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COURT OF APPEALS
STATE OF NEW YORK

MATTER OF PLSNY,

Appellant,

-against-

DOCCS,

Respondent.

NO. 65

20 Eagle Street
Albany, New York
May 16, 2024

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE WILSON: Good afternoon. Before we
2 start, I wanted to tell you that we're overjoyed to have
3 visitors today from the Catalyst Fellows, who are law
4 school students from pretty much every law school in New
5 York State, who will spend the summer doing pro bono work.
6 So congratulations and thank you for being here.

7 The first case on the calendar is Matter of the -
8 - - I got the abbreviations here, sorry. Prison Legal
9 Services of New York v. DOCCS.

10 Counsel?

11 MR. MCGOWAN: Good afternoon, Your Honors, and
12 may it please the court. I'm Matthew McGowan for
13 appellant, Prisoners' Legal Services of New York. I'd like
14 to reserve four minutes for rebuttal, please, Your Honor?

15 CHIEF JUDGE WILSON: Four, yes.

16 MR. MCGOWAN: Thank you. The underlying
17 questions in this case will typically evade review because
18 respondent relied on inherently time-limited conditions to
19 deny access to these records. And, as a result, the
20 agency's misinterpretation of important and threshold
21 elements of the statute will generally be nonsubject to
22 litigation unless this court grants an exception to
23 mootness.

24 JUDGE HALLIGAN: Counsel, what - - -

25 JUDGE SINGAS: Does the fact that you could - - -



1 MR. MCGOWAN: I'm sorry, Your Honor?

2 JUDGE SINGAS: - - - that you could still look
3 for attorney's fees, does that - - - how does that impact
4 whether or not it would be evading review? Because the
5 court would still have to make a determination of the
6 reasonableness of the court below withholding these
7 records. So wouldn't that give you a review?

8 MR. MCGOWAN: FOIL's fee-shifting provision, Your
9 Honor, would not be adequate with regard to these specific
10 questions, because it applies a different standard than the
11 actual standard for withholding records outright. The fee-
12 shifting provision provides that there has to be no
13 reasonable basis for the respondent's position in order to
14 be entitled to fees, and a petitioner also has to have
15 substantially prevailed, meaning they got all of the
16 records at issue. So the courts below denied attorneys'
17 fees on both of those grounds.

18 So here only some of the records pertain to these
19 important and novel questions. And also the novelty and
20 importance of the questions itself makes the attorneys'
21 fees provision inadequate to reach those. Which is to say,
22 when there's a good faith dispute over what the statute
23 means or how it should be applied, then a agency may well
24 have a basis that could be characterized as reasonable, and
25 yet still have acted unlawfully in withholding the records

1 in the first place.

2 JUDGE CANNATARO: Is there a novelty? Is - - - I
3 assume you say there is a genuine novelty argument to be
4 made with respect to the ongoing investigation exception
5 that was invoked? Can you just sort of elaborate on what's
6 novel there?

7 MR. MCGOWAN: What's novel there, Your Honor, is
8 that more than forty-five years after FOIL has been
9 enacted, there's never been any substantive attention from
10 any appellate court, and particularly this court, on what
11 the term "compiled for" means. That's a question that the
12 U.S. Supreme Court has addressed in John Doe Agency with
13 respect to federal FOIA, but it remains unaddressed at the
14 New York State level with respect to our statute.

15 So there is a genuine and novel question as to
16 what it actually means for a record to be compiled for a
17 law enforcement purpose. And while FOIA may be instructive
18 in the New York State interpretation of FOIL, the Court of
19 Appeals is by no means bound by the federal interpretation
20 and appellant respectfully submits that Justice Scalia's
21 dissent in John Doe Agency is a preferred meaning.

22 JUDGE CANNATARO: And is it your position that
23 this will consistently evade review? I mean, if it's being
24 used for law enforcement purposes, at some point, the - - -
25 sorry - - - the FOIL hearing is going to happen, and if

1 there's still an ongoing investigation that is going to be
2 asserted. So I'm not sure I fully comprehend how this
3 evades review.

4 MR. MCGOWAN: As this court recognized in *Lesher*
5 *v. Hynes*, investigations, once they conclude, generally
6 will terminate the application of that exemption. And as
7 the court also recognized in *Lesher*, investigations
8 generally conclude in a reasonable amount of time.

9 JUDGE GARCIA: But Counsel, those are cases where
10 we are applying the mootness exception - - - determining if
11 we're going to apply. This case comes to us in a very
12 different posture. Really, the issue seems to me, here, is
13 did the Appellate Division abuse its discretion in refusing
14 to apply the mootness exception? And to me, that's a very
15 different analysis. Maybe we would apply it differently.
16 But why, as a matter of law, would we say the Appellate
17 Division, in these circumstances, abused its discretion in
18 refusing to apply it?

19 MR. MCGOWAN: I think in part it's that the - - -
20 the capability of the question of aiding review is not
21 something that has to be uniform. Which is to say, as this
22 court recognized in *City of New York v. Maul*, the mere
23 possibility of evading in the context of foster care
24 placements was enough.

