeal may extend the accrual date of a claim. *See e.g., Carnevale v. City of Albany*, 68 A.D.3d 1290 (3d Dept. 2009); *Berkshire Nursing Center, Inc. v. Novello*, 13 A.D.3d at 328; *Orange County Publications v. Kiryas Joel Union Free School District*, 282 A.D.2d 604 (2d Dept. 2001); *Archdeacon v. Town of Oyster Bay,* 12 Misc.3d 438 (Sup.Ct. Nassau Co. 2006). This is because such ambiguous actions evidence that the agency had not reached a *final* determination. The burden rests on the party seeking to assert the statute of limitations as a defense to establish that its decision was unambiguously communicated as final more than four months before the proceeding was commenced. *Berkshire Nursing Center, Inc. v. Novello*, 13 A.D.3d at 328.

In this proceeding, Newsday's appeals (one of which related to multiple FOIL requests) must be examined individually. In sum, there are two relevant appeal dates: September 10, 2015, on which date two relevant appeals were taken (one each for Request Nos. 3 and 4); and October 16, 2015, in which one joint appeal was taken for Request Nos. 1, 2, 5-7 and 10-13. The limitations defense as to the October 16, 2015 appeal is easily disposed of: according to the Town this proceeding had to be commenced by February 29, 2016 (a response was due by October 26, 2015, the claim accrued on October 27, 2015 and the first business day four months later was February 29th). Since this proceeding was commenced on February 26, 2016, by the Town's own calculation this proceeding as it relates to the October 16, 2015 joint appeal is timely.

Furthermore, the Town itself, in an email to Newsday from Jonathan Sinnreich, Esq., on January 11, 2016, stated that the Town's response to the October 16, 2015 appeal was contained in a December 18, 2015 letter from Thomas Sabellico, Esq. Although the December 18 letter only makes explicit reference to one of the FOIL requests that were the subject of the October 16 appeal (a request not in issue in this proceeding), the January 11 Sinnreich email further states that "the Town anticipates providing responses to the remainder of Newsday's outstanding FOIL requests by the end of this week." Sinnreich's January 11 email was in response to three emails sent to him by Newsday, dated January 5, 7 and 8, 2016. These emails asked about the status of Request Nos. 25180 (Request No. 5), 25181 (Request No. 6), 25196 (Request No. 7) and 25462 (Request No. 10). Sinnreich similarly stated in an email to Newsday on December 18, 2015, that the Town was still working on Newsday's outstanding FOIL requests and acknowledged that "the Town is aware that there are some outstanding FOIL requests that have not been responded to." As a result of these communications from the Town, the limitations period for Newsday to file this proceeding with respect to the October 16 appeal did not accrue until January 11, 2016, at the earliest.

The timeliness of this proceeding concerning the September 10, 2015 appeals is not as straightforward. Absent evidence that the Town still had not finally determined the appeals by October 26, 2015, this proceeding is untimely. The Town argues that Newsday's claim accrued on September 21, 2015—the first day after the Town's response to the appeals was

statutorily due. Newsday claims that the Town's communications reflect that it still had not finally determined these appeals as late as January 2016. Newsday submits the affidavit of Dina Sforza, Esq., Newsday's counsel, who attests that on October 27, 2015 she had a telephone conversation with Sinnreich during which he advised her that he had been retained by the Town to, among other things, respond to Newsday's outstanding appeals. She attests that Sinnreich "indicated that he would be working with the Town to ensure that Newsday received responses to all of them." Newsday further makes reference to the parties' communications from November 2015 through January 2016 as evidence that the Town was still indicating that it was working on the outstanding FOIL requests and appeals.

It cannot be said, however, that the communications clearly reflect that the Town was still considering the two requests at issue in these appeals: the Sabellico internal investigation report (Request No. 3) and an electronic copy of the Town's check register or claims system (Request No. 4). Undoubtedly, Newsday's communications to the Town during this period inquire as to the status of these requests, but it cannot be ascertained from the documents alone that the Town gave Newsday the reasonable understanding that it had not made a final decision concerning providing these two items. As a result, a question of fact is presented that must be determined at a hearing.

C. The Merits of the FOIL Request Denials

With respect to Request Nos. 1 and 2, Newsday seeks a certification that the Town has done a diligent search and it does not possess requested documents beyond those produced or that such documents could not be located after a diligent search. *See Matter of Beechwood Restorative Care Ctr. v. Signor*, 5 N.Y.3d 435, 440-41 (2005) (responding entity must certify that it does not possess a requested document and that it could not be located after a diligent search if not produced or subject to a request denial). The Town argues that it had made clear to Newsday that all of the contracts and contract amendments sought were produced. But Newsday's request was broader. As noted above, Newsday also sought copies of independent reviews of capital improvements at the locations at issue as well as proposals to make capital improvements, and it has a good-faith basis to believe that not all responsive documents in this regard were provided. As a result, Newsday is entitled to the sought-after certification.

