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.

REPLY BRIEF FOR APPELLANT

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PRELIMINARY STATEMENT

Petitioner-appellant Prisoners' Legal Services of New York (PLS) submits this brief in reply to the brief filed by respondent New York State Department of Corrections and Community Supervision (DOCCS) in this matter on August 31, 2023.

ARGUMENT

I. The Questions Presented Warrant an Exception to the Mootness Doctrine.

Respondent maintains that petitioner's claims satisfy none of the three requirements for an exception to mootness—i.e., 1) a likelihood of repetition... 2) a phenomenon typically evading review; and 3) a showing of significant or important questions not previously passed on. *(Matter of Hearst Corp. v Clyne,* 50 N.Y.2d 707, 714-715 [1980]; Resp. Br. at 16). For the reasons below, respondent's position concerning element of the exception to mootness is unavailing.

A. DOCCS's reliance on time-limited conditions to deny access to non-exempt materials is a phenomenon that will typically evade review.

Respondent suggests that the general existence of appellate litigation concerning Freedom of Information Law (FOIL) exemptions demonstrates that the questions herein will not typically evade review, since FOIL matters are frequently litigated—including the exemptions on which respondent relied to deny the records

at issue. (Resp. Br. at 17-18). Such framing places the issues at an unreasonable level of generality. In proper context, the phenomenon that here evades review is not simply a FOIL determination in the abstract; instead, it is the agency's reliance on time-limited conditions to deny records under exemptions that are facially inapplicable from the outset. Those time-limited constraints will typically resolve before the underlying FOIL denial can be fully litigated. Absent an exception to mootness, DOCCS's statutory misinterpretations will therefore continue to evade review and correction.[1]

DOCCS denied petitioner's request for a prison Unusual Incident (UI) report on the ground the "preliminary" status of the report made it an exempt intra-agency material under Public Officers Law § 87(2)(g). (R-173). Respondent's brief, and conduct, suggest that it does not assert a blanket exemption for UI reports under § 87(2)(g), since it provided copies of such reports once finalized. (*See* Resp. Br. at 19). Thus, the narrower question before the Court is whether the statute

[1] Despite respondent's suggestion, FOIL's attorney's fees provision under POL § 89(4)(c) is not an adequate substitute for direct judicial review of an underlying FOIL denial. (*See* Resp. Br. at 20-21). The statute provides merely that a court shall assess fees against an agency where a person has substantially prevailed in an Article 78 challenge to a FOIL denial and the agency "had no reasonable basis for denying access." Whether a denial may have been "reasonable" is a distinct question from whether it reflected an accurate and lawful application of the statute. Particularly with novel questions of statutory interpretation like in the case at bar, a court may find an agency's conduct to be reasonable precisely because a case implicates a matter of first impression. In such a case, the court need not reach the lawfulness of the underlying denial itself. Accordingly, the attorney's fees framework cannot supplant an exception to mootness as a sufficient means to review important questions like those raised herein.

independently places objective, factual information beyond the scope of the intra-agency materials exemption, regardless of a document's finality.

The case at bar shows that there is no "realistic likelihood" that the actual time-limited issue before the Court concerning prison UI reports—or intra-agency materials more broadly—will recur with a "timely opportunity to review." (*Matter of Gold-Greenberger v. Human Resources Admin. of City of N.Y.*, 77 N.Y.2d 973, 974-75 [1991]). The preliminary status of a report is inherently transient, as it ceases to be preliminary at the moment it becomes final—a development that can and will occur for every UI report that DOCCS creates. Just as respondent finalized the UI report at issue before the underlying lawfulness of its denial could be litigated, DOCCS can be expected to finalize all such reports on a broadly similar timeline, as the draft status of a document is definitionally temporary. Accordingly, the issue herein concerning Public Officers Law § 87(2)(g) as it relates to preliminary prison UI reports will consistently evade review.