25 JUDGE GARCIA: And that might be a very good



1 reason for us to decide we wanted to apply a mootness
2 exception. But is it a reason for us to say the Appellate
3 Division abused its discretion in refusing to do that?

4 MR. MCGOWAN: The reason why appellant would
5 answer that affirmatively is because of the importance and
6 novelty of the underlying question. Which is to say, the
7 exception to mootness involves three elements when viewed
8 in total. If there's any ambiguity in terms of how likely
9 something is to evade review, or whether the Appellate
10 Division abused its discretion in determining that
11 something may not consistently evade review, the underlying
12 novelty could resolve that in favor of this court reaching
13 the question.

14 JUDGE GARCIA: We have two cases, Matter of
15 Anonymous and, I think, David C. where we've done this.
16 And I think those involved provisions of the Mental Health
17 Law, where the triggering events underneath it were
18 fourteen days, and the argument was these are going to
19 consistently evade review. And we said it wasn't an abuse
20 of discretion for the Appellate Division to apply a
21 mootness - - - refused to apply the mootness exception. So
22 why, again, would we say as a matter of law, they abused
23 their discretion here?

24 MR. MCGOWAN: Well, there's - - - there's two
25 elements to this case, Your Honor. One dealing with the

1 interagency materials exemption and one dealing with the
2 law enforcement exemption. It may be a more challenging
3 question to reach - - - to conclude that the Appellate
4 Division abused its discretion with respect to law
5 enforcement investigations, because there is generally a
6 longer timeline for an investigation or a criminal
7 prosecution. But with respect to the interagency materials
8 question here, in particular, the Appellate Division, in
9 our opinion, did not give adequate stock to the timeline on
10 which this supposed finalization process of prison - - -

11 JUDGE HALLIGAN: On - - - on that, I take it
12 you're talking about the UI report, yes?

13 MR. MCGOWAN: That's right, Your Honor.

14 JUDGE HALLIGAN: Okay. So you assert, I think in
15 your brief, that the preliminary UI reports are routinely
16 denied. But I don't see any support for that in the
17 record. Is there a place in the record that establishes
18 that?

19 MR. MCGOWAN: The record establishes it insofar
20 as that's what the agency did in this instance.

21 JUDGE HALLIGAN: In this instance, right. But -
22 - - but one question, I think, that we generally look at in
23 deciding whether the mootness exception applies and would
24 need to look at in gauging whether the Appellate Division
25 abused its discretion, is whether or not it routinely

1 evades review. So what I'm asking is, is there anything in
2 the record which goes to the question of whether the
3 practice of denying a preliminary report and then providing
4 a final report is - - - is commonplace?

5 MR. MCGOWAN: There are several things that can
6 support that inference for this court, which is that both
7 courts below did not contest the likelihood of recurrence.

8 JUDGE HALLIGAN: But nothing specific in the
9 record that affirmatively lays that out, I take it?

10 MR. MCGOWAN: Nothing that identifies a specific
11 policy other than the fact that respondent has not
12 meaningfully contested that practice in its briefs.

13 JUDGE GARCIA: Am I wrong in reading the record
14 that there's two parts to this, right? Auburn and Clinton?

15 MR. MCGOWAN: Correct.

16 JUDGE GARCIA: You have not appealed the Clinton
17 part here. We're not arguing about the Clinton materials.
18 But in that case, which is part of this one, they did turn
19 over redacted reports to you, as I read the record?

20 MR. MCGOWAN: It's our understanding, Your Honor,
21 that those were produced because those reports had
22 allegedly been finalized. The reason why there is a
23 partially redacted report in the record, which, in and of
24 itself, allows this court to reach the substantive
25 questions by seeing what actually - - -

1 JUDGE GARCIA: But I'm - - - my point is being -
2 - - it's not that they routinely deny access to the
3 reports. On this record, it seems that they produced at
4 least redacted reports right away in - - - in the case
5 you're not appealing in Clinton.

6 MR. MCGOWAN: So several months had passed from
7 the time of the incident to the time of the actual
8 production of those records, and the agency had ostensibly
9 finalized the report in that context. So what's really at
10 issue is the delay that's wrought by this - - -

11 JUDGE GARCIA: Well, you requested that on July
12 23rd, and they responded August 6th.

13 MR. MCGOWAN: For an underlying incident in May.
14 So there was a several-month delay in which the agency
15 allegedly had finalized the report. And that delay has
16 real-world consequences in the sense that the public has a
17 right of timely access under FOIL.

18 JUDGE TROUTMAN: Are you still seeking the
19 preliminary report?

20 MR. MCGOWAN: So as we understand it, Your Honor,
21 preliminary is simply a status that the agency assigns.
22 It's not actually a different document. The narrative
23 objective, factual content in that report should, in most
24 instances or all instances, be one and the same. So
25 there's - - - in a relatively opaque finalization process.

1 But the core of this issue is that those narrative reports
2 reflect written memorializations of events that happened by
3 staff who were present and saw them. So it's a chilling
4 prospect that there needs to be any secret, deliberative
5 process for government actors to decide what happened.

