To be Argued by: TERRY DING
Time Requested: 15 Minutes

APL-2024-00143
New York County Clerk's Index No. 154792/2022
Appellate Division, First Department Case No. 2022-05629

Court of Appeals
State of New York

NEW YORK CIVIL LIBERTIES UNION,

Petitioner-Appellant,

– against –

NEW YORK STATE OFFICE OF COURT ADMINISTRATION,

Respondent-Respondent.

BRIEF FOR PETITIONER-APPELLANT

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February 19, 2025

DISCLOSURE STATEMENT PURSUANT TO RULE 500.1(f)

The New York Civil Liberties Union hereby discloses that it is a non-profit 501(c)(4) organization and is the New York State affiliate of the American Civil Liberties Union.

STATEMENT OF RELATED LITIGATION PURSUANT TO RULE 500.13(a)

The New York Civil Liberties Union states that its declaratory-judgment claims in this hybrid action are pending before the Supreme Court, New York County (*see* R. 287–289). Pursuant to the parties' stipulation, those Supreme Court proceedings are stayed pending this Court's resolution of this appeal (NYSCEF Doc No. 65, in *New York Civil Liberties Union v New York State Off. of Ct. Admin.*, Sup Ct, NY County, Index No. 154792/2022).

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PRELIMINARY STATEMENT

This appeal presents an important question concerning New Yorkers' right to understand how their courts make decisions affecting their lives: Whether the New York State Office of Court Administration can conceal from public view memoranda the agency issues to judges advising them on how to interpret law and adjudicate cases. The First Department permitted OCA to withhold those memoranda, reversing the Supreme Court and denying on privilege and overbreadth grounds a Freedom of Information Law request by the New York Civil Liberties Union. If allowed to stand, the First Department's Order would shut the door on New Yorkers' access to documents that inform the adjudication of their rights while opening the door for agencies to shield records from the public based on sweeping and unsupported claims of privilege and overbreadth. Such a result cannot be squared with FOIL or this Court's precedent.

OCA disputes neither the existence nor the import of the legal guidance it issues to judges, yet it refuses to disclose that guidance to the public. Were it not for the leak of a 2021 memorandum urging judges to construe narrowly a landmark Appellate Division ruling concerning due process, to this day New Yorkers would have no inkling that OCA plays a substantive role in judicial decisionmaking—including on issues as weighty as separating pre-trial defendants from their families, granting or denying bail, and subjecting individuals to involuntary commitment.

The First Department's Order misapplied several lines of this Court's precedent in allowing OCA to withhold its guidance. First, the Order erroneously relied on *Appellate Advocates v New York State Department of Corrections & Community Supervision* (40 NY3d 547 [2023]) to uphold OCA's blanket claim of privilege over its guidance based on a purported attorney-client relationship with every judge in the Unified Court System, even though OCA failed to meet its burden to prove the existence of such an expansive relationship. Applying *Appellate Advocates* in this way eviscerates the requirement that a party must establish an attorney-client relationship to invoke the attorney-client privilege. The Order additionally upheld, without explanation, OCA's claim of work-product privilege, even though OCA's guidance sets forth non-privileged statements of agency policy and was shared with third parties outside the agency.

Second, the Order exemplifies the First Department's recent practice of improperly rejecting FOIL requests as overbroad or not reasonably described in reliance on agencies' assertion that their record-keeping practices make it burdensome to respond. This practice conflicts with precedents of this Court and other Appellate Division Departments cautioning against conflating burden with a requester's obligation to reasonably describe the records sought. Fairly understood, the NYCLU's FOIL request describes a specific and circumscribed set of documents

that could only have been created by a small number of senior OCA staff. Thus, contrary to OCA's claim, the request is conducive to a limited and targeted search.

Third, in denying the FOIL claim, the First Department explicitly considered and dismissed the concerns animating the NYCLU's request, contravening this Court's holding that a requester's "motive for seeking the records is . . . irrelevant" and "constitutes an improper basis for denying [a] FOIL request." The First Department's assurance that there is no reason to worry about OCA's provision of guidance to judges is little comfort when the public cannot see that guidance. To the contrary, the court's statements only highlight the importance of realizing FOIL's promise of government transparency and accountability by giving New Yorkers access to the guidance.

Accordingly, the NYCLU respectfully requests that this Court reverse.

QUESTIONS PRESENTED FOR REVIEW

1. Whether, in denying public access to guidance issued by OCA to judges based on OCA's blanket claims of attorney-client and work-product privilege over the guidance, the Order erroneously applied *Appellate Advocates v New York State Department of Corrections & Community Supervision* (40 NY3d 547 [2023]) and FOIL to effectively eliminate the requirement for an agency asserting privilege to establish an underlying attorney-client relationship and to allow an agency to

withhold final statements of policy that have been shared with third parties (*see* R. 375–386; Mem of Law in Support of Mot for Lv to Appeal at 11, 16–20).

2. Whether FOIL permits an agency to deny a specific and circumscribed FOIL request as not "reasonably described" based on the agency's representation that its record-keeping practices render a search for records difficult or that responding to the request would otherwise be burdensome (*see* R. 358–375; Mem of Law in Support of Mot for Lv to Appeal at 11, 20–23).

3. Whether it was proper for the First Department, in denying the NYCLU's FOIL claim for records concerning court transparency, to consider the NYCLU's perceived motivation for making the request (*see* Mem of Law in Support of Mot for Lv to Appeal at 11, 15–16).

JURISDICTIONAL STATEMENT

This Court has jurisdiction over this appeal pursuant to CPLR 5602 (a) because the Court granted the NYCLU's motion for leave to appeal on October 22, 2024 (R. 283).

FACTUAL AND PROCEDURAL BACKGROUND

OCA's Issuance of Substantive Legal Guidance to Judges

In July 2021, public reporting brought to light that the New York State Office of Court Administration ("OCA") issues guidance to judges in the Unified Court System ("UCS") on how to interpret and apply substantive law in adjudicating cases

(R. 22–23).[1] The previous month, the Appellate Division had rendered a decision, *Crawford v Ally*, holding that due process requires courts to provide people charged with crimes an evidentiary hearing before they can be subjected to a pre-trial temporary order of protection that may deprive them of significant personal or property interests (197 AD3d 27, 33–34 [1st Dept 2021]). These evidentiary hearings should have been an important safeguard protecting low-income New Yorkers, particularly people of color, from being barred from their homes and separated from their families without due process.[2]

Within days of the Appellate Division's ruling, however, OCA issued a memorandum urging judges to read *Crawford* narrowly (R. 60–63). The *Crawford* memorandum was authored by OCA's Deputy Counsel of Criminal Justice and marked "Confidential" (R. 60). It instructed judges: "*Crawford* . . . **should <u>not</u> be read** as to require live witnesses and/or non-hearsay testimony" at the evidentiary hearings mandated by due process (R. 60 [emphases in original]). The memorandum further advised judges that they "should resist—unless absolutely necessary and

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[1] *See* Sam Mellins, *New York Judges Lock the Accused Out of Their Homes, Skirting Review Required by Landmark Ruling, Critics Charge*, N.Y. Focus (July 23, 2021), available at https://perma.cc/2DAU-KG8D (last accessed Feb. 19, 2025).

[2] *See* Brief of *amici curiae* Brooklyn Defender Services et al. at 5–7, in *Crawford v Ally*, 197 AD3d 27 (1st Dept 2021), available at https://bds.org/assets/files/Appellate_Div_First_Dept_Crawford_Defenders_Amici_Brief_2021_04_06.pdf.

appropriate—anything approaching a full testimonial hearing . . . .” (R. 63). Since OCA issued the *Crawford* memorandum, New York City courts have consistently denied defense attorneys’ requests for live-witness testimony in *Crawford* hearings (R. 88–89).

