

No. APL-2023-00048

To be argued by:  
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10 minutes requested

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**State of New York**  
**Court of Appeals**

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

*Petitioner-Appellant,*

-against-

NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY  
SUPERVISION,

*Respondent-Respondent,*

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

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**BRIEF FOR RESPONDENT**

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## PRELIMINARY STATEMENT

In this C.P.L.R. article 78 proceeding, petitioner Prisoners' Legal Services of New York sought disclosure of records from respondent New York State Department of Corrections and Community Supervision (DOCCS) under the Freedom of Information Law (FOIL). As relevant here, petitioner sought all records introduced at the disciplinary hearings of two of its clients—Phillip Bradley and Antonion Christian—who were involved in a fighting incident in the recreation yard at Auburn Correctional Facility in 2019. DOCCS initially withheld, under the exemption for intra-agency materials, a preliminary unusual incident report introduced at Bradley's hearing. *See* Public Officers Law § 87(2)(g). DOCCS also withheld video footage of the Auburn incident under the exemption for records compiled for law enforcement purposes. *See id.* § 87(2)(e).

After this proceeding commenced, however, petitioner obtained the final version of the unusual incident report<sup>1</sup> from

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<sup>1</sup> As noted below, petitioner has abandoned its request for the preliminary version of the unusual incident report.

DOCCS and the Auburn video footage through discovery in a separate criminal proceeding. In its answer below, DOCCS did not defend its FOIL determinations on the merits, but sought to have the proceeding dismissed as moot. Supreme Court, Albany County (O'Connor, A.J.), dismissed the proceeding as moot and declined to apply the exception to the mootness doctrine. The Appellate Division, Third Department affirmed the dismissal on the ground of mootness.

Like the courts below, this Court should hold that this proceeding is moot and decline to address the merits of petitioner's FOIL claims under the mootness exception. None of the criteria for the exception is satisfied. First, FOIL determinations do not typically evade review. To the contrary, the intra-agency and law enforcement exemptions on which DOCCS relied are frequently litigated. Second, the issues petitioner raises on appeal are not substantial and novel. Rather, petitioner challenges fact-specific FOIL determinations under settled legal principles. Third, the propriety of DOCCS's specific FOIL determinations here is not an issue that is likely to recur. And the broader issues on which peti-

tioner seeks declaratory relief will likely recur in future cases that will afford the Court a timely opportunity to review those issues on an adequately developed record in the context of a live dispute.

Even if this Court finds that the mootness exception applies here, it still should deny the three declarations petitioner seeks. First, the Court cannot declare DOCCS's specific FOIL determinations in this case improper because there is no factual record on which to evaluate those determinations. Second, while petitioner asks the Court for a broad declaration that unusual incident reports generally are not exempt intra-agency materials, DOCCS withheld only the preliminary version of the report, and it is well settled that draft documents—such as preliminary unusual incident reports—may be withheld under the intra-agency exemption because they reflect an agency's deliberative decision-making process. Third, petitioner's argument that records are *compiled* for law enforcement purposes—and thus subject to the law enforcement exemption—only if they are specifically *generated* for an investigation is inconsistent with both the plain meaning of the statute and persuasive federal and state authority.

## QUESTIONS PRESENTED

1. Whether Supreme Court correctly declined to apply the exception to the mootness doctrine and dismissed petitioner's FOIL claims as moot.

The Appellate Division answered this question in the affirmative.

2. If the Court finds that the mootness exception applies, whether this Court should decline to issue the declaratory relief petitioner seeks, both because the courts below did not reach the merits and because the claims are based on unduly narrow readings of the relevant FOIL exemptions.

The Appellate Division did not reach these issues.

## STATEMENT OF THE CASE

### A. Statutory Framework

FOIL requires state agencies to "make available for public inspection and copying all records," subject to certain statutory exemptions. Public Officers Law § 87(2). As relevant here, Public Officers Law § 87(2)(e) permits agencies to withhold records that "are compiled for law enforcement purposes" if disclosure would

- i. interfere with law enforcement investigations or judicial proceedings . . . ;
- 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.

*Id.* § 87(2)(e). This is known as the law enforcement exemption.

Additionally, Public Officers Law § 87(2)(g) permits agencies to withhold “inter-agency or intra-agency materials” other than

- i. statistical or factual tabulations or data;
- ii. instructions to staff that affect the public;
- iii. final agency policy or determinations; [or]
- iv. external audits . . . .

This is known as the intra-agency (or inter-agency) exemption.

An agency’s response to a FOIL request is subject to both administrative and judicial review. Administratively, “any person denied access to a record” may appeal the agency’s denial to the agency head or their designee. Public Officers Law § 89(4)(a). The agency head or their designee must either “fully explain in writing to the person requesting the record the reasons for further denial,

or provide access to the record sought.” *Id.* If the initial denial of access to records is upheld on administrative appeal, the FOIL requestor may then file an article 78 proceeding challenging that appeal determination. *Id.* § 89(4)(b). The agency, as respondent in that article 78 proceeding, has the “burden of proving that such record[s]” are exempt from disclosure. *Id.* If the FOIL requestor “substantially prevail[s]” in the article 78 proceeding and “the court finds that the agency had no reasonable basis for denying access,” then the requestor is entitled to reasonable attorney’s fees and costs. *Id.* § 89(4)(c).