6 JUDGE RIVERA: So I thought you were going to
7 explain why, in the record, there's a preliminary report.

8 MR. MCGOWAN: Our understanding, Your Honor, is
9 that that is a redacted final report.

10 JUDGE SINGAS: So are you saying there's no
11 practical difference between the underlying report and the
12 final report?

13 MR. MCGOWAN: So the - - - the specific internal
14 mechanics are relatively opaque to appellant. But what's
15 clear is that the actual narrative content, which comprises
16 the vast majority of the report itself: there's a
17 description of an incident; there's names; there are dates;
18 there are - - -

19 JUDGE TROUTMAN: So are you saying - - - you are
20 in agreement that the preliminary report becomes a final
21 report, and they are effectively the same thing?

22 MR. MCGOWAN: Our understanding is that the
23 narrative content is the same thing for all practical
24 purposes.

25 JUDGE TROUTMAN: Okay.

1 MR. MCGOWAN: And it's that reason why it's
2 improper to deny that at - - - in the first instance.
3 Which is, this court recognized in no uncertain terms in
4 Gould, that objective, factual information is not - - -

5 JUDGE RIVERA: Did - - - did you ask for all the
6 reports or the report?

7 MR. MCGOWAN: The FOIL request, Your Honor, asked
8 for all UI reports. But our understanding is that it's
9 effectively a single document that the agency assigns a so-
10 called status of being preliminary. But for all intents
11 and purposes, those narrative sections are static facts
12 that cannot be changed, such that whether it's deemed
13 preliminary or final doesn't have a true bearing on whether
14 it's - - -

15 JUDGE HALLIGAN: So - - - so if the agency didn't
16 distinguish with respect to any labeling between
17 preliminary or final, and provided it to you at some point
18 when it internally viewed it as finalized, would you have
19 an argument and what would it be?

20 MR. MCGOWAN: I'm sorry, Your Honor, if?

21 JUDGE HALLIGAN: In other words, I take it you're
22 saying that you're not actually seeking a distinct
23 document. You're seeking the same document earlier in
24 time; is that fair to say? You're not suggesting that
25 there is a material difference between the content of the

1 preliminary report and the final report?

2 MR. MCGOWAN: That's consistent with appellant's
3 understanding of how the process works.

4 JUDGE HALLIGAN: Okay. And so if the agency
5 didn't dub one preliminary and the other final, would your
6 objection fall away? I'm just trying to understand how
7 much of it is just about the timing, as opposed to a
8 discrete document that you want to get access to and - - -
9 and can't?

10 MR. MCGOWAN: The timing, in effect, is
11 everything. It's that it's unlawful, at the outset, for
12 the agency to deny access to factual material.

13 JUDGE CANNATARO: In this case, did you receive
14 the document, when you eventually received it, too late to
15 put it to whatever use you had intended to use it? And if
16 not, how does that - - - how does that impact on your
17 substantiality argument?

18 MR. MCGOWAN: It, in fact, was received too late
19 in that there are very short administrative appeal
20 timelines. Appellant's primary practice areas include - -
21 - I notice that my light is on. May I finish?

22 CHIEF JUDGE WILSON: Please continue. Yep.

23 MR. MCGOWAN: Appellant's main practice areas
24 include challenging administrative prison disciplinary
25 hearings, which have tight appeal deadlines. There's no

1 independent discovery mechanism, so the only means of
2 getting these documents is using the Freedom of Information
3 Law. By getting that document after the appeal window had
4 closed, respondent was deprived of - - - or - - - I'm
5 sorry, appellant rather, was deprived of reviewing it for
6 purposes of the appeal.

7 JUDGE RIVERA: I'm sorry. If I can ask? So I'm
8 a little unclear about your prior response to Judge
9 Halligan. So if they have something that they've
10 designated a preliminary UI report, and then they do either
11 change something or add something or delete something - - -
12 take it whichever way you wish - - - and that is what they
13 label the final report, I - - - that's why I asked about
14 what you requested - - - I thought your request was, I want
15 to see both. Some redactions apply, of course, they can
16 seek to redact, and you can challenge it and move forward.
17 But I thought you were requesting both?

18 MR. MCGOWAN: To the extent the request asked for
19 all UI's, Your Honor, it simply meant had there been
20 multiple incidents or if the agency had characterized it in
21 multiple incidents and, therefore, generated multiple
22 reports, both of which could have been tracked on this
23 preliminary finalization timeline. It wasn't asking
24 specifically for the document that's internally designated
25 as preliminary.

1 JUDGE RIVERA: So if they had a preliminary - - -
2 something they designated a preliminary report and then
3 they finalized it and made it final, you would be satisfied
4 with just what was designated final? You would then say, I
5 don't need to see whatever was originally designated as a
6 preliminary report, even if those things had changed?

7 MR. MCGOWAN: As a general matter, that's
8 correct, Your Honor. We - - -

9 JUDGE RIVERA: How would you know they changed?

10 MR. MCGOWAN: I'm sorry.

11 JUDGE RIVERA: How would you know they changed?

12 MR. MCGOWAN: Well, to some extent, we don't have
13 any insight into their actual recordkeeping practices,
14 whether there is a document retained that is a so-called
15 preliminary version. So that may be something that, you
16 know, could warrant from further factual development. But
17 as a baseline matter, the objective factual information is
18 always outside the scope of the intra-agency exemption at
19 the time it's written, because its factual, objective
20 content at that first writing.