The NYCLU’s FOIL Request

In response to reporting about the *Crawford* memorandum, an OCA spokesperson stated that it is the agency’s “normal practice” to “issue memos with context on cases that have potential significant operational impacts on the courts” (R. 22; Mellins, n 1, *supra*). Seeking to understand this “normal practice,” on September 30, 2021, the NYCLU submitted a FOIL request to OCA seeking its legal guidance to judges (R. 33–39). The initial request sought “documents created by the OCA” since 2011 and “distributed within the OCA and/or to judges in the New York State Unified Court System” in which “federal or state court decisions” or “statutes, regulations, or ordinances” are “summarized, analyzed, interpreted, construed, explained, clarified, and/or applied” (R. 34–35).[3] The NYCLU explained the request was prompted by the revelation of the *Crawford* memorandum and the concern that OCA was, “through communications not disclosed to the public, instructing judges on how to interpret and apply substantive law” (R. 33). The NYCLU appended the

[3] The FOIL request also sought certain OCA policies (R. 35). That portion of the request is not at issue in this litigation.

Crawford memorandum to the request as an example of the documents sought (R. 36–39).

OCA denied the request, claiming it was "overly broad" and did not "reasonably describe records" because, in OCA's view, the request encompassed any document that "might involve any interpretation or evaluation" of, or even simply "implicate," decisional or statutory law (R. 43–44). OCA also asserted, without explanation and without identifying any specific records, that every responsive document would be exempt from disclosure as privileged and intra-agency materials (R. 44).

The NYCLU administratively appealed the denial (R. 46–48). Explicitly clarifying the FOIL request in response to OCA's expansive construction of it, the NYCLU explained that it was "*not* seeking documents that merely '*implicate* a federal or state court decision, statute, regulation, or ordinance'" (R. 46–47 [first emphasis added], quoting R. 44). Rather, the NYCLU specified, the request sought "documents created by the OCA that contain instructions or guidance as to how judges should interpret and/or apply court decisions, statutes, regulations, or ordinances"—that is, "substantive law"—as exemplified by the *Crawford* memorandum (R. 46–47; *see also* R. 33 [initial FOIL request explaining that it pertained to OCA's guidance to "judges on how to interpret and apply substantive

law"]). And the NYCLU pointed out that OCA's conclusory and blanket claims of privilege and exemption were insufficient to justify withholding records (R. 47–48).

OCA denied the administrative appeal (R. 50–56). The agency maintained its position that the request did "not reasonably describe records" and "would require an unreasonable effort to attempt to locate responsive documents" (R. 52), that responsive records would "fall within the intra-agency exemption" (R. 53–55), and that responsive records would be privileged (R. 55–56). OCA indicated that it had not attempted to identify responsive documents (R. 50).

Procedural History

The NYCLU then filed this lawsuit in the New York County Supreme Court alleging that OCA's refusal to produce the requested documents violated FOIL (*see* R. 17–30). In light of OCA's mischaracterization of the initial FOIL request, the NYCLU reiterated at oral argument before the Supreme Court that the operative request was set forth in the administrative appeal (*see* R. 263:24–264:9). On October 19, 2022, the Supreme Court ordered OCA to turn over the requested records, holding that OCA's "denial of the FOIL request . . . was in error after [the NYCLU] amended the request" in the administrative appeal (R. 5–6). The court found that the request, as clarified, was "sufficiently tailored" and that OCA's purported inability to locate responsive records was "not persuasive" (R. 5). The Supreme Court further

rejected OCA's blanket assertions of privilege and the intra-agency exemption (R. 5–6).

Instead of producing records, OCA appealed the Supreme Court's decision to the First Department (R. 3–4). OCA failed to timely perfect the appeal (NYSCEF Doc No. 5 ¶¶ 9–11, in *New York Civil Liberties Union v New York State Off. of Ct. Admin.*, App Div, 1st Dept, Case No. 2022-05629). Accordingly, on January 16, 2023, the First Department deemed the appeal dismissed (*id.*). After OCA moved to vacate the dismissal, the First Department permitted OCA to reinstate the appeal (NYSCEF Doc No. 13, in *New York Civil Liberties Union v New York State Off. of Ct. Admin.*, App Div, 1st Dept, Case No. 2022-05629).

On the merits, OCA maintained that its refusal to produce the requested records was appropriate. First, although it acknowledged that "[a] requestor is permitted to clarify its FOIL request with the agency . . . during the administrative FOIL process" (R. 320), OCA contended the NYCLU had not clarified its FOIL request in the administrative appeal and that the initial request was overbroad (R. 311–319). But OCA conceded that the clarified request, if accepted, describes an identifiable "subset of documents" (R. 415).

Second, OCA abandoned its claim that the requested records are intra-agency materials as well as its belated claim, raised for the first time on appeal, that the records are also inter-agency materials (*see* R. 392–421 [OCA reply brief making no

mention of either exemption in response to the NYCLU's pointing out that the judiciary is neither a part of OCA nor an "agency" at all for purposes of FOIL]).

Third, OCA made the blanket assertion that all requested records were privileged because OCA serves as "in-house counsel" to every judge in the UCS (R. 333–335), even while acknowledging that judges are not part of OCA (R. 236 n 7).

On February 8, 2024, the First Department issued an order reversing the Supreme Court ("Order") (R. 284–286). The Order began by dismissing the NYCLU's motivation for submitting the FOIL request: "Petitioner's concern that [OCA] is privately instructing judges how to interpret and apply substantive law is unfounded, as the court is not bound by [OCA's] interpretations" (R. 285). Next, the Order held that the NYCLU had not clarified its FOIL request and that the initial request was overbroad, based on OCA's representation that the requested "information [is] not stored in any centralized manner, and responding to the FOIL request would involve manually reviewing employees' … files" (*id*. [citation omitted] [alteration in original]). Finally, the Order held in the "alternative," in a single sentence, that all the requested records were "exempt [from disclosure] under

the attorney-client privilege . . . and the attorney work product privilege" (R. 285–286).[4]

The NYCLU moved for leave to appeal the Order. On October 22, 2024, this Court granted the motion (R. 283).

ARGUMENT

This Court has long recognized that "official secrecy is anathematic to our form of government" (*Madeiros v New York State Educ. Dept.*, 30 NY3d 67, 73 [2017], quoting *Fink v Lefkowitz*, 47 NY2d 567, 571 [1979]). To guard against official secrecy, New York enacted FOIL to make "[a]ll government records . . . presumptively open for public inspection" (*Gould v New York City Police Dept.*, 89 NY2d 267, 274–75 [1996]). Thus, the public is entitled to access government records "unless they fall within one of the enumerated exemptions of Public Officers Law § 87(2)" (*id.*).

[4] In addition to its FOIL claim brought under Article 78, the NYCLU also brought two declaratory-judgment claims alleging that OCA's refusal to produce the requested documents violates the First Amendment and common law (R. 29–30). Because Article 78 and declaratory-judgment claims proceed on separate procedural tracks, the Supreme Court and First Department orders giving rise to this appeal addressed only the FOIL claim (*see* R. 5–6). The declaratory-judgment claims are pending before the Supreme Court following a remand from the First Department in a separate appeal (*see* R. 287–289). The parties have stipulated to stay those proceedings pending the resolution of this appeal (NYSCEF Doc No. 65, Stipulation and Order, in *New York Civil Liberties Union v New York State Off. of Ct. Admin.*, Sup Ct, NY County, Index No. 154792/2022). The First Department stated in remanding the declaratory-judgment claims that its "prior holding that certain records sought in the FOIL request are subject to the attorney-client and work product privileges . . . constitutes the law of the case" (R. 288–289).

"To ensure maximum access to government documents, the exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption" (*id.* at 275 [citation and internal quotation marks omitted]). This means that to withhold records, an agency must show they "fall[] *squarely* within the ambit of one of these statutory exemptions" (*id.* [emphasis added]). It is also the agency's burden to establish that a FOIL request is overbroad by showing "the [requester's] descriptions were insufficient for purposes of locating and identifying the documents sought" (*Konigsberg v Coughlin*, 68 NY2d 245, 249 [1986] [citations and internal quotation marks omitted]).

Here, in asserting a blanket claim of privilege over documents it has not even identified, OCA has fallen far short of meeting its burden to withhold the requested memoranda from the public. Likewise, OCA has failed to establish that the NYCLU's specific and circumscribed FOIL request is overbroad.