The Legislature amended Public Officers Law § 87(2)(e) in 2022 to provide for an additional procedural requirement when an agency withholds records under the law enforcement exemption. *See* L. 2022, ch. 155. The amended provision applies to an agency that is considering withholding records because of interference with a law enforcement investigation being conducted by a separate investigating agency. Under the amended provision—which was not in effect when the events at issue here occurred—the agency that withholds documents under Public Officers Law § 87(2)(e)(i)

must “receive confirmation from the law enforcement or investigating agency conducting the investigation that disclosure of such records will interfere with an ongoing investigation.” Public Officers Law § 87(2)(e)(i).

## **B. Factual Background**

Petitioner is a non-profit organization that provides legal services to indigent individuals incarcerated in New York State correctional facilities. (R. 126.) DOCCS charged four of petitioner’s clients—Phillip Bradley, Antonion Christian, Charles Blanchard, and Shaun Martin—with violating prison disciplinary rules in 2019. (R. 129.)

The disciplinary charges against Bradley and Christian were based on a May 11, 2019 fighting incident that occurred in the recreation yard at Auburn Correctional Facility. (R. 129.) Petitioner submitted FOIL requests for, among other things, all evidence introduced or viewed at their Tier III disciplinary hearings. (R. 148, 150.) DOCCS disclosed all documents responsive to the Bradley and Christian requests except for video footage of the Auburn incident and Bradley’s preliminary unusual incident report. On admin-

istrative appeal, DOCCS explained that the May 11, 2019 Auburn video was exempt from disclosure under Public Officers Law § 87(2)(e) because of the risk of interference with ongoing law enforcement investigations. (R. 163, 173.) DOCCS noted that “release of the video at this time would threaten to prematurely reveal law enforcement and the District Attorney’s plans for the case [and] prematurely reveal the identity of witnesses and sources.”<sup>2</sup> (R. 173.) DOCCS further explained that the Bradley unusual incident report was exempt under Public Officers Law § 87(2)(g) because it was a nonfinal intra-agency record. (R. 173.)

The disciplinary charges against Blanchard and Martin were based on a series of large-scale, racially-motivated incidents that took place on June 10, 11, and 14, 2019, in the recreation yard at Clinton Correctional Facility. (R. 132.) After Blanchard’s and Martin’s Tier III disciplinary hearings, petitioner again submitted

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<sup>2</sup> The letter response referred to multiple external law enforcement agencies and the “District Attorney” but did not specify which agencies or District Attorney’s Office. This incident was also under investigation internally. *See generally* DOCCS Directive No. 6910 (describing procedure for investigating criminal behavior by incarcerated individuals).



FOIL requests for, among other things, all evidence introduced or viewed at the hearings, including video footage of the Clinton incidents. (R. 176-177, 187-188.) DOCCS disclosed all responsive documents except for video footage of the incidents. (R. 318, 362.) On administrative appeal, DOCCS explained that the Clinton videos were exempt from disclosure under Public Officers Law § 87(2)(f) because disclosure could endanger the life or safety of others who were involved in those incidents. DOCCS further explained that the videos were exempt under the law enforcement exemption. (R. 321, 365.)

### **C. Procedural History**

Petitioner brought this article 78 proceeding in Albany County Supreme Court challenging DOCCS's FOIL determinations as to Blanchard, Bradley, Christian, and Martin. The petition sought disclosure of the Auburn and Clinton videos and Bradley's unusual incident report that DOCCS had withheld, or, in the alternative, in camera review of these materials, as well as attorney's fees. (R. 125, 135.)

The petition also asked for declaratory relief, specifically, declarations that:

- “[unusual incident] reports are not inter-agency or intra-agency materials”;
- “[unusual incident] reports are not compiled for law enforcement purposes” or, in the alternative, “the release of the requested [unusual incident] report would not interfere with an ongoing law enforcement investigation”;
- “prison surveillance videos are not compiled for law enforcement purposes” or, in the alternative, release of the requested videos would not interfere with a law enforcement investigation, identify a confidential source or disclose confidential information related to a criminal investigation, or reveal confidential criminal investigative techniques or procedures; and
- “the release of the requested videos would not endanger the life or safety of any person.” (R. 135.)

In answering the petition, DOCCS did not defend the merits of its responses to the Bradley and Christian FOIL requests, but instead asserted that petitioner’s claims seeking the disclosure of these records were moot. DOCCS explained that Bradley’s unusual incident report had been finalized after this article 78 proceeding had commenced, and that the final report had been disclosed to petitioner. (R. 234, 240.) DOCCS further withdrew its objection to disclosure of the Auburn video footage because petitioner had

received such footage from defense counsel in pending criminal proceedings. (R. 234, 240.)

As to the Clinton video footage, DOCCS withdrew its claimed law enforcement exemption because the investigations had concluded, but continued to maintain that the Clinton videos fell within the public safety exemption. In support of that exemption, DOCCS offered the affidavit of the Deputy Superintendent of Security at Clinton, who explained that these videos portrayed violent, racially-motivated incidents between African-American and white incarcerated individuals in the yard at Clinton. (R. 368-369.) The affidavit further explained that disclosure of the requested videos would make it easier for members of rival race-based gangs to identify and retaliate against both incarcerated individuals and correction officers who were involved in the incidents. (R. 371.)

In a decision and order dated February 11, 2021, Supreme Court (O'Connor, A.J.) dismissed the petition in part. Specifically, the court dismissed petitioner's claims regarding the Bradley and Christian FOIL requests as moot because DOCCS had disclosed Bradley's unusual incident report and petitioner had received the

Auburn video through pending criminal proceedings. (R. 33, 36.) The court declined to apply the exception to the mootness doctrine, finding that while the issues raised were likely to recur, they were not substantial and novel and were unlikely to evade review. (R. 36.) The court also dismissed petitioner's claims for declaratory relief because petitioner failed to serve and file a summons and complaint. (R. 36-37.) The court further instructed DOCCS to submit the Clinton videos for in camera inspection. (R. 38-39.)