21 JUDGE RIVERA: That's what I'm saying. I'll ask
22 him. But let's assume for purposes of this hypothetical,
23 if, between whatever they've labeled a designated
24 preliminary report and what they then label as finalized,
25 there is some change in the factual rendition. If you only

1 get the final, how would you know?

2 MR. MCGOWAN: That - - - that's certainly an
3 interesting question, Your Honor, and it would raise very
4 real and grave concerns about the agency's practice in
5 changing their narrative account. And, to the extent that
6 there are documents that remain on file that could reflect
7 those, appellant would be interested in reviewing both
8 documents.

9 CHIEF JUDGE WILSON: I may have misunderstood
10 something because your last answer just - - - it was the
11 opposite of what I thought you had said. I understood you
12 to say you want the reports as quickly as you can get them
13 because you have a pressing time need for them, and that
14 the - - - the preliminary report and the final report,
15 ninety-nine percent of the time at least you believe are
16 the same. So I would have thought you would have said,
17 what I really want is the preliminary report because I'll
18 get it sooner, but you said, no, I want the final report.
19 And now I'm confused.

20 MR. MCGOWAN: Essentially, it's immaterial, Your
21 Honor, to appellant what the agency calls it. We want the
22 objective narrative.

23 CHIEF JUDGE WILSON: But the question is when do
24 you want it? So if we know that they have one they call
25 preliminary and later they have one we call final, don't

1 you want the earlier one whatever it's called.

2 MR. MCGOWAN: We certainly would like the
3 information as soon as possible, regardless of what the
4 agency calls it; that's correct, Your Honor. But there are
5 a number of instances in which appellant seeks records. So
6 in reviewing a use of force, for example, if the agency has
7 changed its story, then appellant would be interested in
8 reviewing how that has changed. So the public has a wide
9 variety of reasons why they may want access to records.
10 There are many conceivable instances in which noting and
11 being able to confirm that the government has changed its
12 position as to the basic facts would be important.

13 In the context of an administrative disciplinary
14 hearing, for example, time is absolutely of the essence.

15 CHIEF JUDGE WILSON: Thank you.

16 MR. MCGOWAN: Thank you.

17 MR. KIERNAN: May it please the court. Beezly
18 Kiernan for DOCCS.

19 The Appellate Division did not abuse its
20 discretion in declining to apply the mootness exception
21 here because the issues petitioner raises on appeal do not
22 typically evade review. Take the intra-agency exemption:
23 if a FOIL requester seeks a draft document, that request
24 does not become moot merely because the agency provides a
25 final version of the document.

1 In this particular case - - -

2 JUDGE RIVERA: What would change in a UI from
3 preliminary draft, whatever - - - whatever the agency is
4 designating it, and the final or, again, whatever you
5 designate it? What would change?

6 MR. KIERNAN: That goes to the nature of a UI
7 report. It's not a witness statement. It's not a report
8 by a DOCCS employee who witnessed an unusual event. A UI
9 report reflects DOCCS's considered judgment at what - - -
10 about what happened during a significant incident at a
11 DOCCS facility. It's prepared by a watch commander who
12 gathers statements, interviews witnesses, reviews video
13 footage, photographs, and writes a narrative of what - - -
14 of the results of his investigation.

15 And then the preliminary report goes to DOCCS
16 central office which checks for any inconsistencies, makes
17 sure the investigation was comprehensive. And then it goes
18 to the facility superintendent who signs it. He reviews
19 the report, and if there's a use of force, he makes a
20 determination about whether that use of force was
21 necessary.

22 JUDGE RIVERA: And what if they find
23 inconsistencies at that second - - - well, in the middle?

24 MR. KIERNAN: And that may be what happened here.
25 The Auburn incident was a large-scale, violent altercation

1 - - -

2 JUDGE RIVERA: No. What happens? No, I'm just -

3 - -

4 MR. KIERNAN: Well, there's more - - -

5 JUDGE RIVERA: - - - generically, what would
6 happen?

7 MR. KIERNAN: I - - - there would be more
8 investigation. More - - -

9 JUDGE RIVERA: What happens to that - - - that
10 version of a report that was prepared, that you're saying
11 at a second level is determined to be inconsistent? I'm
12 not sure inconsistent with what, but let's just go with
13 that. What happens to that first report?

14 MR. KIERNAN: What happens to the - - - I - - -
15 I'm not sure whether DOCCS maintains a copy of the earlier
16 report. These aren't necessarily static versions. This is
17 information entered into, I believe a computer terminal, so
18 I'm not sure if the preliminary version still exists. If
19 it was printed out at any point, then the printouts would
20 still exist.

21 JUDGE HALLIGAN: If - - -

22 JUDGE RIVERA: I take it your point is, once - -
23 - once the - - - the levels of review are complete, that is
24 then the - - - I'll call it, for lack of a better term, the
25 official report.