I. OCA HAS NOT MET ITS BURDEN TO WITHHOLD EVERY REQUESTED RECORD AS PRIVILEGED.

The Order's sweeping, one-sentence ruling that *every* responsive record is privileged is contrary to this Court's precedent (*see* R. 285–286). The ruling misapplied this Court's recent decision in *Appellate Advocates v New York State Department of Corrections & Community Supervision* (40 NY3d 547 [2023]) to effectively erase the requirement that a party asserting the attorney-client privilege must establish an underlying attorney-client relationship. The Order also ignored

factual concessions by OCA that are fatal to its privilege claims and overlooked the NYCLU's argument—undisputed by OCA—that any privilege applicable here must yield to the strong public interest in removing the veil of secrecy around the OCA memoranda.

Because OCA has not and cannot show that the requested records are privileged, this Court should reverse and order OCA to produce the responsive guidance. In the alternative, to the extent the Court believes there may be a small subset of responsive records that are privileged, it should remand with instructions for the Supreme Court to conduct an in-camera review of the records to ensure that non-privileged records are produced.

A. OCA Failed to Establish the Attorney-Client Relationship Necessary to Support an Attorney-Client Privilege.

The Order upheld OCA's attorney-client privilege claim even though OCA did not establish an attorney-client relationship extending to every judge in the UCS and, in fact, made concessions making clear that no such relationship exists. Since there is no attorney-client relationship between OCA and UCS judges with respect to the records at issue, those records cannot be privileged.

"The party asserting the [attorney-client] privilege bears the burden of establishing its entitlement to protection by showing that [1] the communication at issue was between an attorney and a client for the purpose of facilitating the rendition of legal advice or services, in the course of a professional relationship, [2] that the

communication is predominantly of a legal character, [and] [3] that the communication was confidential and that the privilege was not waived" (*Ambac Assur. Corp. v Countrywide Home Loans, Inc.*, 27 NY3d 616, 624, [2016] [citations and internal quotation marks omitted]).

"[I]t is beyond dispute that no attorney-client privilege arises unless an attorney-client relationship has been established" (*Priest v Hennessy*, 51 NY2d 62, 68 [1980]). The party invoking privilege bears the burden of proving "independent facts" to "demonstrate the existence of an underlying attorney-client relationship"; an attorney's "mere statement that [a] party was a 'client' does not satisfy this burden" (*id.* at 70; *see Ambac Assur. Corp.*, 27 NY2d at 624). Independent facts that could support a finding that an attorney-client relationship existed include a fee arrangement or payment, a retainer agreement, or the attorney's appearance in a judicial proceeding on behalf of the client (*see e.g. Rand v Birbrower, Montalbano, Condon & Frank, P.C.*, 31 Fed Appx 748, 751 [2d Cir 2002]; *Cooke v Laidlaw, Adams & Peck, Inc.*, 126 AD2d 453, 455 [1st Dept 1987]).

OCA has adduced no independent facts substantiating its expansive claim of an attorney-client relationship with every judge in the UCS. Instead, OCA offers only the bare assertion that it serves as "in-house counsel" to all judges (R. 333–335). "New York law demands more" (*Bonde v Wexler & Kaufman, PLLC*, 345 FRD 31, 43–44 [SD NY 2023]). In *Bonde*, for instance, the court cited *Priest* to hold that

"the conclusory affidavits of [attorneys]" claiming "to have 'assumed' the 'role' of in-house counsel" were insufficient to establish an attorney-client relationship (*id.*, citing *Priest*, 51 NY2d at 70). Tellingly, when OCA told the First Department that "OCA established in the underlying proceedings that Counsel's Office serves as 'in-house counsel' to the Unified Court System," that claim was accompanied by no citation to judicial findings or evidence in the record (R. 335)—because there are none.

The affidavit submitted by OCA's FOIL officer likewise fails to provide the "independent facts" necessary to establish an attorney-client relationship (*Priest*, 51 NY2d at 70). The affidavit represents: "[OCA] Counsel's Office serves the *Chief Administrative Judge and OCA* in an 'in-house' capacity" (R. 178 [emphasis added]). It conspicuously does not claim that OCA serves *every UCS judge* in an "in-house" capacity. The affidavit also states that "Counsel's Office represents the interests of OCA, judicial and non-judicial employees, and Chief Administrative Judge" in a variety of functions, including "state and federal litigation," "drafting and negotiating contracts for goods and services," and "prosecut[ing] disciplinary proceedings against non-judicial employees" (*id.*). Nowhere does this list mention an attorney-client relationship within which OCA issues legal guidance to UCS

judges.[5] Thus, the FOIL officer's assertion that "[a]ll the functions of Counsel's Office are in furtherance of an attorney-client relationship" has no factual support (*id.*). It is, in other words, precisely the kind of "mere statement that [a] party was a 'client'" that "does not satisfy th[e] burden" to establish an attorney-client relationship (*Priest*, 51 NY2d at 70; *see e.g. Washington Post Co. v New York State Ins. Dept.*, 61 NY2d 557, 567 [1984] [holding that an agency failed to show it could withhold documents under a FOIL exemption based on "conclusory" assertions "without the benefit of evidentiary support"]; *Nacos v Nacos*, 124 AD3d 462, 462 [1st Dept 2015] [finding that two individuals' "conclusory statements [were] insufficient" to "establish that an attorney-client relationship existed between them"]; *Williams & Connolly v Axelrod*, 139 AD2d 806, 807–08 [3d Dept 1988]) [declining to recognize privilege over legal memorandum sent by an agency attorney to an associate agency director because "[s]ufficient facts [were] not alleged to permit a finding that the requisite confidential relationship arose between [them]"]).

OCA's own characterization of its relationship with UCS judges belies the agency's claim that it is the judges' "in-house counsel." In this litigation, OCA has repeatedly disclaimed that judges are part of the agency: "Judges are elected or

[5] The NYCLU recognizes that OCA may have an attorney-client relationship with judges in certain contexts, for example, where OCA is representing particular judges in litigation. But, in this case, OCA has not met its burden to establish an attorney-client relationship with every UCS judge in the context of the agency's distribution of guidance.

appointed state constitutional officials and *are not considered staff of OCA*" (R. 236 n 7 [emphasis added]; *accord* R. 332 ["Judges are elected or appointed officials and not employees of OCA . . . ."]). Consistent with OCA's concessions, the Supreme Court found that "[j]udges are not employees of" OCA (R. 6), contradicting the agency's assertion that it "established in the underlying proceedings that Counsel's Office serves as 'in-house counsel' to the Unified Court System" (R. 335). The Supreme Court's finding makes sense, as accepting OCA's claim of an attorney-client relationship with all UCS judges would lead to absurd results. Notably, if the records at issue were created as part of a legal representation in which every UCS judge is a client, no judge would be able to adjudicate this case (*see* Judiciary Law § 14 ["A judge shall not sit as such in, or take any part in the decision of, an action . . . in which he is interested . . . ."].

The few authorities OCA cites further expose the lack of support for its claim of an attorney-client relationship. In its briefing and its FOIL officer's affidavit, OCA references Public Officers Law § 87 (2) (a), CPLR 3101, CPLR 4503, and Judiciary Law § 212 (1) (r) (*see* R. 177–178, 237, 326–328). The first three of those statutes merely provide general descriptions of certain privileges recognized as FOIL exemptions (*see* Public Officers Law § 87 [2] [a] [providing that agencies may withhold records "specifically exempted from disclosure by state or federal statute"]; CPLR 3101 [c] [describing the work-product privilege]; CPLR 4503 [a] [describing

the attorney-client privilege]). And all Judiciary Law § 212 (1) (r) provides is that OCA may "[e]stablish educational programs, seminars and institutes for the judicial and nonjudicial personnel of the unified court system." None of these statutes says anything about an attorney-client relationship between OCA and judges.[6]

Accordingly, OCA has not and cannot meet its burden to substantiate its claim of the attorney-client privilege here.