Subsequently, in a decision, order, and judgment dated June 8, 2021, the court dismissed the remainder of the petition. After reviewing the Clinton video footage in camera, the court agreed with DOCCS that disclosure of the same could endanger the life or safety of incarcerated individuals and correction officers who appear on video. (R. 68-69.) Thus, the court held that the videos were exempt from disclosure under Public Officers Law § 87(2)(f). The court also denied petitioner's request for attorney's fees. (R. 69.)

The Appellate Division, Third Department affirmed. The court held that the mootness exception did not apply to petitioner's claims regarding the Bradley and Christian FOIL requests. As the

court explained, whether respondent properly claimed the law enforcement and intra-agency exemptions was not an issue that typically evades review because those exemptions are frequently litigated. (R. 6.) The court further held that DOCCS had met its burden of showing that disclosure of the Clinton videos could endanger the life or safety of those involved in the incidents. (R. 8.) Finally, the court held that Supreme Court had not abused its discretion in declining to award attorney's fees because DOCCS had a reasonable basis for withholding Bradley's preliminary unusual incident report and the Auburn video footage. (R. 10.)

This Court granted leave to appeal. (R. 2.) Petitioner's brief challenges DOCCS's invocation of the intra-agency exemption to withhold Bradley's preliminary unusual incident report, and DOCCS's invocation of the law enforcement exemption to withhold the Auburn video footage. Because petitioner does not challenge the judgment below insofar as it confirmed DOCCS's determination to withhold the Clinton video footage, petitioner's claims regarding that determination are not preserved for this Court's review.

## ARGUMENT

### POINT I

#### **PETITIONER’S CLAIMS ARE MOOT AND THE EXCEPTION TO THE MOOTNESS DOCTRINE DOES NOT APPLY**

Petitioner’s claims challenging DOCCS’s response to the Bradley and Christian FOIL requests are moot. While DOCCS withheld Bradley’s preliminary unusual incident report under the intra-agency exemption, *see* Public Officers Law § 87(2)(g), DOCCS disclosed the final report after this proceeding commenced.<sup>3</sup> And while DOCCS initially withheld video footage of the May 11, 2019 yard fight at Auburn because of the risk of interference with ongoing law enforcement investigations, *see* Public Officers Law § 87(2)(e), petitioner later obtained the video footage from defense counsel in related criminal proceedings. Petitioner’s receipt of the final unusual incident report and the Auburn video renders its request for relief moot or “academic.” *See Matter of Madeiros v. New*

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<sup>3</sup> Petitioner has not suggested that it continued to seek the preliminary version of Bradley’s unusual incident report after the disclosure of the final version. By failing to raise any such claim below or in its opening brief, petitioner has abandoned it.

*York State Educ. Dep't*, 30 N.Y.3d 67, 73 n. 1 (2017) (citing *Matter of Fappiano v. New York City Police Dep't*, 95 N.Y.2d 738, 749 [2001]); see also *Matter of Mental Hygiene Legal Serv., Third Jud. Dep't v. Delaney*, 38 N.Y.3d 1076, 1078 (2022).

Petitioner nonetheless urges the Court to apply the exception to the mootness doctrine and declare that (1) DOCCS's denial of the preliminary unusual incident report and Auburn video footage was unlawful; (2) unusual incident reports generally are not exempt intra-agency materials insofar as they contain factual information; and (3) prison surveillance videos generally are outside the scope of the law enforcement exemption insofar as they are not specifically created for law enforcement purposes. (Br. at 22, 40.)

The Appellate Division correctly declined to reach those issues, and this Court should too. This Court's jurisdiction "extends only to live controversies." *Saratoga County Chamber of Commerce v. Pataki*, 100 N.Y.2d 801, 810 (2003). Accordingly, the Court does not give advisory opinions. See *Cuomo v. Long Is. Light. Co.*, 71 N.Y.2d 349, 354 (1988) (giving advisory opinions "is not the exercise of the judicial function") (citation omitted). Nor does it rule

on “academic, hypothetical, moot, or otherwise abstract questions.” *Saratoga County Chamber of Commerce*, 100 N.Y.2d at 810-11 (quoting *Matter of Hearst Corp. v. Clyne*, 50 N.Y.2d 707, 713 [1980]). And while the Court has “discretion to review” an otherwise moot case “if the controversy or issue involved is likely to recur, typically evades review, and raises a substantial and novel question,” *id.* at 811, the issues presented on this appeal do not satisfy those conditions. Thus, the Court should affirm the Appellate Division’s order, which affirmed Supreme Court’s judgment dismissing the claims at issue here as moot.

**A. FOIL Determinations Do Not Typically Evade Review.**

The Court should decline to apply the exception to the mootness doctrine because FOIL determinations, like those at issue here, do not typically evade review. Rather, as the Appellate Division explained, FOIL “exemptions and their invocation are frequently examined” by courts. (R. 6.)