1 MR. KIERNAN: That's the official report. That's
2 correct, Your Honor.

3 JUDGE HALLIGAN: And if there were distinct
4 versions saved and there had been a request for both the
5 preliminary report and the final report, would you agree
6 that if the agency said we'll turn over the final report
7 but we're going to invoke the exemption as to the
8 preliminary report, that that request would not be moot
9 should appellant wish to continue to pursue it?

10 MR. KIERNAN: That's correct. That's correct.
11 In this particular case, PLS accepted the production of the
12 final report as fulfillment of its FOIL request. That's
13 what PLS said in its reply in Supreme Court at 404 of the
14 record.

15 But in a different case, if a requester actually
16 sought a draft, that would not become moot.

17 JUDGE HALLIGAN: And can you tell us - - - I
18 realize it may not be in the record, but perhaps you know
19 from your client, how long does it generally take? I'm
20 sure it's different, you know, depending on the complexity
21 of the incident, but how long does it generally take for a
22 report to become finalized?

23 MR. KIERNAN: Under Directive 4004, which is not
24 in the record, the superintendent is supposed to sign the
25 final version within ten days of the incident. So it's

1 supposed to occur very quickly.

2 JUDGE HALLIGAN: And so the window in which you
3 would not be able - - - one would not be able to get a
4 report because it has not yet been finalized should be, if
5 that directive is being complied with, I take it,
6 relatively short?

7 MR. KIERNAN: That's correct, Your Honor.

8 And to be fair, disciplinary proceedings are also
9 conducted very quickly. If an individual is placed in
10 segregated confinement, I believe the hearing has to take
11 place within five days afterwards.

12 CHIEF JUDGE WILSON: What about the appeal time
13 on the hearing?

14 MR. KIERNAN: The appeal timeline is somewhat
15 longer. So if the final report is finalized by ten days
16 after the incident, it should be available for review
17 within the time frame to appeal and to decide that
18 administrative appeal. I'll also note that there's been a
19 rule change since the events at issue in this case
20 occurred. Under 7 NYCRR 251-5.2 an incarcerated individual
21 may be represented at a disciplinary hearing. So if PLS
22 gets involved at the disciplinary hearing stage, my
23 understanding is that the representative will have the same
24 access to documents that the incarcerated individual has,
25 further allaying any potential concerns PLS has.

1 JUDGE CANNATARO: You mean through some sort of
2 discovery process in the administrative hearing or through
3 FOIL?

4 MR. KIERNAN: Not through FOIL, just by being
5 present at the hearing.

6 JUDGE GARCIA: So they would have the same access
7 as the person - - - the prisoner would have?

8 MR. KIERNAN: That's my understanding.

9 JUDGE GARCIA: Incarcerated person.

10 JUDGE RIVERA: Would they have it in advance or
11 at the hearing? Because I thought you just said at the
12 hearing; just to clarify.

13 MR. KIERNAN: I'm not sure. I - - - these UI
14 reports are typically only introduced at the request of the
15 incarcerated individual. I'm not sure if the individual
16 gets notice ahead of the hearing or receives the documents
17 at the hearing.

18 JUDGE RIVERA: But what other - - - other - - -
19 whatever else might be submitted at the hearing? Do they
20 get to see it in advance or just at the hearing?

21 MR. KIERNAN: I will let my - - - I'm not sure
22 for sure.

23 JUDGE RIVERA: Okay. That's fine.

24 MR. KIERNAN: I believe there's some notice, but
25 I'm not sure.

1 JUDGE RIVERA: Thank you.

2 JUDGE TROUTMAN: And with respect to one who is
3 unrepresented, would they still continue to have no access?

4 MR. KIERNAN: I believe, in that case, if PLS
5 stepped in later on, then DOCCS would ask PLS to FOIL it.

6 JUDGE TROUTMAN: But if they weren't represented?

7 MR. KIERNAN: Right.

8 JUDGE TROUTMAN: If they were - - - if they were
9 self-represented - - -

10 MR. KIERNAN: Right.

11 JUDGE TROUTMAN: - - - would they have access to
12 these contested documents?

13 MR. KIERNAN: I - - - I think DOCCS would direct
14 PLS to make a FOIL request. So it's not the same access.
15 They wouldn't receive it at the hearing. They wouldn't be
16 present at the hearing.

17 But as the record reflects in this case, DOCCS
18 does expeditiously respond to - - - to FOIL requests in as
19 little as - - - as a week or two, giving PLS an opportunity
20 to review documents when it would be helpful for them to do
21 so. It's just that in this case, the unusual incident
22 report was not finalized. It was still subject to review.
23 The state was still checking it for accuracy. It would
24 have been premature to disclose it at that stage, and it
25 would have undermined the purpose of the intra-agency



1 exemption which is to allow individuals within an agency to
2 exchange their views freely as part of the deliberative
3 process, without the concern - - -

4 JUDGE SINGAS: Well, what can you point to that
5 says that this UI was just that; engaging in a deliberative
6 process? I think you mentioned before that it was just
7 somebody's observation, a collection of witness statements,
8 so I'm a little confused about where you see it was
9 deliberative.