B. The Order Misapplied this Court's *Appellate Advocates* Decision to Relieve OCA of Its Burden to Establish an Attorney-Client Relationship and Effect an Unprecedented Expansion of Privilege.

The Order nevertheless held that the responsive records are categorically privileged, citing *Appellate Advocates* as the sole basis for this conclusion (*see* R. 285–286). The Order's reliance on *Appellate Advocates* was misguided because that decision was a narrow one addressing whether the *content* of certain attorney-client communications was privileged, not whether an underlying attorney-client relationship existed.

In *Appellate Advocates*, the petitioners sought "various materials related to the Board of Parole's decision-making process" (40 NY3d at 551). The agency "disclosed thousands of pages of material" and withheld only "11 documents

[6] By contrast, in situations where the Legislature intended to authorize an attorney-client relationship between UCS judges and government attorneys, it did so explicitly (*see e.g.* CPLR 7804 [i] [providing that justices or judges "shall be entitled to be represented by the attorney general" in specified types of litigation]).

prepared by counsel for the Board of Parole . . . . to train and advise Board of Parole commissioners on how to comply with their legal duties and obligations" (*id.* at 550–51). This Court determined those eleven documents were privileged because they "reflect counsel's legal analysis of statutory, regulatory and decisional law, and provide guidance for the [Board of Parole] commissioners on how to exercise their discretionary authority" (*id.* at 553).

The existence of an attorney-client relationship was not in dispute in *Appellate Advocates* because the documents were sent by "counsel for the Board of Parole" to "Board of Parole commissioners" (*id.* at 550). The parties stated this explicitly. The agency's brief explained: "[T]here is no dispute that counsel's advice was rendered during the course of an existing an attorney-client relationship with the Board" (Brief for Respondent at 22, in *Appellate Advocates*, NY Ct App, APL-2022-00063). The petitioners agreed, stating that the question of whether "a document [was] being transmitted in the scope of an attorney-client relationship" was not at issue (July 8, 2022 Letter Brief at 7, *Appellate Advocates*, NY Ct App, APL-2022-00063).

Thus, *Appellate Advocates* cannot salvage OCA's failure to establish an attorney-client relationship. If allowed to stand, the Order's misapplication of this Court's precedent would drastically lower the showing parties must make to invoke the attorney-client privilege by relieving their burden to establish an underlying attorney-client relationship. Such a result would contravene this Court's admonition

that the invocation of the attorney-client privilege "should be cautiously observed" because it "constitutes an obstacle to the truth-finding process" (*Priest*, 51 NY2d at 68 [citation and internal quotation marks omitted]).

C. OCA Failed to Meet Its Burden to Withhold the Requested Records Based on the Work-Product Privilege and to Establish that Any Applicable Privilege Has Not Been Waived.

The Order also erred in holding that all the requested records are exempt from disclosure under the work-product privilege. That holding—unexplained other than a citation to the statutes generally describing the privilege (*see* R. 285–286, citing CPLR 3101 [c]; Public Officers Law § 87 [2] [a])—disregards that the memoranda at issue are non-privileged statements of agency policy. It also fails to recognize that, in any event, OCA's distribution of the memoranda to judges outside the agency waives any privilege.

The work-product privilege is "narrowly applied to materials prepared by an attorney, acting as an attorney, which contain his or her analysis and trial strategy" (*NYAHSA Servs. v People Care Inc.*, 155 AD3d 1208, 1211 [3d Dept 2017] [citation and alterations omitted]). Courts have "accorded [the work-product privilege] a very narrow scope" and "cast precious little under the 'work product' category of [CPLR 3101] (c)" (Siegel, NY Prac § 347 [6th ed 2024]). The work-product privilege, like the attorney-client privilege, does not apply to "communications made in the presence of third parties . . . because they are not deemed confidential" (*Ambac Assur.*

Corp., 27 NY3d at 624 [citations omitted]). And both privileges are waived "if a communication is made in confidence but subsequently revealed to a third party" (*id.* [citation omitted]; *see Gartner v New York State Atty Gen's Off.*, 160 AD3d 1087, 1092 [3d Dept 2018]). The party asserting privilege bears the burden of demonstrating that no waiver has occurred (*see People v Kozlowski*, 11 NY3d 223, 246 [2008]; *Loudon House LLC v Town of Colonie*, 123 AD3d 1409, 1411 [3d Dept 2014]).

The Order accepted OCA's blanket claim of the work-product privilege over every responsive document even though that claim, like OCA's claim of the attorney-client privilege, was premised on the agency's assertion that it is "in-house counsel" to every UCS judge (R. 333–335). The Order did not explain why it credited this assertion even though OCA affirmatively disclaimed that UCS judges are part of the agency (*see* Argument I.A, *supra* at 16–17).

Nor did the Order explain how the work-product privilege could apply to the requested OCA memoranda to the extent they set forth statements of agency policy. FOIL requires agencies to disclose "final agency policy" and "instructions to staff that affect the public," reflecting that such material cannot be privileged (Public Officers Law § 87 [2] [g] [ii], [iii]). OCA's guidance is subject to this disclosure mandate, as the *Crawford* memorandum illustrates. The memorandum articulates OCA's policy on how courts should apply the *Crawford* decision, including that they

should not permit "live witnesses and/or non-hearsay testimony" in temporary-order-of-protection hearings and "should resist . . . anything approaching a full testimonial hearing" (R. 60–63). This policy informs courts' adjudication of temporary orders of protection (*see* Argument I.D, *infra* at 26; R. 88–89 [affirmation describing courts' practices following the issuance of the *Crawford* memorandum]). Thus, the *Crawford* memorandum—and other OCA memoranda setting forth the agency's policies or instructions that affect the public—do not constitute privileged work product.[7]

This result is consistent with case law applying the federal Freedom of Information Act ("FOIA"). Under FOIA, "agencies may withhold inter-agency or intra-agency . . . . records that would be normally privileged in the civil discovery context," including records that constitute attorney work product (*Natl. Assn. of Criminal Defense Lawyers v Dept. of Justice Exec. Off. for United States Attys*, 844 F3d 246, 249 [DC Cir 2016] ("*NACDL*") [citations and internal quotation marks omitted]; *see* 5 USC § 552 [b] [5]). But because the rationale for protecting attorney work product is "to protect the integrity of the adversary trial process," "materials

[7] OCA had attempted to argue earlier in this case that its memoranda are inter- and intra-agency records, but abandoned that argument after the NYCLU pointed out, among other things, that the memoranda set forth "final agency policy" and "instructions to staff that affect the public" within the meaning of Public Officers Law § 87 (2) (g) (*see* R. 375–382 [NYCLU brief]; R. 392–421 [OCA reply brief]).

serving no cognizable adversarial function," such as "statements of [agency] policy," do "not constitute work product" (*NACDL*, 844 F3d at 251, 255–58 [citations and internal quotation marks omitted]).

The same is true for FOIL. FOIL's provision mandating disclosure of agency policy and instructions that affect the public is "patterned after the federal analogue" (*Tuck-It-Away Assocs., L.P. v Empire State Dev. Corp.*, 54 AD3d 154, 162 [1st Dept 2008], *affd sub nom. W. Harlem Bus. Grp. v Empire State Dev. Corp.*, 13 NY3d 882 [2009]). "[F]ederal case law on the scope of this exemption is therefore instructive" in applying FOIL (*id.*; *see Fink*, 47 NY2d at 572 n * [same]). Further, New York recognizes the work-product privilege for the same reason as federal law: "to protect the integrity and vitality of the adversarial system" (*Corcoran v Peat, Marwick, Mitchell & Co.*, 151 AD2d 443, 445 [1st Dept 1989], citing *Hickman v Taylor*, 329 US 495 [1947]). Accordingly, agency policy statements and agency instructions that affect the public, which serve no adversarial function, do "not constitute work product" under FOIL (*NACDL*, 844 F3d at 255–58).