The exception to the mootness doctrine permits courts to “review important and recurring issues which, *by virtue of their*



*relatively brief existence*, would be rendered otherwise nonreviewable.” *Matter of Hearst Corp.*, 50 N.Y.2d at 714 (emphasis added). For example, this Court has reviewed otherwise moot cases involving hunger strikes, *see Matter of Bezio v. Dorsey*, 21 N.Y.3d 93, 100 (2013), and foster care placements, *City of New York v. Maul*, 14 N.Y.3d 499, 507 (2010). In such cases, the issues are necessarily short-lived and would remain unreviewable if not for the mootness exception. When “[t]he controversy is not of the type to remain live for a relatively short duration,” however, this Court declines to apply the mootness exception. *Matter of Morrison v. New York State Div. of Hous. & Community Renewal*, 93 N.Y.2d 834, 838 (1999); *see also Matter of Citineighbors Coalition of Historic Carnegie Hill v. New York City Landmarks Preserv. Comm’n*, 2 N.Y.3d 727, 730 (2004); *Wisholek v. Douglas*, 97 N.Y.2d 740, 742 (2002).

FOIL determinations are neither short-lived nor unreviewable. To the contrary, the intra-agency exemption, *see* Public Officers Law § 87(2)(g)—the ground on which DOCCS withheld Bradley’s preliminary unusual incident report—is frequently litigated. *See, e.g., Matter of National Lawyers Guild, Buffalo Ch. v.*

*Erie County Sheriff's Off.*, 196 A.D.3d 1195 (4th Dep't 2021); *Matter of Jewish Press, Inc. v. New York City Dep't of Investigation*, 193 A.D.3d 461 (1st Dep't 2021); *Matter of McGee v. Putnam County Assistant Dist. Attorney David M. Bishop*, 192 A.D.3d 1446 (3d Dep't 2021). So is the law enforcement exemption, see Public Officers Law § 87(2)(e), which DOCCS cited when it initially withheld the Auburn video. See, e.g., *Matter of Madeiros*, 30 N.Y.3d at 75-77; *Matter of Abdur-Rashid v New York City Police Dep't*, 31 N.Y.3d 217, *rearg. denied*, 31 N.Y.3d 1125 (2018); *Matter of Cohen v. Alois*, 201 A.D.3d 1104 (3d Dep't 2022); *Matter of Clayton v. Chemung County Dist. Attorney Weeden Wetmore*, 195 A.D.3d 1264 (3d Dep't), *lv. denied*, 37 N.Y.3d 916 (2021); *Matter of Disability Rights N.Y. v. New York State Comm'n of Corr.*, 194 A.D.3d 1230 (3d Dep't 2021).

The frequency with which these FOIL exemptions are litigated demonstrates that proceedings challenging such exemptions are “not of the type to remain live for a relatively short duration.” *Matter of Morrison*, 93 N.Y.2d at 838. Thus, the Appellate Division

properly declined to apply the mootness exception and review the otherwise moot FOIL determinations on the merits.

The record does not support petitioner's contention that DOCCS deliberately sought to evade review by disclosing the unusual incident report and Auburn video after improperly relying on the intra-agency and law enforcement exceptions. (Br. at 19-20, 38-39.) Nor does the record support petitioner's characterization of DOCCS's FOIL response as "inherently evasive." (Br. at 19.) To the contrary, the record demonstrates that DOCCS disclosed records as appropriate and submitted its proposed exemptions for litigation in this article 78 proceeding. For example, DOCCS promptly disclosed an unusual incident report in response to petitioner's FOIL request for materials introduced at the disciplinary proceeding of one of the other incarcerated persons represented by petitioner (Blanchard). (R. 328-343.) That report had been finalized at the time of the FOIL request, and thus DOCCS had no need to assert the intra-agency exemption for nonfinal documents. And DOCCS fully litigated the safety exemption under which it withheld the Clinton video footage, rather than disclose it in order to evade review. (*See, e.g.*, R. 7-8,

383-388.) There is no basis to conclude that DOCCS disclosed the records at issue here for the purpose of evading judicial review.

Moreover, the FOIL attorney's fee provision ensures that many FOIL claims rendered moot by the agency's post-litigation disclosure are nevertheless subject to some level of judicial review without resort to the mootness exception. Under Public Officers Law § 89(4)(c), a petitioner is entitled to attorney's fees and costs if the petitioner "substantially prevailed" in an article 78 proceeding challenging an agency's FOIL determination and "the agency had no reasonable basis for denying access." As the Appellate Division explained, an agency's release of documents during litigation does not moot a claim for attorney's fees. (R. 9.) Thus, courts regularly scrutinize an agency's rationale for denying access even when the agency discloses documents after litigation commences.<sup>4</sup> *See, e.g., Matter of Madeiros*, 30 N.Y.3d at 79-80; *Matter of Vertucci v. New York State Dep't of Transp.*, 195 A.D.3d 1209 (3d Dep't 2021), *lv.*

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<sup>4</sup> Here, the Appellate Division declined to award fees upon finding that DOCCS had a reasonable basis for withholding the preliminary unusual incident report and the Auburn video. (R. 10.) Petitioner does not challenge those findings on this appeal.

*denied*, 37 N.Y.3d 917 (2022); *Matter of Associated Gen. Contrs. of N.Y. State, LLC v. New York State Thruway Auth.*, 173 A.D.3d 1526, 1527-28 (3d Dep't 2019); *Matter of Cobado v. Benziger*, 163 A.D.3d 1103, 1105-06 (3d Dep't 2018).

Because FOIL determinations do not typically evade review, the Court should decline to reach the issues presented by DOCCS's FOIL determinations here. The Court instead should affirm the Appellate Division's decision upholding Supreme Court's dismissal of petitioner's FOIL claims as moot.