10 MR. KIERNAN: It's not just a collection of
11 witness statements. And I encourage Your Honors to look at
12 the use - - - the unusual incident report in the record
13 beginning at page 328, related to the Clinton incident.

14 There's a narrative, but that reflects DOCCS's
15 official view of what happened. It's not just a collation
16 of every single witnesses' statement.

17 JUDGE HALLIGAN: But how do you distinguish that
18 from Gould?

19 MR. KIERNAN: In Gould, the petitioner requested
20 police reports. And - - -

21 JUDGE HALLIGAN: But how are those reports
22 different from a UI report?

23 MR. KIERNAN: This court explained that the
24 police report contained a lot of objective information
25 recorded by the police officer. There was - - -



1 JUDGE HALLIGAN: So too does the redacted report,
2 I would - - - I would say, in the record.

3 MR. KIERNAN: Well, in Gould too you're talking
4 about a finalized police report. There's no draft form of
5 that.

6 The UI report is developed by facility staff, not
7 necessarily someone who is - - - who witnessed the
8 incident, who is gathering information and coming up with
9 DOCCS's official narrative.

10 JUDGE HALLIGAN: I realize there's obviously a
11 threshold mootness question, but just on the merits of the
12 disclosure question, is it - - - is it permissible to
13 redact any portions that you think might reflect
14 deliberative process? Or is the entire document something
15 that has to be evaluated all in or all out?

16 MR. KIERNAN: Well, this - - - it's a fact-
17 specific determination every time the agency - - -

18 JUDGE HALLIGAN: But I just mean, as a matter of
19 law, is there - - - is there anything that would prevent
20 the agency from, if there are specific responses that in
21 the agency's view, do reveal deliberative process as
22 opposed to facts, from redacting those and then turning
23 over the document?

24 MR. KIERNAN: In DOCCS's view, the facts relayed
25 in the unusual incident report are still subject to change.

1 Until the report is finalized, the State is still checking
2 it for accuracy.

3 JUDGE HALLIGAN: But how are the - - - how
4 though? Yeah. But that to me is about the preliminary
5 versus final. I'm asking about the deliberative process
6 point. How would the factual components of a UI report be
7 different from the facts gathered in the police report in
8 Gould?

9 MR. KIERNAN: Again, Your Honor, it - - - it's a
10 work in progress. It's not necessarily a static document.
11 It's a watch commander who is gathering information and
12 adding information to the narrative. And until it's in
13 final form, it would be premature to disclose it. Because
14 when the state issues - - - discloses information - - -
15 objective information under FOIL, it carries the imprimatur
16 of the state. And if you're talking about a preliminary -
17 - -

18 JUDGE HALLIGAN: That's true with, I would think,
19 a police report as well. No? It carries the imprimatur of
20 the city law enforcement agency.

21 MR. KIERNAN: It captures what that particular
22 police officer did in that particular investigation. I
23 understand - - - there are similarities but this case, I
24 think, is distinguishable because of the nature of a UI
25 report. It reflects the agency's considered view about

1 what happened. It involves collecting statements from
 2 multiple agency employees. Where - - - whereas police
 3 reports, it's principally one police officer writing down
 4 what he or she has done in an investigation - - - you know
 5 - - -

6 JUDGE CANNATARO: The way you describe that, it
 7 sounds almost as if your argument is that the narrative
 8 portion of the UI at issue here is something more like a -
 9 - - like an analysis with a fact finding involved. Like,
 10 you collect the reports, you synthesize them, and then you
 11 make some sort of statement about what really happened; is
 12 it that? Or is it, to use your adversary's words,
 13 objective, factual, slash, narrative descriptions of
 14 events?

15 MR. KIERNAN: It does reflect the agency's
 16 deliberative review of information and the agency's final
 17 determination about what occurred during an unusual
 18 incident. It's not witness statements; those are
 19 disclosable. DOCCS does not - - -

20 JUDGE CANNATARO: So that being the case, I
 21 understood your adversary to argue that the - - - and I'll
 22 use his words again, objective, factual, slash,
 23 deliberative portions. You wouldn't expect them to change
 24 from the preliminary report to the end. And I understood
 25 that argument because when things - - - facts are facts,

1 they don't change from preliminary to final. But now I
2 think you're arguing that it's not really that factual;
3 it's more a series of conclusions or determinations. Is
4 that what you're saying the UI is?

5 MR. KIERNAN: It is more akin to factual
6 findings, Your Honor, yes. Because it's prepared by
7 someone who didn't necessarily witness the incident.

8 JUDGE CANNATARO: So that would suggest to me
9 that they could very easily change between preliminary and
10 final result?

11 MR. KIERNAN: They do. And I understand that it
12 really is a work in progress, it does change. They tend to
13 be finalized very quickly; within ten days. So usually
14 there's not much factual development after the narrative is
15 initially written. But in cases where there may be
16 inconsistencies or there may be a need for further
17 investigation, those factual findings genuinely can change.