DOCCS further denied petitioner's request for routine prison surveillance video of common areas at Auburn Correctional Facility, citing Public Officers Law § 87(2)(e) (the "law enforcement exemption"). (R-173). Petitioner stands by the assertions in its brief that the § 87(2)(e) exemption naturally lends itself to issues that evade review. (*See* Pet. Br. at 37-39). Again, this Court has observed that "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." *(Matter of Lesher v. Hynes*, 19 N.Y.3d 57, 67 [2012]). The substantial majority of law enforcement investigations thus have a "relatively brief existence" that frequently renders improper use of the exemption "nonviewable"—particularly when compared to the protracted timeline required for precedential appellate litigation. (*See generally Matter of Hearst Corp.*, 50 N.Y.2d at 714).

The general existence of caselaw addressing FOIL's law enforcement exemption does not establish that the relevant questions raised in this appeal are so durable as to preclude a mootness exemption. Indeed, several of respondent's cited cases show that underlying law enforcement investigations had concluded by the time the respective courts issued a decision. (*See* Resp. Br. at 18, citing *Matter of Matter of Disability Rights N.Y. v. New York State Comm'n of Corr.*, 194 A.D.3d 1230, 1235 n. 2 [3d Dep't 2021][six of eight pertinent investigations had ended by the time of oral argument before the Appellate Division, and respondent conceded that the corresponding records sought were thus subject to disclosure]; *Matter of Clayton v. Chemung County Dist. Attorney Weeden Wetmore*, 195 A.D.3d 1264, 1266 [3d Dep't 2021], *lv. denied*, 37 N.Y.3d 916 [2021] [Appellate Division observed, without deciding, that "if there are no further appeals or related judicial proceedings pending, the exemption set forth in Public Officers Law §

87(2)(e)(i) would no longer be applicable"]; *Lesher*, 19 N.Y.3d at 68 [noting that if the petitioner were correct in his assessment of an intervening legal development in Israel, "there is, practically speaking, no longer any pending or potential law enforcement investigation or judicial proceeding with which disclosure might interfere"]). Thus, even where the law enforcement exemption has received substantive appellate attention, the underlying issues were often at risk of being dismissed as moot due to the conclusion of the relevant investigations—further illustrating the transient nature of the exemption.

Finally, for the reasons forth in petitioner's brief at 29 to 37, and in Section II, *infra*, the foundational questions on appeal concerning the meaning of "compiled for law enforcement purposes"—both generally and in the context of prison surveillance video—are sufficiently novel and significant to resolve any ambiguity about their likelihood of evading review in favor of granting an exception to mootness.

B. The issues presented are both substantial and novel.

Respondent's attempt to dismiss the significance and novelty of the questions herein rests on an excessively narrow framing that fails to engage with the relevant context. Respondent suggests that an agency's general obligation to articulate a "particularized and specific justification" for withholding records means that an individual FOIL denial has no bearing on future cases. (Resp. Br. at 22, citing *Matter*

of Gould v. New York City Police Dep't, 89 N.Y.2d 267, 275 [1996]). Petitioner agrees that all FOIL denials must be factually linked to the specific responsive records. But that basic truth does nothing to change the broad ramifications of the agency's facial misinterpretations of the statutory text, as already set forth in petitioner's brief-in-chief. Since the relevant issues concerning the intra-agency and law enforcement exemptions each center on questions of statutory interpretation, their resolution will have statewide effects beyond the facts of the case. The particularized facts of a FOIL denial scarcely matter when an agency misinterprets the relevant exemption from the start.

Again, respondent relied on a blatant misreading of the intra-agency materials exemption to deny the Bradley UI report. DOCCS asserts that objective, factual information in UI reports may be withheld merely because a document is in preliminary status. That position has no support whatsoever in the plain text of the statute and is inconsistent with this Court's holding in *Gould* (89 N.Y.2d 267), as discussed further in Section III, *infra* at 13-15. (*See also* Pet. Br. at 24-27). Improperly curtailing FOIL's scope due to this bald misinterpretation implicates the public's right of timely access to objective information in draft materials created by *all* state entities subject to FOIL. Moreover, because this Court has not ruled on the inherently factual nature of prison UI reports, the applicability of Public Officers

Law § 87(2)(g)(i) to that category of important government documents remains undecided, and thus presents a novel question.