Even setting aside that the requested records were not privileged work product in the first instance, they could not have retained any privilege once OCA distributed them outside the agency. Assuming *arguendo* that OCA's guidance was initially protected work product, its subsequent circulation to judges who are "not employees of OCA" waived the privilege (R. 332; R. 6; *see Ambac Assur. Corp.*, 27 NY3d at

624; *Gartner*, 160 AD3d at 1092). Indeed, after the NYCLU pointed out this waiver in its First Department brief (*see* R. 384–385), OCA's reply brief offered no response (*see* R. 414–419). OCA has therefore forfeited its argument regarding the work-product privilege (*see Weimer v Bd. of Educ. of Smithtown Cent. Sch. Dist. No. 1*, 52 NY2d 148, 154 n 4 [1981] [noting that "respondent's brief challenged [appellant's] standing to bring the appeal" and "[appellant's] reply brief failed to respond to that challenge," and dismissing appeal]; *Murphy v RMTS Assocs., LLC*, 71 AD3d 582, 582–83 [1st Dept 2010] ["As defendants argue in their brief without contradiction from plaintiff in her reply brief, plaintiff has abandoned the contention she advanced in Supreme Court . . . ."]).

D. It Is Contrary to Public Policy to Allow OCA to Withhold Legal Guidance that Affects the Adjudication of New Yorkers' Rights.

Finally, even assuming any responsive records may be privileged, weighty public-policy considerations overcome the privilege here. New York law requires disclosure in the public interest even of documents that are otherwise privileged (*see Priest*, 51 NY2d at 69 ["[E]ven where the technical requirements of the privilege are satisfied, it may, nonetheless, yield in a proper case, where strong public policy requires disclosure."]; *Spectrum Sys. Intl. Corp. v Chem. Bank*, 78 NY2d 371, 380 [1991] ["[W]e have several times noted that the privilege may give way to strong public policy considerations."]; *e.g. Matter of Jacqueline F.*, 47 NY2d 215, 222–23 [1979] [holding that the attorney-client privilege "must yield to the best interests of

the child" where the client had made "deliberate attempts to avoid a court mandate concerning custody of a child"]). It is emphatically in the public interest for New Yorkers to be aware of agency guidance that concretely affects the adjudication of their rights—a consideration the Order did not address (*see* R. 284–286).

OCA does not deny either the existence of its legal guidance to judges or the significance of that guidance. Providing judges with guidance on how to interpret and apply the law is, by OCA's own description, the agency's "normal practice" (R. 22; *see e.g.* R. 60–63, 69–81). And OCA admits that the guidance "inform[s] members of the judiciary in their decision-making processes" (R. 296). In short, there is no dispute that the OCA guidance influences the adjudication of cases and thus the rights of litigants and the public at large.

The few examples of OCA guidance that have found their way into the public eye confirm that they pertain to the adjudication of issues as important as whether New Yorkers should be forcibly committed or separated from their families pending trial. For instance, in an April 2022 memorandum, OCA instructed judges that the "least restrictive means" standard governing bail determinations only "*arguably* weigh[s] against setting higher bail amounts or remanding a defendant in specific cases" (R. 75 [emphasis added]). The memorandum further encouraged courts to take an expansive view of their authority to commit defendants for mental-health reasons (R. 79 n 9).

And the *Crawford* memorandum urges judges to "resist—unless absolutely necessary and appropriate—anything approaching a full testimonial hearing" when determining whether to impose an order of protection that may bar a defendant from entering their home and seeing their children for months (R. 63). Since OCA issued the *Crawford* memorandum, courts across New York City have consistently denied defense counsel's requests for live-witness testimony in *Crawford* hearings (*see* R. 88–89). The resulting orders of protection could have "render[ed] people homeless"; separated "parents from children, spouses from one another, and children from siblings"; and spawned "negative immigration consequences."[8]

Had these memoranda not leaked, New Yorkers would have no inkling that confidential guidance from OCA informs courts' adjudication of cases. And without awareness that judges were receiving such guidance, litigants would not know to make arguments about whether and how the guidance is applicable to their cases.

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[8] Brief of *amici curiae* Brooklyn Defender Services et al. at 3–4, n 2, *supra*. At oral argument, the First Department repeatedly stated that that "[t]here's something called an appeal" for correcting any errors made by trial courts in reliance on OCA's guidance (Appellate Division, First Department, *Oral Argument Archives* at 2:28:17 [Jan. 18, 2024], https://cmi.nycourts.gov/vod/WowzaPlayer/AD1/AD1_Archive2024_Jan18_13-58-32.mp4; *see also id.* at 2:26:01, 2:27:00, 2:29:28). But appellate review cannot undo all harms that may flow from erroneous reliance on OCA's guidance. Take the *Crawford* memorandum, for example: If a trial court issues an unwarranted temporary order of protection based on the memorandum, even if the error is corrected on appeal, the defendant may have been unnecessarily banished from their homes and separated from their children for months in the interim (*see* Brief of *amici curiae* Brooklyn Defender Services et al. at 7–26, n 2, *supra*). Indeed, the *Crawford* court noted that "the temporary nature of short-term orders of protection serves in many ways to insulate them from legal challenge" (197 AD3d at 32–33).

Thus, the documents at issue in this case go to the heart of FOIL's "strong commitment to open government and public accountability" (*Capital Newspapers Div. of Hearst Corp. v Burns*, 67 NY2d 562, 565 [1986]); of "[t]he people's right to know the process of governmental decision-making and to review the documents . . . leading to determinations" (Public Officers Law § 84); and of "the premise that . . . official secrecy is anathematic to our form of government" (*M. Farbman & Sons, Inc. v New York City Health & Hosps. Corp.*, 62 NY2d 75, 79 [1984]; *see* R. 437 [*amici curiae* brief submitted in this case by fourteen media organizations "emphasiz[ing] the public interest in access to records like those at issue here," which "implicate government activity of public concern"]).[9]

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[9] The public importance of this case is also evidenced by the extensive news coverage that it has received (*see e.g.* Marco Poggio, *NY Panel Rejects NYCLU Demand For Memos To State Judges*, Law360, Feb. 9, 2024, available at https://perma.cc/N6J9-R5LL [last accessed Feb. 19, 2025]; Emily Saul, *NY Office of Court Administration Wins Bid to Shield Judicial Communications*, New York Law Journal, Feb. 8, 2024, available at https://perma.cc/D6F4-S22H [last accessed Feb. 19, 2025]; Emily Saul, '*We Cannot Tell a Judge What to Do': Judicial Guidance From OCA Still Subject to Discretion, Attorney Argues*, New York Law Journal, Jan. 18, 2024, available at https://perma.cc/676E-72TJ [last accessed Feb. 19, 2025]; New York Daily News Editorial Board, *The New York State court system should make guidance memos and policy board meetings public*, New York Daily News, Sept. 9, 2023, available at https://www.nydailynews.com/2023/09/09/the-new-york-state-court-system-should-make-guidance-memos-and-policy-board-meetings-public/ [last accessed Feb. 19, 2025]; Sam Mellins, *The Secret Memos New York Courts Refuse to Give Up*, N.Y. Focus, Sept. 5, 2023, available at https://perma.cc/3KU7-JZEL [last accessed Feb. 19, 2025]; Andrea Keckley, *NYCLU Wins Release Of Memos To New York Judges*, Law360, Oct. 20, 2022, available at https://perma.cc/ZF54-FEBB [last accessed Feb. 19, 2025]; Molly Crane-Newman, *NYCLU claims 'secret memos' from court administrators advise judges on tough decisions*, New York Daily News, Oct. 1, 2021, available at https://www.nydailynews.com/2021/10/01/nyclu-claims-secret-memos-from-court-administrators-advise-judges-on-tough-decisions/ [last accessed Feb. 19, 2025]; Matt Perez, *NYCLU Sues To Obtain Court Office's Memos To Judges*, Law360, June 2, 2021, available at https://perma.cc/VR6L-9RHD [last accessed Feb. 19, 2025]).