18 JUDGE RIVERA: So let me just - - - if I can
19 drill on this a little bit. When you say "inconsistencies"
20 and you say part of what the UI is doing is presenting a
21 report, if I can call it that, on this investigation, at
22 least at that first stage, which it may include speaking to
23 witnesses and getting their statement. So is it that then
24 the individuals filling out the UI at the first stage is
25 making an assessment about the witness statements or

1 literally just - - - just, again, recording what the
2 witness' statements are? And someone else - - - let's say
3 one witness says it happened this way, another witness says
4 it happened that way, what happens in the UI report? Does
5 - - - are you saying that DOCCS decides we believe it
6 happened the way the first person said it happened, and we,
7 as a judgment call - - - because I thought you said they're
8 making judgment calls - - -

9 MR. KIERNAN: Right.

10 JUDGE RIVERA: - - - adopt that version?

11 MR. KIERNAN: It - - - it's a narrative about
12 what happens. It's - - - it doesn't recount what - - -
13 what each witness says. And, again, I encourage Your
14 Honors to look at the Blanchard UI report between pages 328
15 and 341 - - -

16 JUDGE RIVERA: Okay. But try this - - - just try
17 answering that question. If two witnesses give different
18 statements about what they claim to have observed that are
19 in conflict, are you saying that during this process then
20 someone up the chain decides I'm crediting A's version over
21 B's version, and that's what will become our formal
22 articulation of what occurred?

23 MR. KIERNAN: Yes. DOCCS is making a - - -

24 JUDGE RIVERA: Okay. So then would they have
25 access to B's version at any - - - anytime, anywhere?

1 MR. KIERNAN: If B's version is in a witness
2 statement - - -

3 JUDGE RIVERA: If it is not.

4 MR. KIERNAN: If it is not, it wouldn't be
5 subject to FOIL disclosure.

6 JUDGE RIVERA: So it would - - - and if B's
7 statement is only in the preliminary - - - what we're
8 calling the preliminary report - - - you would not turn
9 that over because you're only going to turn over the last -
10 - - the final, which is going to include A's statement, as
11 what DOCCS believes is what occurred?

12 MR. KIERNAN: Based on - - -

13 JUDGE RIVERA: Is that right?

14 MR. KIERNAN: - - - based on the UI reports that
15 I - - - that I've seen, including the one in the record,
16 the agency is not saying witness B says this. That's just
17 not in the UI report. Instead, it's a narrative account of
18 - - -

19 JUDGE RIVERA: Yes. But, again, the - - - as I
20 understood you, the narrative is based - - - because you
21 said the person who's going to make that decision was not
22 present. It's going to be based on what others may have
23 said. Perhaps, some other material that's been collected
24 to help make clear the way the events evolved. So my
25 question is, again, if it's in that UI that's preliminary

1 but is not reflected in the final, unless as you say, it's
2 in a witness statement that they could request and get,
3 they will not otherwise know. Is that correct?

4 MR. KIERNAN: I - - -

5 JUDGE RIVERA: They will not otherwise know that
6 DOCCS decided to choose version A over version B?

7 MR. KIERNAN: In the context of FOIL, that
8 information - - -

9 JUDGE RIVERA: Correct.

10 MR. KIERNAN: - - - if the - - - if there is
11 objective information that only exists in a draft document
12 - - -

13 JUDGE RIVERA: Yes.

14 MR. KIERNAN: - - - then a trial court could
15 certainly say you have to disclose this information and
16 then that would be - - -

17 JUDGE RIVERA: But you wouldn't - - - what I'm
18 saying is that you would not turn it over. I understand
19 that they can challenge that. But your - - - DOCCS's
20 position - - -

21 MR. KIERNAN: Right.

22 JUDGE RIVERA: - - - is we're not turning that
23 over?

24 MR. KIERNAN: Because of the nature of the UI
25 report, that is correct. If I may just briefly - - - of

1 course, if there's litigation about this later on and a
2 plaintiff requests this kind of information in discovery
3 and it's still available, that's a different standard, of
4 course.

5 JUDGE RIVERA: But you're saying you don't know
6 if they preserve it?

7 MR. KIERNAN: I - - - if it's printed out, then
8 it's likely preserved. I'm not sure if it's otherwise
9 preserved.

10 JUDGE RIVERA: Thank you.

11 MR. KIERNAN: Unless there are any further
12 questions, I urge the court to affirm the decision.

13 CHIEF JUDGE WILSON: Thank you.

14 MR. KIERNAN: Thank you.

15 MR. MCGOWAN: Just briefly, Your Honors, a
16 clarification on the timeline. It would be virtually
17 unheard of in appellant's practice to receive a finalized
18 report within ten days. There's a statutory mandate to
19 acknowledge receipt of a FOIL request in five business
20 days, but it is the routine practice for that finalization
21 process to take far longer.

22 And the record shows that in this instance, with
23 respect to the contested Bradley report, it took more than
24 four months. Which is to say, the incident took place in
25 May of 2019; you can see that on page 149 of the record.

1 On page 172 of the record, a FOIL appeal was denied because
2 the report was still allegedly nonfinal on September 18th
3 of 2019.

4 CHIEF JUDGE WILSON: So why can't you get review
5 of the issues you want reviewed by demanding the
6 preliminary reports or drafts or whatever you want to call
7 them, have them refused, and then you get review?