**B. Petitioner Fails to Present any Substantial and Novel Question.**

The Court should decline to apply the exception to the mootness doctrine for the additional reason that none of the issues petitioner raises on appeal is substantial and novel. Again, petitioner seeks advisory opinions on three issues: (1) whether DOCCS's initial denial of the specific records sought in petitioner's FOIL requests was unlawful; (2) whether unusual incident reports generally are not exempt intra-agency materials insofar as they contain factual information; and (3) whether prison surveillance

videos generally are outside the scope of the law enforcement exemption insofar as they are not specifically created for law enforcement purposes.

First, petitioner fails to explain why DOCCS's initial denial of access to records in this case constitutes a substantial question. Whether DOCCS properly withheld Bradley's preliminary unusual incident report and the Auburn video is a fact-specific question. And it has no bearing on future FOIL cases because whenever an agency withholds documents under one of the FOIL exemptions, it "must articulate [a] 'particularized and specific justification'" for doing so. *Matter of Gould v. New York City Police Dep't*, 89 N.Y.2d 267, 275 (1996) (quoting *Matter of Fink v. Lefkowitz*, 47 N.Y.2d 567, 571 [1979]). Thus, the propriety of DOCCS's FOIL determinations in this particular case is not itself a substantial question that warrants applying the mootness exception.

Second, the applicability of the intra-agency exemption to unusual incident reports generally does not rise to the level of a substantial and novel question warranting this Court's review. Petitioner argues that this is a "substantial issue of public impor-

tance” because DOCCS views such reports as categorically exempt from disclosure. (Br. at 17.) This argument misconstrues DOCCS’s position. DOCCS routinely discloses finalized unusual incident reports; it initially withheld Bradley’s unusual incident report only because it was a *nonfinal* intra-agency record. As explained further below, it is well settled that draft documents like Bradley’s preliminary unusual incident report are exempt under Public Officers Law § 87(2)(g). *See, e.g., Matter of Xerox Corp. v. Town of Webster*, 65 N.Y.2d 131, 132 (1985); *Matter of Gilbert v. Office of the Governor of the State of N.Y.*, 170 A.D.3d 1404, 1406 (3d Dep’t 2019); *Matter of Spring v. County of Monroe*, 141 A.D.3d 1151, 1152 (4th Dep’t 2016); *see also United States Fish & Wildlife Serv. v. Sierra Club, Inc.*, 141 S. Ct. 777, 786-87 (2021).

Third, the applicability of the law enforcement exemption to prison surveillance video generally does not rise to the level of a substantial and novel question. As explained further below, courts have uniformly held that records may be *compiled* for law enforcement purposes—and thus subject to the law enforcement exemption—even if they are not specifically *created* for a law enforcement

investigation. *See John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 155 (1989) (interpreting analogous federal disclosure law); *Matter of New York Times Co. v. New York State Exec. Chamber*, 57 Misc. 3d 405, 416 (Sup. Ct., Albany County 2017); *Matter of New York Times Co. v. City of N.Y. Fire Dep't*, 195 Misc. 2d 119, 123-24 (Sup. Ct., New York County 2003), *mod.*, 3 A.D.3d 340 (1st Dep't 2004), *mod.*, 4 N.Y.3d 477 (2005). Indeed, it would be surprising if it were otherwise, given that law enforcement investigations frequently involve the collection of pre-existing evidence, such as video footage. Thus, whether routine prison surveillance footage may properly be subject to the law enforcement exemption is not a substantial and novel question warranting this Court's review.<sup>5</sup>

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<sup>5</sup> To the extent petitioner invokes the “civil and human rights” of the incarcerated individuals whom petitioner represents to articulate a substantial question for review (Br. at 1), it appears to mean the procedural rights of incarcerated individuals in disciplinary proceedings. While undeniably important, those concerns are best addressed in a case challenging an actual disciplinary determination rather than this FOIL proceeding. That said, DOCCS's positions in this case are fully consistent with those rights.



**C. Petitioner’s Claim Challenging DOCCS’s FOIL Determinations Presents Fact-Specific Issues that Are Not Likely to Recur.**

Insofar as petitioner seeks a declaration that DOCCS improperly withheld the specific records requested here—Bradley’s preliminary unusual incident report and the Auburn video—that claim involves fact-specific issues that are unlikely to recur because DOCCS has disclosed the requested records. This is an independent reason not to apply the mootness exception to petitioner’s claim challenging DOCCS’s FOIL determinations.

The propriety of DOCCS’s FOIL determinations here is not an issue that will recur in future cases. By disclosing Bradley’s final unusual incident report and the Auburn video footage under FOIL, DOCCS has made those records “available for public inspection and copying”—both for petitioner and any other member of the public. Public Officers Law § 87(2). And whether DOCCS properly withheld the specific records requested by petitioner has little bearing on future FOIL determinations because, as explained above, every FOIL determination is fact-specific. *See Matter of Gould*, 89 N.Y.2d at 275. So even if DOCCS withheld similar records in the future,

the propriety of such determinations would turn on the facts and record developed in those cases.

The propriety of DOCCS's invocation of the law enforcement exemption here is particularly unlikely to recur due to a recent change in law. In 2022, the Legislature amended Public Officers Law § 87(2)(e). *See* L. 2022, ch. 155. The amended statute sets forth a procedural requirement for an agency that is considering withholding records because of interference with a law enforcement investigation being conducted by a separate investigating agency. Specifically, the agency that received the FOIL request must "receive confirmation from the law enforcement or investigating agency conducting the investigation that disclosure of such records will interfere with an ongoing investigation." Public Officers Law § 87(2)(e)(i). No such requirement applied when DOCCS withheld the Auburn video in 2019. In light of the 2022 amendment, at least some of "the precise issues presented by" petitioner's challenge to DOCCS's 2019 FOIL determinations "may never again recur." *Saratoga County Chamber of Commerce*, 100 N.Y.2d at 811-12; *see also Matter of Mental Hygiene Legal Serv.*, 38 N.Y.3d at 1079

(dismissing claim challenging disability services because of “intervening material alterations of the service programs challenged in the petition”). Thus, whether DOCCS properly withheld the requested documents here is not a recurring issue that warrants applying the exception to the mootness doctrine.