In sum, allowing OCA to withhold its guidance on privilege grounds would be contrary to public policy and inimical to the purpose of both the attorney-client and work-product privileges—"to protect the integrity and vitality of the adversarial system" (*Corcoran*, 151 AD2d at 445; *see Forman v Henkin*, 30 NY3d 656, 662 [2018] [teaching that "application [of any privilege] must be consistent with the purposes underlying the immunity"]). Judges are not, as a general matter, parties in the adversarial system; they serve as impartial adjudicators of disputes. Denying public access to documents that inform judges' adjudication of cases is antithetical to bedrock principles of democracy and transparency.

OCA disputes none of these principles (*see generally* R. 257–258, 385–386 [NYCLU arguing there is an overriding public interest in disclosure of OCA guidance]; R. 309–338, 392–421 [OCA offering no response]). Accordingly, "strong public policy requires disclosure" of the OCA guidance (*Priest*, 51 NY2d at 69).

E. Even If this Court Believes Some Responsive Records May Be Privileged, It Should Order OCA to Produce the Records to the Supreme Court for In-Camera Review.

Given OCA's failure to show that the requested records are privileged, this Court should order the agency to promptly produce the records. If the Court believes—notwithstanding OCA's inability to establish privilege or non-waiver as a general matter—there may be some documents that are privileged for specific

reasons, the Court should order OCA to provide those documents to the Supreme Court for in-camera review.[10]

As this Court has emphasized, "blanket exemptions for particular types of documents are inimical to FOIL's policy of open government" (*Gould*, 89 NY2d at 275; *see Konigsberg*, 68 NY2d at 251 ["[T]he broad allegation here that the files contained exempt material is insufficient to overcome the presumption that the records are open for inspection."]). Because "whether a particular document is or is not protected is necessarily a fact-specific determination" (*Spectrum Sys. Intl Corp.*, 78 NY2d at 377–78), "[t]he proper procedure for reaching a determination" on privilege is for the agency to provide the documents for an "*in camera* inspection" (*M. Farbman & Sons*, 62 NY2d at 83). OCA acknowledges that generally, before a court rules on privilege, "[a]n agency should submit documents it deems privileged to a court for an *in camera* inspection" (R. 418).

Here, however, OCA has not attempted to identify a single responsive record, let alone submit any for in-camera review. The Order therefore erred in endorsing OCA's categorical invocation of privilege (*see City of Newark v Law Dept. of City of New York*, 305 AD2d 28, 33–34 [1st Dept 2003] [holding that agency's "blanket invocation of three statutory [FOIL] exemptions, without enumerating or describing

[10] If, for example, OCA drafted certain memoranda intended to provide guidance to judges but never distributed them outside the agency, they may be privileged.

any of the documents withheld and without offering a specific basis for any of the claims of exemption," "falls short of the showing FOIL requires"]). To the extent there may be some responsive records that are privileged, OCA should submit them to the Supreme Court for review and "articulat[e] a particularized and specific justification" for withholding them (*Konigsberg*, 68 NY2d at 251 [citations omitted]). OCA should be ordered to promptly produce the remaining records to the NYCLU.

II. THE NYCLU'S FOIL REQUEST IS SPECIFIC, CIRCUMSCRIBED, AND REASONABLY DESCRIBES THE RECORDS SOUGHT.

Contrary to the First Department's ruling, the NYCLU's FOIL request reasonably describes the records sought and was not overbroad (*see* R. 285). The Order misconstrued the scope of the request and credited OCA's assertion that it could not easily locate responsive records despite evidence indicating the records could be identified through a targeted search. In doing so, the First Department continued a recent practice of denying FOIL claims based on an agency's perfunctory assertion that it cannot easily locate responsive records. This practice is both inconsistent with this Court's decisions distinguishing the specificity of a FOIL request from the burden of searching for responsive records and in tension with decisions of other Appellate Division Departments.

A. The NYCLU's Clarified FOIL Request Is Sufficiently Tailored, Reasonably Describes the Records Sought, and Permits a Targeted Search.

FOIL does not impose a high standard of specificity for requests. It "requires only that the records be 'reasonably described' so that the respondent agency may locate the records in question" (*M. Farbman & Sons*, 62 NY2d at 82–83, quoting Public Officers Law § 89 [3]). The agency bears the burden "to establish that the descriptions were insufficient for purposes of locating and identifying the documents sought before denying a FOIL request for reasons of overbreadth" (*Konigsberg*, 68 NY2d at 249 [citations and internal quotation marks omitted]; *see* R. 312 [admitting that OCA "bears the burden to establish that the [FOIL petitioner's] descriptions were insufficient"]).

The NYCLU provided a specific and circumscribed description of the records sought when it clarified its FOIL request in the administrative appeal: "[D]ocuments created by the OCA [since 2011] that contain instructions or guidance as to how judges should interpret and/or apply court decisions, statutes, regulations, or ordinances" (R. 46–47). To provide further clarity to OCA, the NYCLU appended the *Crawford* memorandum to its original FOIL request and administrative appeal and explained that the memorandum is "an example of the type of documents sought" (R. 47). As the Supreme Court observed, this request was "sufficiently tailored" and OCA's insistence that it would be unable to locate responsive records was "not

persuasive" (R. 5). Critically, OCA has conceded that the clarified request "do[es] identify a subset of documents" (R. 415).

The NYCLU's clarified request is circumscribed in three key ways. To begin, it is limited by subject matter to "instructions or guidance as to how judges should interpret and/or apply court decisions, statutes, regulations, or ordinances" (R. 47). Consistent with this description, a document must "substantive[ly]" engage with decisions and laws—like the *Crawford* memorandum, which explains the application of a landmark decision of this Court—to be responsive (R. 46–47). Next, the request is limited by time to documents created on or after January 1, 2011 (R. 34), a period featuring digital record-keeping that facilitates electronic searches for responsive records. Finally, the request is limited both by author, to "documents created by the OCA," and recipient, to documents "distributed within the OCA and/or to judges in the Unified Court System" (R. 34, 46–47). This request is sufficiently tailored as it is "circumscribed as to subject matter, groups of individuals to whom they pertained, and time period" (*Goldstein v Inc. Vill. of Mamaroneck*, 221 AD3d 111, 119 [2d Dept 2023]).[11]

[11] The NYCLU's original request was also reasonably described because it was limited by subject matter (to documents in which decisional and statutory law are substantively "summarized, analyzed, interpreted, construed, explained, clarified, and/or applied"), time period (to documents created "on or after January 1, 2011"), and author and recipient (to documents "created by the OCA" and "distributed within the OCA and/or to judges in the [UCS]") (R. 34–35). The appended *Crawford* memorandum further illustrated that the original request sought documents written for

The record makes clear that the documents responsive to the NYCLU's request form a narrow category and could be identified through a limited, targeted search. Because the documents sought are instructions and guidance on substantive legal issues, only attorneys within OCA could have drafted them. OCA's assertion of the attorney-client privilege over all responsive records, although meritless (*see* Argument I.A, *supra* at 13–18), reflects that they could only have been created by attorneys (*see Spectrum Sys. Intl. Corp.*, 78 NY2d at 377–78 [noting the attorney-client privilege "exists for confidential communications made between attorney and client"]).

What is more, the record reflects that only a small number of *senior* attorneys within OCA could have authored the guidance at issue (*see* R. 60–63, 73–81 [memoranda by "Anthony R. Perri, Deputy Counsel: Criminal Justice"]; R. 69–71 [memorandum by then-Chief Administrative Judge Lawrence K. Marks]). Thus, to locate responsive documents, OCA would need to consult only the small number of senior attorneys with the authority to issue substantive legal guidance to judges throughout the UCS (*see Puig v New York State Police*, 212 AD3d 1025, 1027 [3d Dept 2023] [holding that a FOIL "request was reasonable and sufficiently detailed to enable respondent to locate and identify the requested records" because the

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judges (R. 36–39). Given that the NYCLU clarified its request in the administrative appeal, however, this Court need not address the original request (*see* Argument II.B, *infra* at 34–39).

records were "confined to two identifiable troops"]). Indeed, at no point has OCA given an explanation as to why it cannot respond to the request by simply asking these senior attorneys to provide the relevant guidance they have authored.