Request No. 3 seeks the Sabellico internal investigation report. This report, according to the Town, was prepared by its "Special Counsel" Thomas M. Sabellico, Esq., in connection with an investigation of allegations by a Town resident concerning certain unspecified wrongdoing. The Town argues that the report was prepared for investigation and law enforcement purposes, forwarded to the Nassau County District Attorney and, if released, would interfere with an ongoing investigation.

It is unclear from the record, however, precisely why the investigation was conducted, what was being investigated and the intended purpose of the report. It does not appear that the Town conducted a criminal investigation and the law enforcement purpose is unclear. The Town provides no legal authority to support the proposition that the investigation that was conducted fits within the "law enforcement" exemption under these circumstances, although there is New York caselaw supporting the proposition that the exemption applies to civil as well as criminal enforcement. *See, e.g., Pride International Realty LLC v. Daniels*, 4 Misc.3d 1005(A)(Sup. Ct. New York Co. 2004). But what laws were the Town seeking to enforce and in what manner was the Town capable of enforcing them?

Furthermore, although the report may have been forwarded to the Nassau County District Attorney, there is nothing in the record that establishes that there presently is an ongoing law enforcement investigation with respect to the subject of the report. By a copy of this decision, which is being forwarded to the District Attorney, the court requests that the District Attorney advise the court by way of judicial submission her position concerning release of the report; whether there has ever been an active investigation concerning the subject of the report and, if so, whether that investigation is ongoing; and whether release of the report would interfere with such investigation (and, if so, the reasons for this belief). The court further directs that a copy of the report be provided to it for an *in camera* inspection. *See Fink v. Lefkowitz*, 47 N.Y.2d at 571. Because factual issues are raised concerning the preparation and purpose of the report and the validity of the Town's objection, such issues are to be addressed at the already-required timeliness hearing.[2]

[2] At the hearing, the parties will also be given an opportunity to address whether the report may be withheld as an intra-agency or inter-agency document pursuant to Public Officers Law §87(2)(g).

Request No. 4 seeks an electronic copy of the Town's check register or claims system database. The Town asserts that the request, not limited in time, is too broad and burdensome. But although such an objection may be a proper response to an adversary's demand for documents, it has no place in the context of a FOIL request. *See M. Farbman & Sons, Inc. v. New York City Health and Hospitals Corp.*, 62 N.Y.2d 75, 82-83 (1984). All that is required is that the records requested be "reasonably described" so that they may be located. *Id.* No information has been supplied concerning the form in which the requested material is kept by the Town to allow this court to issue an appropriate order with respect to the timing or manner of its production. As a result, at the hearing to determine the timeliness of this claim, evidence is to be presented concerning this issue.

In response to Request Nos. 5-7 and 10-13, the Town argues that the requested documents may be withheld based upon the investigation/law enforcement exemption. In addition, with respect to Request Nos. 11, 12 and 13, the Town asserts that it is withholding such documents "due to the possibility of significant litigation and the need to preserve the Town's position in any such litigation." These objections find no support from the facts or the applicable law.

Request No. 5 seeks to inspect all contracts currently in effect between the Town and Carlo Lizza & Sons Paving ("Lizza"). Request No. 6 seeks to inspect Town contracts with Lizza completed since January 1, 2008, including change work orders and extensions. In defense of its failure to respond to the request, produce the documents or object to their production, the Town in its answering papers filed herein relies upon its legal position concerning Request No.7—which sought financial disclosure forms filed since 2000 by Frederick Ippolito, a former Town commissioner. Otherwise, states the Town, it "will not comment any further on this topic." An interesting, and ultimately unwise, position for a litigant that bears the burden of proof.

In response to Request No. 7, the Town states that the request for Ippolito's financial disclosure forms is "unique" because the documents "were the subject of activities by law enforcement agencies." Presumably, the Town was making reference to the fact that Ippolito was the subject of a federal indictment (the indictment was unsealed in March 2015) and charged with six counts of tax evasion based on his receipt, from 2008 through 2013, of over

$2 million from Lizza and a principal of Lizza that he failed to report. Ippolito eventually pleaded guilty to one felony count of tax evasion in January 2016. The Town argues that "[a]s materials that are the subject of law enforcement investigations and/or proceedings are generally kept secret...it would have been improper for the Town to disclose those documents to Newsday, which would have undoubtedly published a story...." In support of this argument the Town cites to Fed. R. Crim. Proc. 6 and CPL §190.25(4)(a). Both of these provisions relate, among other things, to the secrecy of grand jury proceedings.