To be sure, insofar as petitioner seeks broad declarations that unusual incident reports *generally* are not exempt intra-agency materials, and that prison surveillance videos *generally* are not compiled for law enforcement purposes, those issues will likely recur. But, as explained above, they are not amenable to resolution in the abstract. And to the extent that FOIL determinations concerning specific unusual incident reports or video footage are the subject of future disputes, they again do not typically evade review. In other words, “[t]here is a realistic likelihood that [those issues] will recur with an adequately developed record and with a timely opportunity for review.” *Matter of Gold-Greenberger v. Human Resources Admin. of City of N.Y.*, 77 N.Y.2d 973, 974-75 (1991). There is no need for the Court to issue the advisory opinions petitioner seeks in this proceeding.

## POINT II

### **THE COURT SHOULD NOT GRANT THE DECLARATORY RELIEF PETITIONER SEEKS**

If the Court holds that the mootness exception applies to petitioner's claims, the Court nonetheless should not issue the declarations petitioner seeks—namely, that DOCCS improperly withheld the specific records requested here, that unusual incident reports generally are not exempt intra-agency materials, and that prison video surveillance footage generally is not compiled for law enforcement purposes. Rather, the Court should affirm the judgment below or, at most, remand for further proceedings.<sup>6</sup>

#### **A. Petitioner's Claim Challenging DOCCS's FOIL Determinations Is Not Reviewable by This Court.**

The first declaration petitioner seeks—that DOCCS improperly withheld Bradley's unusual incident report and the Auburn video—cannot be made here because there is no factual record on which to evaluate those FOIL determinations.

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<sup>6</sup> While the State opposes the declaratory relief petitioner seeks, it would not oppose converting this matter to a declaratory judgment action if the Court finds that the mootness exception applies.

When FOIL requests are initially made, an agency need only explain in writing why it is withholding records. See Public Officers Law § 89(4)(a); *Matter of Competitive Enter. Inst. v. Attorney Gen. of N.Y.*, 161 A.D.3d 1283, 1285 (3d Dep’t 2018). Then, in an article 78 proceeding challenging that determination, it is the agency’s “burden of proving that such record[s]” are exempt from disclosure. Public Officers Law § 89(4)(b). To meet its burden, an agency will typically supplement the administrative record with an affidavit by an official with knowledge filed as part of its answer. An agency may also meet its burden by submitting records for the trial court’s in camera review. See *Matter of Gould*, 89 N.Y.2d at 275; *Matter of M. Farbman & Sons, Inc. v. New York City Health & Hosps. Corp.*, 62 N.Y.2d 75, 83 (1984). But where, as here, the requested records are disclosed (by the agency or a third party) before the agency answers the petition, there is no need for it to establish an evidentiary basis in support of the now-moot FOIL determination. Nor is there any reason to submit the materials to the trial court for in camera review.

Thus, in light of the disclosures here, DOCCS reasonably declined to put forth evidence in support of its determinations to withhold Bradley's preliminary unusual incident report and the Auburn video, and there is no record on which to adjudicate the propriety of those determinations. Should the Court find that the mootness exception applies to petitioner's claim challenging DOCCS's FOIL determinations, then the Court should remand the proceeding for further factual development.

**B. Preliminary Unusual Incident Reports May Properly Be Withheld Under the Intra-Agency Exemption.**

The Court also should decline to declare that unusual incident reports are outside the scope of the intra-agency exemption as a matter of law. As an initial matter, neither Supreme Court nor the Appellate Division reached this issue. This Court, "as a court of last resort," should not decide it in the first instance. *Saratoga County Chamber of Commerce*, 100 N.Y.2d at 825. For this reason alone, the Court should not grant the declaratory relief petitioner seeks.

In any event, DOCCS withheld only the *preliminary* unusual incident report here, and petitioner's argument that unusual inci-

dent reports must generally be disclosed—even if preliminary—fails on the merits. Public Officers Law § 87(2)(g) permits an agency to withhold “inter-agency or intra-agency materials.” As this Court has explained, the purpose of this exemption is “to safeguard internal government consultations and deliberations.” *Matter of Gould*, 89 N.Y.2d at 276; *see also Matter of Xerox Corp.*, 65 N.Y.2d at 132. It does so by “permit[ting] people within an agency to exchange opinions, advice and criticism freely and frankly, without the chilling prospect of public disclosure.” *Matter of New York Times Co. v. City of N.Y. Fire Dep’t*, 4 N.Y.3d 477, 488 (2005). The intra-agency exemption is subject to certain exceptions, including “statistical or factual tabulations or data.” Public Officers Law § 87(2)(g)(i). Thus, while “objective information” must be disclosed, “opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making” are exempt intra-agency materials. *Matter of Gould*, 89 N.Y.2d at 277.