Tellingly, for all of OCA's appeals throughout this case about the size of its overall workforce (*see e.g.* R. 313–315), its FOIL officer does not dispute that only senior attorneys issue substantive legal guidance like the *Crawford* memorandum to judges. Nor has the FOIL officer described any efforts to confer with relevant officials within OCA to confirm which attorneys have issued such guidance or to otherwise locate the guidance. Instead, the FOIL officer protests that seeking responsive records from every single one of the agency's employees "would have been extremely burdensome" (R. 174–175), without regard to the fact that such a search is wholly unnecessary. For these reasons, the Supreme Court rightly concluded that OCA's claimed "inability to search by terms or content of documents is not persuasive" (R. 5).

B. The Order Erred in Rejecting the NYCLU's Clarification of Its FOIL Request During the Administrative Proceedings.

In holding that OCA "properly denied the FOIL request . . . on the ground of overbreadth," the Order opined that the NYCLU's administrative appeal had not clarified the original request (R. 285). This conclusion—which rejects the Supreme Court's factual finding that the NYCLU's administrative appeal "amended the

[original] request" (R. 5–6) without identifying any error in that finding—is incorrect.

There is no dispute that a FOIL applicant may clarify its request during the administrative proceedings. OCA acknowledges that "[a] requestor is permitted to clarify its FOIL request with the agency . . . during the administrative FOIL process" (R. 320, citing *Reclaim the Records v New York State Dept. of Health*, 185 AD3d 1268, 1272 [3d Dept 2020]). For example, in *Sell v New York City Department of Education*, after the "petitioner expressly clarified in his administrative appeal that he does not seek [certain] information," the First Department treated the clarified request as the operative one (135 AD3d 594, 594 [1st Dept 2016]). Allowing such clarification or narrowing of FOIL requests during the administrative process allows requesters and agencies to more efficiently facilitate the production of responsive records (*see* 21 NYCRR 1401.2 [b] [2] [requiring agencies to, "when appropriate, indicate the manner in which the [requested] records are filed, retrieved or generated to assist persons in reasonably describing records"]).

Here, however, the Order stated that "nothing in the language of the original request or the administrative appeal supports" the NYCLU's position that it had clarified its request (R. 285). This conclusion is contradicted by the record. In denying the NYCLU's initial FOIL request, OCA wrote that the request sought any document that "might involve" or "implicate" a "federal or state court decision,

statute, regulation, or ordinance" (R. 43–44; *see* R. 230 [OCA characterizing the request as seeking any documents that merely "discuss" cases and laws, "no matter how brief[ly]"]). To correct this apparent misapprehension, the NYCLU clarified in its administrative appeal that it is not seeking documents that merely mention court decisions or laws. The NYCLU explained that it seeks only OCA-created documents that provided "guidance to judges on how to interpret and apply substantive law" (R. 46). Indeed, the NYCLU explicitly stated that, "contrary to OCA's characterization," the request was "*not* seeking documents that merely 'implicate'" decisional or statutory law, but rather only "documents created by the OCA [since 2011] that contain instructions or guidance as to how judges should interpret and/or apply" decisional or statutory law (R. 46–47 [emphasis added]).

OCA's response to the administrative appeal shows the agency's understanding of the NYCLU's clarification. In denying the appeal, OCA acknowledged that the request sought documents providing "judicial instructions, interpretations and application of substantive law," in contrast to the agency's initial, overbroad characterization of the request (R. 53 n 2).

The NYCLU's explicit clarification distinguishes this case from the *Reclaim the Records* case cited by the Order (*see* R. 285; *see also* R. 325 [OCA brief relying on *Reclaim the Records*]). In *Reclaim the Records*, the Third Department held that the FOIL petitioners' original request governed for a straightforward reason: The

"petitioners' counsel confirmed" during the Article 78 proceedings that "the entirety of the original FOIL request [was] still in issue, and ha[d] not been narrowed in scope" (185 AD3d at 1273 n 4). Here, by contrast, the NYCLU explained during the administrative proceedings—and reaffirmed before the Supreme Court (*see e.g.* R. 26–27; R. 263:24–264:9)—that the scope of its request is narrower than OCA purported to believe.

There is also no merit to OCA's contention that the "NYCLU improperly attempted to submit several clarifications to the Supreme Court in its Article 78 petition" (R. 321). This contention is premised on misrepresentations of the record. First, OCA asserts the NYCLU "argued for the first time that it sought only records that 'pertain to recently enacted laws or recently decided cases'" (R. 321, quoting R. 156). In fact, the NYCLU was merely addressing OCA's claim that "the request implicates hundreds of years of . . . decisions, statutes, regulations, and ordinances" (R. 52). To dispel this notion, the NYCLU pointed out that not only was the request expressly limited to documents created since 2011, but also that "all of the examples of OCA memoranda discussed in the Verified Petition pertain to recently enacted laws or recently decided cases" (R. 155–156). The NYCLU was not introducing a new limitation on its request.

Second, OCA appears to suggest the NYCLU changed the scope of its request by "stat[ing] that it sought 'memoranda from . . . OCA officials'" (R. 321, quoting

R. 158). But the NYCLU has specified from the beginning of the FOIL proceedings that it seeks "documents created by OCA" (R. 34). It is unclear why OCA believes this is a new limitation.

Third, OCA wrongly claims the NYCLU belatedly stated that it sought documents "from a 'small number of senior attorneys within OCA'" (R. 321, quoting R. 250). Rather, as explained above, the NYCLU was pointing out that responsive documents could only have been authored by a small subset of OCA attorneys to refute the agency's assertion that it would have to search the files of every single employee (*see* Argument II.A, *supra* at 33–34).

In sum, the NYCLU properly clarified its request in the administrative proceedings—clarifications that OCA concedes "do identify a subset of documents" (R. 415). Because it erred in dismissing the NYCLU's clarified request, the First Department based its Order on a characterization of the documents at issue that is more expansive than what the NYCLU is actually seeking (*compare* R. 285 [Order describing OCA records "that summarized, interpreted, explained, analyzed, or applied any state or federal court decisions, statutes, or regulations"], *with* R. 46–47 [administrative appeal seeking "documents created by the OCA [since 2011] that contain instructions or guidance as to how judges should interpret and/or apply court decisions, statutes, regulations, or ordinances"]). For one thing, the Order's description does not specify that the documents must "contain instructions or

guidance" regarding the interpretation or application of substantive law (*see* R. 285). For another, it overlooks that the instructions or guidance must be directed at *judges*, which limits the universe of recipients (*see id.*).

C. The First Department Erroneously Conflated the "Reasonably Described" Requirement for FOIL Requests with the Burden of Searching for Records.

The First Department's conclusion that the NYCLU's request is overbroad also exemplifies a departure from this Court's and other Departments' precedent on the requirement for FOIL requests to reasonably describe the records sought. The NYCLU in fact gave OCA more than enough information to locate the responsive records, and OCA's resistance to conducting the search stems from nothing more than the agency's belief that the search would take more effort than it would prefer.

As noted above, FOIL "requires only that the records be 'reasonably described' [in a FOIL request] so that the respondent agency may locate the records in question" (*M. Farbman & Sons*, 62 NY2d at 82–83, quoting Public Officers Law § 89 [3]). This Court has repeatedly cautioned against using the "reasonably described" requirement as cover for denying FOIL requests that implicate a large number of records. Even when a "request is so broad as to require thousands of records," that does "not establish[] that the descriptions were insufficient for purposes of locating and identifying the documents" (*id.* at 83). Put differently, agencies "cannot evade the broad disclosure provisions of [FOIL] upon the naked

allegation that the request will require review of thousands of records" [12] (*Konigsberg*, 68 NY2d at 249 [citation omitted]). FOIL itself dictates that "[a]n agency shall not deny a request on the basis that the request is voluminous or that locating or reviewing the requested records or providing the requested copies is burdensome" (Public Officers Law § 89 [3] [a]). The Legislature added this language to FOIL in 2008 to "recognize technology advances in the storage and collection of public records" and to "ensure that . . . an agency cannot use the excuse that the FOIL request is voluminous, burdensome or it lacks the staff [to produce a response]" (*Goldstein*, 221 AD3d at 121, quoting Senate Introducer's Mem in Support, Bill Jacket, L 2008, ch 223 at 9; Assembly Mem in Support, Bill Jacket, L 2008, ch 223 at 11).