The parties further disagree on the proper reading of the threshold requirement of the law enforcement exemption—i.e., that materials must have been "compiled for" law enforcement purposes for the exemption to attach in the first place. Respondent urges that the meaning of the words "compiled for" under Public Officers Law § 87(2)(e) is broad enough to include "evidence originally generated for some other purpose and later collected as part of an investigation." (Resp. Br. at 39). As set forth in petitioner's brief, however, it remains unsettled under New York law whether "compiled" means "originally acquired or produced," or merely "later collected into a file." (Pet. Br. at 30-35). To petitioner's knowledge, the meaning of this statutory text is an open question that has never been addressed by the Appellate Division or this Court. Only a few outlying state Supreme Court decisions have considered the meaning of "compiled for" under § 87(2)(e)—and while those courts admittedly adopted respondent's preferred interpretation, their position does not put the matter to rest.

The proper meaning of "compiled for" under FOIL is neither a trifling matter nor a foregone conclusion. Indeed, no lesser authorities than the U.S. Court of Appeals for the Second Circuit and the U.S. Supreme Court have interpreted the same term under the parallel provision of the federal Freedom of Information Act

(FOIA) and reached opposite conclusions. (*See* Pet. Br. at 30-35, discussing *John Doe Corp. v. John Doe Agency,* 850 F .2d 105 [2d Cir. 1988], *rev'd* 493 U.S. 146 [1989]). Petitioner maintains that both the Second Circuit opinion and Justice Scalia's Supreme Court dissent in *John Doe* offer compelling and superior readings of "compiled for"—especially in light of the mandate that FOIL's "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]).

As the New York judiciary is not bound by federal courts' reading of FOIA when interpreting FOIL, it is reasonable that this Court may embrace the parallel interpretations reflected in Justice Scalia's dissent or the Second Circuit opinion, or otherwise adopt a narrower reading of the words "compiled for." Petitioner respectfully asks the Court, for the reasons set forth in its brief at 30 to 35, to engage in its own analysis of this matter of first impression, which has sweeping implications for the breadth of the law enforcement exemption statewide. It is a novel and foundational question that either expands or restricts the potential for agencies to withhold records that the legislature may have duly intended to remain open to the public.

As with the intra-agency materials question, the law enforcement question herein is not merely a discrete application of a FOIL exemption to a particular

record; it is a question of statutory interpretation that implicates the public's right to access information statewide. Accordingly, the questions before the Court are sufficiently novel and substantial to support an exception to mootness.

C. The issues presented are likely to recur.

Respondent's suggestion that the issues raised by its improper FOIL denials are unlikely to recur warrants no meaningful consideration. (*See* Resp. Br. at 25 to 27). Supreme Court correctly found that the issues raised are indeed likely to recur (R-53). As noted above, both the intra-agency materials and law enforcement denials arise from DOCCS's baseline misreading of the statute, which effectively guarantees ongoing, unlawful denials on the same grounds.

That FOIL denials must be grounded in facts concerning specific documents requested is beside the point when an agency uses the wrong standard when applying an exemption. The details of a particular record do not matter when DOCCS is committed to withholding records for effectively extra-statutory reasons. Moreover, the 2022 amendments to Public Officers Law § 87(2)(e) (*See* L. 2022, ch. 155; Resp. Br. at 26) will have no bearing on the general recurrence of the relevant law enforcement question on appeal, as the amendment did not alter the threshold requirement that a record be "compiled for law enforcement purposes" for the exemption to attach in the first place. The final element of the exception to mootness standard is thus met.

II. The Record on Appeal Permits the Court to Reach the Issues Raised.

Respondent maintains that the record before the Court is insufficient to review DOCCS's denial of the Bradley UI report and Auburn video. Even if there were deficiencies in the record, which petitioner does not concede, they would be the product of DOCCS's own litigation strategy and should not serve as a bar to the Court's consideration of the merits.