It is well settled that draft agency documents are intra-agency materials exempt from disclosure. By definition, draft documents are subject to internal review and revision by agency personnel. As

such, they necessarily reflect the internal deliberative process that the intra-agency exemption is designed to safeguard. *See Matter of Gould*, 89 N.Y.2d at 276. For this reason, this Court in *Matter of Xerox Corp.* held that “FOIL protects against disclosure of pre-decisional memoranda or other nonfinal recommendations.” 65 N.Y.2d at 133. Lower courts have also consistently held that draft documents are properly withheld under the intra-agency exemption. *See Matter of McGee*, 192 A.D.3d at 1450 (draft letter response to petitioner’s request for respondent to commence a criminal investigation); *Matter of Gilbert*, 170 A.D.3d at 1406 (preliminary drafts of letter terminating sublease); *Matter of Shooters Comm. on Political Educ., Inc. v. Cuomo*, 147 A.D.3d 1244, 1246 (3d Dep’t 2017) (draft FOIL response); *Matter of Spring*, 141 A.D.3d at 1152 (draft informal dispute resolution request); *Matter of Smith v. New York State Off. of the Attorney Gen.*, 116 A.D.3d 1209, 1211 (3d Dep’t), *lv. denied*, 24 N.Y.3d 912 (2014) (draft Q&As and press releases). Petitioner cites no authority to the contrary.



Draft documents are also properly withheld under the federal Freedom of Information Act (FOIA). Because FOIL was modeled after FOIA, this Court regards federal case law as “instructive” when interpreting FOIL. *Matter of Friedman v. Rice*, 30 N.Y.3d 461, 480 (2017) (quoting *Matter of Leshner v. Hynes*, 19 N.Y.3d 57, 64 [2012]). The United States Supreme Court has squarely held that the analogous FOIA provision—which exempts “inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency,” 5 U.S.C. § 552(b)(5)—applies to draft documents. See *Sierra Club*, 141 S. Ct. 777. In *Sierra Club*, the Court held that draft opinions prepared by a federal agency concerning the impact of a proposed rule on endangered species were exempt from disclosure because they “reflect a preliminary view—not a final decision—about the likely effect” of the rule. *Id.* at 786. As the Court explained, “a preliminary version of a piece of writing [is] subject to feedback and change.” *Id.* at 786. Thus, it reflects the deliberative process “by which governmental decisions and policies are formulated.” *Id.* at 785 (citation omitted).

Preliminary unusual incident reports are draft documents subject to the intra-agency exemption. Indeed, they reflect precisely the kind of deliberative process that the intra-agency exemption is designed to safeguard. Preliminary unusual incident reports are prepared by facility staff in response to a serious occurrence that may impact upon or disrupt facility operations, has the potential for affecting DOCCS's public image, or might arouse widespread public interest. *See Matter of Prisoners' Legal Servs. of N.Y. v. New York State Dep't of Corr. & Community Supervision*, 173 A.D.3d 8, 12 (3d Dep't 2019) (quoting DOCCS Directive No. 4004). Unusual incident reports generally include a narrative description of the incident and describe the role played by each of the incarcerated individuals and correction officers involved in the incident. (*See, e.g., R. 328-343.*) Preliminary reports are reviewed by a Correctional Facility Operations Specialist at DOCCS's central office, and finalized by the facility superintendent. And where, as here, an unusual incident involves the use of force, the superintendent relies in part on the unusual incident report to determine whether the use of force was necessary and appropriate.

Like the draft impact opinions at issue in *Sierra Club*, preliminary unusual incident reports are “subject to feedback and change” until finalized. *Sierra Club*, 141 S. Ct. at 786. And the preliminary reports reflect DOCCS’s deliberative process in analyzing and responding to particularly serious incidents at DOCCS facilities. *See Matter of Gould*, 89 N.Y.2d at 276. In general, therefore, preliminary unusual incident reports may properly be withheld under Public Officers Law § 87(2)(g).

Petitioner is mistaken in arguing that factual information in unusual incident reports is always subject to disclosure, regardless of whether the report is preliminary or finalized. (Br. at 25-27.) Public Officers Law § 87(2)(g) broadly exempts “inter-agency or intra-agency materials” from disclosure. As noted above, the statute carves out an exception for “statistical or factual tabulations or data,” which this Court has interpreted as “objective information.” *Matter of Gould*, 89 N.Y.2d at 277. But the type of factual information—tentative, speculative, or subjective—more likely to be contained in drafts is not covered by this exception. *See Matter of Shooters Comm. on Political Educ.*, 147 A.D.3d at 1246

(information proposed for “discussion purposes” does not qualify as objective). Consistent with these principles, DOCCS disclosed misbehavior reports, photographs, and other objective information admitted as evidence in the disciplinary proceedings, and asserted the intra-agency exemption only for Bradley’s nonfinal unusual incident report. In any event, this is not the type of issue that is susceptible to an advisory declaration in the absence of a specific record.

In sum, even if the Court finds that the mootness exception applies to this issue, it should not declare that unusual incident reports are outside the scope of the intra-agency exemption as a matter of law. Neither of the courts below addressed this issue, and in any event, it is well settled that draft documents may properly be withheld under the intra-agency exemption.

**C. Prison Video Surveillance Footage May Properly Be Withheld Under the Law Enforcement Exemption.**

Finally, the Court should decline to declare that prison video surveillance footage is outside the scope of the law enforcement exemption as a matter of law. Neither Supreme Court nor the

Appellate Division reached this issue. This Court should not decide it in the first instance.

Petitioner's claim fails on the merits in any event. Under Public Officers Law § 87(2)(e), records that are "compiled for law enforcement purposes" are exempt from disclosure if they satisfy one of four conditions, including that disclosure would interfere with a pending law enforcement investigation. Petitioner contends that records are compiled for law enforcement purposes "only if they were originally generated for such purposes." (Br. at 41.) But petitioner's interpretation lacks textual support and is contrary to the U.S. Supreme Court's interpretation of the analogous compilation requirement in FOIA.