The argument of the Town is wholly without merit. The Newsday requests have nothing to do with grand jury proceedings nor any criminal investigation. Instead, they ask for government contracts and financial disclosure forms required to be in the Town's possession—documents that undoubtedly are proper subjects of a FOIL request. They were not compiled for law enforcement purposes and therefore cannot possibly be subject to the law enforcement exemption. Whether the contents of these made-in-the-ordinary-course Town documents reveal or establish nefarious or criminal conduct and as such may be used as evidence in a criminal proceeding is material only to the extent that Newsday, as the public's representative, is able to bring such conduct to public light—precisely part of Newsday's mission, as well as that of the FOIL statutes. The Town's argument to the contrary reveals a misunderstanding (or perhaps contempt) of the purpose of the FOIL statutes, and the materials must be produced.

Request No. 10 seeks Town building permits issued in February and March 2015. As with respect to its responses to Request Nos. 5 and 6, the Town relies upon its argument seeking to justify its refusal to provide documents in response to Request No. 7; *i.e.*, that the materials are the subject of some unspecified law enforcement investigation. These materials too must be produced.

Request Nos. 11-13 seek documents that the Town describes as "relative to the Singh matter," which the Town defines as "issues involving certain corporations and one of their mutual principals, Harendra Singh, which had license agreements to provide concession services at Town facilities." Respondents' Memorandum of Law at 1, 2. Newsday seeks income and balance sheets provided to the Town by various Singh-owned entities (including entities owned by Ruby Singh) that operated concessions at various Town facilities (Request

No. 11); documents reflecting payments made by various Singh-owned entities (including entities owned by Ruby Singh) that operated concessions at various Town facilities (Request No. 12); and contracts and amendments for the operation of food and beverage concessions at Tappen Beach, Centre Island Beach and Stehli beach, as well as reviews or reports concerning capital improvements made at these facilities (Request No. 13). The Town again relies on its now-losing argument that these types of documents can somehow be exempt from disclosure under the law enforcement exemption. It is irrelevant that the contents of the requested documents might prove to be "bad news" for Singh or the Town. The public has a right to see the contracts entered into by the Town and documents concerning the performance under those contracts.

The Town makes one additional argument in support of withholding the documents called for by Request Nos. 11-13: the "possibility of significant litigation and the need to preserve the Town's position in any such litigation." Respondents' Memorandum of Law at 13, 14. Again, no case law is advanced to support this argument. That is likely because such a defense would not fly even if the Town were smack in the middle of a significant litigation and the documents were the subject of a FOIL request by its adversary. As held by the Court of Appeals over twenty years ago: "Access to records of a government agency under the Freedom of Information Law (FOIL) (Public Officers Law, art 6) is not affected by the fact that there is pending or potential litigation between the person making the request and the agency." *M. Farbman & Sons, Inc. v. New York City Health and Hospitals Corp.*, 62 N.Y.2d at 78. Furthermore, the court cannot help but wonder how non-disclosure of a document assists in preserving one's position in a litigation. Would the Town's arguments change depending upon whether its adversary knew the contents of the documents?

For the reasons set forth above, the Town is directed to promptly make available to Newsday the documents and materials responsive to Request Nos. 5-7 and 10-13, and the certification in connection with Request Nos. 1 and 2. A court conference shall be held on July 14, 2015 at 9:00 a.m. to schedule a hearing with respect to the remaining requests and establish a firm deadline for the production of the documents (the court expects that the Town will begin making arrangements for such production forthwith).

III. OPEN MEETINGS LAW

At 8:44 a.m. on January 5, 2016, Newsday, by its reporter Phillips, sought copies from the Town Clerk of "all back up material, including but not limited to memos, studies, contracts, correspondence, and statistical information, to all resolutions scheduled to be considered at the board meeting" being held that day. According to Newsday, the request was neither acknowledged nor responded to by the Town.

On February 2, 2016 at 9:51 a.m., Phillips sent a similar email to the Town requesting materials concerning the Town Board meeting to be held on that day. On February 8, 2016, the Town sent a letter to Newsday indicating that it would respond within twenty days to the request for information pursuant to FOIL as to the availability of the requested records.

The Town contends that Newsday failed to provide the Town with sufficient time to respond to either request either prior to or at the meetings at issue. Town Board meetings started at 10:00 a.m. Newsday alleges that the Town violated Public Officers Law §103(e) by failing to make the material available prior to or at the meetings in question.