Each stage of the FOIL process, both administrative and judicial, unfolded here in due course and is reflected in the record for the Court's review. Petitioner submitted a FOIL request, and DOCCS denied the same. Petitioner submitted an administrative appeal, which DOCCS again denied. Petitioner then pursued this Article 78 proceeding to contest DOCCS's claimed exemptions. That DOCCS chose not to offer any further support for its withholding of the Bradley UI and Auburn video in the Article 78 proceeding does not preclude review of its facially improper denials under the exemptions that it claimed. The agency's bases for denial at the administrative stage are fully reflected in the record on appeal, and "judicial review of an administrative determination is limited to the grounds invoked by the agency and the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis." (*Matter of Madeiros*, 30 N.Y.3d at 74) (internal citations and quotation marks omitted). To the extent DOCCS wishes

to somehow amend the grounds it invoked to deny the instant records, it cannot do so.

Beyond that, the record is adequate to establish petitioner's entitlement to the disputed materials. The record amply establishes that UI reports are documents that contain primarily objective, factual information—which is the only relevant consideration with respect to whether such information is subject to disclosure under the intra-agency materials exemption. (Public Officers Law § 87[2][g][i]). For example, the record contains a partially-redacted UI report that DOCCS produced during this litigation. (R-328-342). As noted in petitioner's brief, that document demonstrates that a UI report contains sections "devoted to such purely factual data" as the date, location, and 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 Gould*, 89 N.Y.2d at 276 (1996)]).

Moreover, the Appellate Division, Third Department, has confirmed that a UI report "is, at its core, a written memorialization of an event that occurred at a DOCCS facility," with a "factual nature" that "is written by a witness or witnesses with knowledge of the underlying facility event." (*Matter of Prisoners' Legal Servs. of N.Y. v. New York State Dep't of Corr. & Community Supervision*, 173 A.D.3d 8, 13 [3d Dep't 2019]). The record in this case is therefore more than adequate to allow

the Court to address and resolve the issues petitioner has raised regarding the applicability of Public Officers Law § 87[2][g][i]) to "preliminary" unusual incident reports.

The record is similarly adequate to assess the statutory interpretation question concerning the law enforcement exemption. There is no dispute that the requested record is a routine prison surveillance video of a common area, rather than an investigatory record generated specifically for a "law enforcement purpose," as contemplated by Public Officers' Law § 87(2)(e). (*See* Resp. Br. at 39). The Court therefore has sufficient context and a sufficient record to rule on the threshold statutory interpretation question raised by the Auburn video—i.e., determine that such video was not compiled for a law enforcement purpose within the meaning of the statute, and is therefore beyond the scope of the exemption. There is no need for any further factual development of the record to reach the issue.

III. If the Court Uses its Discretion to Grant an Exception to Mootness and Convert this Matter to a Declaratory Judgment Action, Petitioner Should Prevail on the Merits.

In the event the Court grants an exception to mootness and exercises its discretion to convert this matter to a declaratory judgment action for decision on the merits, it should further grant each declaration sought. With respect to the merits, petitioner rests primarily on the arguments set forth in its brief-in-chief. Respondent's position concerning the intra-agency materials exemption, however,

warrants brief comment to ensure that focus remains on the narrow and unambiguous issue before the Court.

The parties agree that the intra-agency materials exemption is designed generally "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]). Respondent, however, asserts that a preliminary UI report may be properly withheld under § 87(2)(g) because "It is well settled that draft agency documents are intra-agency materials exempt from disclosure"—seemingly without regard to whether such document contains objective, nondeliberative, factual information. (Resp. Br. at 31). Put bluntly, there is no such well-settled proposition with respect to "draft" documents writ large. That framing ignores the explicit structure of the statute.