The plain meaning of Public Officers Law § 87(2)(e)'s reference to records "compiled for law enforcement purposes" is that the statute applies to any records collected by a law enforcement agency in connection with some law enforcement investigation. Indeed, the word "compile" in this context is unambiguous: it means to gather records in a collection. Webster's, for example, defines "compile" as "to collect and assemble (written material or items from various

sources).” Webster’s Third New International Dictionary, 464 (1976). Nothing in the text of the statute suggests that the law enforcement exemption is limited to records specifically *generated* for a law enforcement investigation, rather than records *collected* by a law enforcement agency as part of an investigation.

Where, as here, “the statutory language is clear and unambiguous, the [C]ourt should construe it so as to give effect to the plain meaning of the words used.” *Matter of D.L. v. S.B.*, 39 N.Y.3d 81, 87 (2022) (quoting *Patrolmen’s Benevolent Ass’n of City of N.Y. v. City of New York*, 41 N.Y.2d 205, 208 [1976]). And because the text is unambiguous, petitioner’s reliance on the principle that FOIL exemptions must be narrowly construed is unavailing. “Absent ambiguity the courts may not resort to rules of construction to alter the scope and application of a statute.” *Matter of D.L.*, 39 N.Y.3d at 87 (quoting *Kuzmich v. 50 Murray St. Acquisition LLC*, 34 N.Y.3d 84, 91 [2019]); *see also Matter of Federation of N.Y. State Rifle & Pistol Clubs v. New York City Police Dep’t*, 73 N.Y.2d 92, 96 (1989) (FOIL exemptions must be given “their natural and obvious meaning where such interpretation is consistent with the legis-

lative intent and with the general purpose and manifest policy underlying FOIL”). Thus, applying the plain meaning of “compile,” records “compiled for law enforcement purposes” include not only documents specifically generated for an investigation, such as witness statements, but also other types of evidence, such as video surveillance footage, originally generated for some other purpose and later collected as part of an investigation.<sup>7</sup>

As petitioner concedes (Br. at 32), federal courts applying the analogous compilation requirement under FOIA have rejected the distinction petitioner makes “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.” *John Doe Agency*, 493 U.S. at 155. Notably, FOIA contains the same relevant text as FOIL: the law enforcement exemption applies to records “compiled for law enforcement purposes.” 5 U.S.C. § 552(b)(7). As the U.S. Supreme Court explained in *John*

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<sup>7</sup> Of course, just because records are “compiled for law enforcement purposes” does not mean they are exempt from disclosure. The agency still must show that one of the four conditions set forth in Public Officers § 87(2)(e) applies.

*Doe Agency*, the ordinary meaning of “compilation” is “something composed of materials collected and assembled from various sources or other documents.” 493 U.S. at 153. “This definition,” the Court reasoned, “seems readily to cover documents already collected by the Government originally for non-law-enforcement purposes.” *Id.* Thus, “documents originally gathered for routine business purposes may fall within” the law enforcement exemption under FOIA “if they are later compiled for use” in a law enforcement investigation. *Milner v. Department of Navy*, 562 U.S. 562, 584 (2011) (Alito, J., concurring).

If it reaches this issue, this Court should follow this interpretation of the compilation requirement under FOIA. As this Court has noted, New York courts frequently rely on federal case law “because the FOIL law enforcement exemption is modeled on the federal counterpart found in the Freedom of Information Act.” *Matter of Madeiros*, 30 N.Y.3d at 76. Accordingly, several New York courts have adopted the U.S. Supreme Court’s interpretation of the compilation requirement in construing New York’s parallel provision. *See Matter of New York Times Co. v. New York State Exec.*



*Chamber*, 57 Misc. 3d at 416; *Matter of New York Times Co. v. City of N.Y. Fire Dep't*, 195 Misc. 2d at 123-24. Other state courts have done the same in construing their states' parallel laws. *See, e.g., MaineToday Media, Inc. v. State of Maine*, 82 A.3d 104, 113 (Me. 2013); *Newman v. King County*, 947 P.2d 712, 715 (Wash. 1997). Petitioner offers no compelling reason to deviate from that interpretation here, where the relevant text of the two statutes is identical and unambiguous, and there is no indication that New York's legislature intended a different result.

Thus, even if the Court finds that the mootness exception applies to this issue, it should still decline to declare that prison video surveillance footage is generally outside the scope of the law enforcement exemption. The courts below did not address this issue, and the plain meaning of Public Officers Law § 87(2)(e)—consistent with federal case law interpreting the analogous provision under FOIA—applies to any records collected by a law enforcement agency in connection with an investigation.

## CONCLUSION

The Court should affirm the Appellate Division's order, which affirmed Supreme Court's judgment dismissing the claims at issue here as moot.

Dated: Albany, New York  
August 31, 2023

Respectfully submitted,

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**REPRODUCED ON RECYCLED PAPER**

## AFFIRMATION OF COMPLIANCE

Pursuant to the Rules of Practice of the New York Court of Appeals (22 N.Y.C.R.R.) § 500.13(c)(1), Beezly J. Kiernan an attorney in the Office of the Attorney General of the State of New York, hereby affirms that according to the word count feature of the word processing program used to prepare this brief, the brief contains 7,367 words, which complies with the limitations stated in § 500.13(c)(1).



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BEEZLY J. KIERNAN