8 MR. MCGOWAN: That would be one potential
9 strategy, Your Honor. But appellant's understanding is
10 that it's effectively the same document with simply a
11 different status applied.

12 CHIEF JUDGE WILSON: That's okay. But if they're
13 going to refuse to give you something, are they going to -
14 - - then you have a refusal, and you could litigate that.

15 MR. MCGOWAN: That would be a conceivable avenue
16 for litigation. There's the underlying factual issue,
17 which is not developed on this record, as to whether
18 there's actually a preliminary version retained at all. So
19 it may well be the response is simply this document doesn't
20 exist, at which case this issue continues to remain
21 unreviewed into the unforeseeable future.

22 JUDGE GARCIA: But if they're saying it's not
23 final, how do they not have a preliminary?

24 MR. MCGOWAN: So final doesn't necessarily
25 indicate to retained copies of a document; it simply could

1 be a status that suggests they're still reviewing it. So
2 there's not necessarily a final that's retained on file or
3 along with the preliminary that continues to exist. So - -
4 -

5 JUDGE HALLIGAN: It's kind of a tough question,
6 right? So if it takes me five days to write a document,
7 right? I would think it would be difficult to succeed on a
8 request that says, I want as far as you've gotten on day
9 one, and then I want as far as you've gotten on day two, et
10 cetera. Right? So it seems like the strength of the
11 request does turn, in part, on the actual practice and
12 whether or not there is a distinct item called a
13 preliminary report versus a final report.

14 MR. MCGOWAN: That's true, Your Honor. And there
15 may well be room for further factual development on remand.
16 But there's a essential underlying question that this court
17 could still reach on this record, which is that as the
18 Appellate Division, Third Department recognized in 2019 in
19 Matter of PLS v. DOCCS, UI reports, at their core, are
20 written memorializations of events that happened. So they
21 cannot be properly characterized as deliberative within the
22 traditional meaning of the intra-agency materials
23 exemption.

24 There may be some potential inaccuracies, but as
25 this court recognized in no uncertain terms in Gould, a

1 witness statement is still factual information subject to
2 disclosure.

3 JUDGE RIVERA: So my hypothetical is pure
4 fantasy?

5 MR. MCGOWAN: I'm sorry, Your Honor?

6 JUDGE RIVERA: Is that - - - so my hypothetical
7 to him was not - - - is pure fantasy? It's not possible
8 that one witness says it happened this way, one witness
9 says it happens that way, and DOCCS decides we're going to
10 accept the witness A version and not witness B, and then
11 never includes witness B's articulation in the final report
12 because as counsel made clear, its DOCCS narrative?

13 MR. MCGOWAN: It could well be that the agency
14 makes that determination, but the underlying statements
15 themselves would remain factual content. And what would
16 properly be deliberative is if there's some - - -

17 JUDGE RIVERA: Yes. But if there was no
18 statement? I thought I asked that. Maybe I didn't. I
19 asked and he said if there was a statement, yes. But if
20 there is no such written statement by the witness, it's
21 just an interview that's then written up by someone else.
22 Again, is that fantasy? Does that not happen?

23 MR. MCGOWAN: Again, there's an opaque nature in
24 terms of appellant's ability to know the actual internal
25 processes.

1 JUDGE RIVERA: Okay.

2 MR. MCGOWAN: But my understanding is that it
3 would never be done simply, verbally. There would be some
4 exchange of written reports. And again, as the witness
5 statements were recognized to be in Gould, those, even
6 though they may contain inaccuracies because of inherent
7 fallibility of human observation, those accounts still are
8 the kinds of factual information that are - - -

9 JUDGE GARCIA: Counsel, it seems like we've kind
10 of - - - I'm sorry. May I just - - -

11 CHIEF JUDGE WILSON: Yeah. Of course.

12 JUDGE GARCIA: Thank you. It seems like we've
13 gone off on this road. You asked for the unusual incident
14 report. We agree they produced what you asked for.
15 Because getting into Judge Halligan's question, yes, you
16 could ask for a report and given the report right now, and
17 they could give it to you and it's not finished, then you
18 would still want the later report, right? You wouldn't
19 only want each snapshot. You're going to want their final
20 conclusion, right? Which is what you essentially asked for
21 here and what you got.

22 So to me, the straightforward question here is,
23 you asked for something, you got it. It mooted this
24 litigation. And the question is, was the mootness
25 exception properly declined by the Appellate Division?

1 Whether and what's in other reports or on a
2 computer system, it seems like this was mooted out by the
3 time of the response by the prisoner officials, and - - -
4 you know, at least in the court. And now what you would
5 like is someone to review this, even though it's moot.

6 MR. MCGOWAN: That's correct, Your Honor, because
7 there was real-world harm wrought from the delay, and it
8 was unlawful to deny that at the outset. And that's the
9 issue that we would like the court to reach.

10 JUDGE GARCIA: Understood.

11 MR. MCGOWAN: Thank you, Your Honors.

12 CHIEF JUDGE WILSON: Thank you.

13 (Court is adjourned)

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C E R T I F I C A T I O N

I, Chrishanda Sassman-Reynolds, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of PLSNY v. DOCCS, No. 65 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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