Public Officers Law §103(e), enacted in 2011, provides that agency records otherwise available under FOIL as well as "any proposed resolution, law, rule, regulation, policy or any amendment thereto, that is scheduled to be the subject of discussion by a public body during an open meeting shall be made available, upon request therefor, to the extent practicable as determined by the agency or department, prior to or at the meeting during which the records will be discussed." The text of this statute introduces a rule of reason: documents are to be provided to the extent practicable. Practicable means feasible. *See http://www.merriam-webster.com/dictionary/practicable*. Although the Town has discretion to determine what is "practicable," as with any exercise of discretion it must be reasonable. As stated by the Department of State Committee on Open Government: "To the extent practicable' pertains to the ability to take reasonable steps through reasonable efforts to achieve the goals of the legislation." *See http://www.dos.ny.gov/coog/openmeetinglawfaq.html*. For example, it likely would not be reasonable to fail to provide for inspection long-prepared resolutions that were to be voted on by the Board, at least at the meeting itself.

Here, the court cannot determine from the evidence before it whether the failure of the Town to provide any requested materials was reasonable. The court does not have the

agendas for the Town Board meetings at issue and does not know what, if any, records or resolutions were to be discussed; the amount of notice given to the public of the scheduled agendas; and what was actually discussed or voted upon at such meetings. As a result, a factual hearing is required to determine if the Town was in violation of OML as alleged in the Petition and, if so, the appropriate remedy.

IV. ZONING BOARD OF APPEALS MINUTES

Newsday alleges that the Town has violated Public Officers Law §§ 106(1) and 106(3) by failing to provide it with minutes of the Town's Zoning Board of Appeals meetings for the years 2010, 2011, 2012 and 2015 as it requested (once again, through Phillips) on October 26, 2015. The Town responds that it has now produced such minutes and presumably would have done so before this action commenced if only Newsday had been clear with respect to its request (the Town asserts that it was unclear if Newsday only desired minutes or wanted transcriptions of the ZBA proceedings).

A review of the correspondence submitted reflects that Newsday was not ambiguous as the Town contends with respect to its request: it sought the ZBA minutes. The Town, on the other hand, conflated the request for minutes with the possibility of providing transcripts, as evidenced by Jonathon Sinnreich's January 11, 2016 email to Dina Sforza: "[I]t remains the Town's position that, in accordance with the provisions of the freedom of information law, the Town will require payment for the transcription of any zoning board of appeals minutes that Newsday may request...."

In all events, Newsday now contends that the minutes supplied by the Town after the commencement of this proceeding are insufficient as they fail to properly record the votes of each member in accordance with the Public Officers Law. *See Zehner v. Bd. of Educ. of the Jordan-Elbridge Cent. School Dist.* 31 Misc.3d 1218(A)(Sup. Ct. Onondaga Co. 2011). Newsday is correct in that at least the minutes as provided to the court do not contain this information. It is possible that the transcriptions, which the Town sought to require Newsday to purchase, contain this information. It is also possible that the Town had a particular custom or practice that may shed more light on the substance of the minutes. In any event, the appropriate remedy with respect to any minute deficiencies must await a hearing to be

scheduled by the court so that evidence can be adduced concerning the Town practices of recording minutes of its meetings.

V. NEWSDAY'S REQUEST FOR COUNSEL FEES

Newsday has "substantially prevailed" with respect to at least a portion of this FOIL proceeding—that part which pertains to its October 16, 2015 appeal. It may, following a hearing, also prevail with respect to its September 10, 2015 appeals. Furthermore, the records that the Town must now produce are clearly matters of significant public interest. A single Google search utilizing the terms "Singh" and "Oyster Bay" produces approximately 151,000 results. A search of "Ippolito" and "Oyster Bay" produces approximately 20,100 hits. Whether Newsday itself conjured up a "cloud of controversy surrounding the Town of Oyster Bay" as the Town alleges, or whether it was the facts as reported by Newsday that created the cloud, is not for the court to decide. Either way, controversy exists and it is in the general public's significant interest that Newsday be permitted to conduct the news investigation it is attempting to pursue by examining public documents (or, at least, documents that should have been and now will be public).

Finally, the Town lacked a reasonable basis in law for withholding the documents at issue ruled upon herein. *Matter of Beechwood Restorative Care Center v. Signor*, 5 N.Y.3d 435, 441 (2005). The paucity of case law cited by the Town to support its actions is indicative of the weakness of its arguments. As a result, Newsday is entitled to at least a portion of its counsel fees with respect to its FOIL claims, the extent and amount of which shall be determined at the hearing. Whether Newsday is entitled to recover counsel fees concerning the alleged OML violations must await the outcome of the hearing.

This constitutes the Decision and Order of this court.

Dated: July 8, 2016
Mineola, NY

ENTER:

LEONARD D. STEINMAN, J.S.C.