Public Officers Law § 87(2)(g)(i)-(iv) sets forth four categories of intra-agency materials. If a record falls within any one of those four categories, it is independently and categorically beyond the scope of the exemption. The first such category is "statistical or factual tabulations or data." In *Gould* (89 N.Y.2d at 277), this Court explicitly differentiated non-exempt factual data from the kinds of deliberative exchanges that are exempt from disclosure: "Factual data, therefore, simply means objective information, in contrast to opinions, ideas, or advice

exchanged as part of the consultative or deliberative process of government decision making." The *Gould* Court rejected the very claim that respondent now makes: "[I]ntra-agency documents that contain 'statistical or factual tabulations or data' are subject to FOIL disclosure, whether or not embodied in a final agency policy or determination." (89 N.Y.2d at 276).

Thus, the mere fact that a document is non-final does not make its full contents exempt from disclosure, as objective information is inherently distinct from deliberative exchanges. Respondent claims, without support, that "[p]reliminary unusual incident reports are draft documents [that] reflect precisely the kind of deliberative process that the intra-agency exemption is designed to safeguard." (Resp. Br. at 34). Respondent further argues that preliminary UIs are "subject to feedback and change" until finalized, and "reflect DOCCS's deliberative process in analyzing and responding to particularly serious incidents at DOCCS facilities." (*Id.*).

The content and nature of unusual incident reports belies respondent's position. As noted, UI reports contain numerous sections devoted to purely factual data that closely mirror the kinds of information that this Court found to be non-exempt in *Gould*: e.g., names, dates, and narrative descriptions of an incident. All such information is objective and static. Again, as the Third Department recognized, a UI report "is, at its core, a written memorialization of an event that occurred at a

DOCCS facility," with a "factual nature" that "is written by a witness or witnesses with knowledge of the underlying facility event." (*Prisoners' Legal Servs. of N.Y.*, 173 A.D.3d at 13). Even if, as respondent suggests, DOCCS ultimately uses the data contained in a UI report to assess the agency's response to an incident, or the appropriateness of a use of force, it cannot change the essential facts of the underlying incident itself. Such facts are not protected by the intra-agency materials exemption. They are recorded to objectively document an occurrence, rather than contribute to any ongoing intra-agency debate.

To the extent some limited portions of a preliminary UI report do contain tentative recommendations that are exchanged as part of DOCCS's deliberative processes, such information can properly be withheld under § 87(2)(g). This Court held in *Gould* that "any impressions, recommendations, or opinions" contained in police follow up reports "would not constitute factual data and would be exempt from disclosure." The Court contrasted such recommendations with the non-exempt witness statements contained in such reports, which "constitute factual data insofar as [they] embod[y] a factual account of the witness's observations" (89 N.Y.2d at 277).

Where a UI report contains some limited portions that may be properly withheld as deliberative, DOCCS must make appropriate redactions and produce the balance of the factual information in the document. (*See Matter of New York Times*

Co. v. City of New York Fire Dept., 4 N.Y.3d 477, 487 [2005] [lower courts "ordered that [the disputed records] be disclosed to the extent they consist of factual statements or instructions affecting the public, but that they be redacted to eliminate nonfactual material—i.e., opinions and recommendations"—which this Court endorsed as "a straightforward and correct application of the statute as we interpreted it in *Gould*"]).

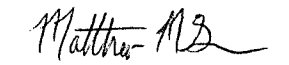
In sum, respondent's suggestion of a categorical exemption for draft documents under § 87(2)(g) fails as inconsistent with both the plain text of the statute and the caselaw. A document's "preliminary" or "draft" status, in and of itself, is immaterial to assessing the applicability of the intra-agency materials exemption.

CONCLUSION

For the reasons set forth above, and those set forth in its brief-in-chief, PLS respectfully requests that the Court grant the relief requested, as well as such other and further relief as the Court deems just.

Dated: September 11, 2023
Albany, New York

Respectfully submitted,



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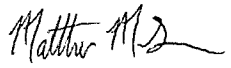
CERTIFICATION PURSUANT TO 22 NYCRR § 500.13(c)(1)

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 reply brief, is 3,714, which complies with the limitations stated in 22 NYCRR § 500.13(c)(1). 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.



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