Yet that is precisely what the First Department allowed OCA to do here. OCA's FOIL officer revealed the true basis for the agency's denial: that responding to the request "would have been extremely burdensome" (R. 175). The Order accepted that rationale, denying the NYCLU's claim "on the ground of overbreadth" and citing OCA's assertion that the documents sought are "not stored in any centralized manner, and responding to the FOIL request would involve manually

[12] Consistent with this principle, the Supreme Court found that OCA's "ability to conduct an efficient search of responsive documents" was "not a dispositive consideration" in determining whether the request was reasonably described (R. 5).

reviewing employees' . . . files" (R. 285). The court did so even though OCA conceded that clarifications the NYCLU made to its request in the administrative proceedings "identify a subset of documents" (R. 415). As explained above, this clarified request is conducive to a targeted search because it seeks records that could only have been authored by a small number of senior OCA attorneys (*see* Argument II.A, *supra* at 33–34). And OCA's own statement that issuing guidance like the *Crawford* memorandum is the agency's "normal practice" reflects that OCA understands exactly what documents would be responsive.[13]

This is just one of several recent cases in which the First Department has denied public access to important documents in reliance on agencies' complaints about burden thinly disguised as objections to the specificity of the FOIL request. In *Oustatcher v Clark*, for example, the First Department affirmed the denial of access to records relating to prosecutorial misconduct on the grounds that the petitioner had "failed to describe the documents sought with sufficient specificity" (217 AD3d 478, 479 [1st Dept], *lv denied*, 40 NY3d 908 [2023]). The court's conclusion relied on the agency's assertion that the relevant "information is not stored in any centralized manner" and that responding would require the agency to "manually review[] employees' personnel files" (*id.*). Similarly, in *Jewish Press v Metropolitan*

[13] Mellins, n 1, *supra*.

Transportation Authority, the First Department affirmed the Metropolitan Transportation Authority's denial of a request for "requests for religious accommodations" by employees "during a certain three-year period" (193 AD3d 460 [1st Dept 2021]). The basis for the court's ruling was the agency's representation that "such information is not stored in any centralized manner" and that locating responsive records would require searching employees' "paper and electronic records" (*id.*).

In each of these cases, the First Department allowed agencies to "evade the broad disclosure provisions of [FOIL] upon the naked allegation" that it would be burdensome to respond to the request (*Konigsberg*, 68 NY2d at 249 [citation omitted]). Such an approach not only conflicts with this Court's precedent, but also makes no sense. If all an agency needs to do to dispose of a FOIL request is to assert that the records "are not stored in a centralized manner" and that responding would require the agency to search in more than one place, many requests would be rejected even when they provide enough information to allow the agency to "locate the records in question" (*M. Farbman & Sons*, 62 NY2d at 82–83). Consider, for example, an agency that maintains files relating to employee misconduct in each employee's personnel file, rather than in a central database. If a FOIL applicant requests the employees' misconduct records over a specified time period, the agency knows exactly where it can "locate the records in question": in the personnel files

(*id.*). Although pulling the records may take some time if the agency has many employees, that burden does not detract from the fact that the request is reasonably described.

The First Department's ruling also incentivizes agencies to maintain "inexact record-keeping" practices (*Schenectady Cnty. Soc. for Prevention of Cruelty to Animals, Inc. v Mills*, 74 AD3d 1417, 1420 [3d Dept 2010], *affd* 18 NY3d 42 [2011]). If an agency can discharge its obligation under FOIL to identify records by conclusorily representing that the records are not stored in an easily searchable or centralized manner, the burden to justify non-disclosure would be minimal (*see id.* ["We cannot allow [the agency] to meet [its] burden of proving an exemption under FOIL by relying on [its] own inadequate [record-keeping] practices."]).

Unlike the First Department, other Departments of the Appellate Division have understood that "the requirement of reasonable description" should not be "conflated" with the "separate[] consideration as to whether it would be unduly burdensome for the [agency] to comply with the [FOIL] request" (*Jewish Press, Inc. v New York City Dept. of Educ.*, 183 AD3d 731, 732 [2d Dept 2020]; *Puig*, 212 AD3d at 1026–27 [same]; *see also Aron Law PLLC v City of Rochester*, 218 AD3d 1121, 1122–23 [4th Dept 2023] [holding that a FOIL request was reasonably described and remanding for the agency to consider the distinct question of whether responding to the request would be burdensome]; *Stein v New York State Dept. of*

Transp., 25 AD3d 846, 848 [3d Dept 2006] ["Inasmuch as petitioner's request clearly described the subject matter of the materials sought, the administrative burden of reviewing [responsive records] for relevance fails to establish that the request is insufficiently descriptive."]).

Moreover, other Departments have recognized they should not unquestioningly accept an agency's assertion that its record-keeping practices render it impracticable to locate responsive records with respect to "records stored electronically, given the advent of electronic word search mechanisms" (*Goldstein*, 221 AD3d at 119–20; *see also e.g. Puig*, 212 AD3d at 1026; *Pflaum v Grattan*, 116 AD3d 1103, 1104 [3d Dept 2014] [rejecting agency's claim that a FOIL request was not reasonably described where the agency "offered no evidence to establish that the descriptions provided are insufficient for purposes of extracting or retrieving the requested document from the virtual files through . . . reasonable technological effort"]). Notably, the NYCLU's request seeks only records created since 2011, a period in which email-based communications and electronic record-keeping have been the norm. But the First Department failed to hold OCA to its burden of showing that "the descriptions provided are insufficient for purposes of extracting or retrieving the requested documents from the virtual files through an electronic word search . . . or other reasonable technological effort" (*Goldstein*, 221 AD3d at 119, quoting *Puig*, 212 AD3d at 1026).

Because the NYCLU's clarified FOIL request reasonably describes the records sought, and because the First Department misconstrued the "reasonably described" requirement in ruling otherwise, that ruling should be reversed.[14]

III. THE FIRST DEPARTMENT IMPROPERLY JUSTIFIED ITS DENIAL OF THE NYCLU'S FOIL REQUEST BY DISMISSING THE CONCERNS THAT MOTIVATED THE REQUEST.

Finally, in denying the NYCLU's FOIL request, the Order improperly considered the NYCLU's motives in making the request. A FOIL petitioner's "motive for seeking the records is . . . irrelevant," subject to limited exceptions not applicable here, and "constitutes an improper basis for denying the FOIL request" (*Data Tree, LLC v Romaine*, 9 NY3d 454, 463 [2007]). But, on the face of its Order, the First Department stated its disapproval of what it perceived to be the purpose of the NYCLU's request. That is reversible error.

This Court made clear forty years ago that because "the public is vested with an inherent right to know" under FOIL, "[f]ull disclosure by public agencies is . . . a public right and in the public interest, irrespective of the status or need of the person making the request" (*M. Farbman & Sons*, 62 NY2d at 79–80, quoting *Fink*, 47

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[14] If, however, this Court determines the request is overbroad, the Court should affirm the Order on that basis only and vacate the First Department's alternative privilege ruling (*see Coleman ex rel. Coleman v Daines*, 19 NY3d 1087, 1090 [2012] ["Courts are generally prohibited from issuing advisory opinions or ruling on hypothetical inquiries."]). Doing so would give the NYCLU the option to submit a narrower FOIL request and the parties the opportunity to resolve their privilege contentions in the context of a concrete set of identified documents.

NY2d at 571). "An agency's inquiry into, or reliance upon the status and motive of a FOIL applicant" would be "intrusive[]" and "conflict with the remedial purposes of FOIL" (*Daily Gazette Co. v City of Schenectady*, 93 NY2d 145, 156 [1999]). Therefore, "FOIL does not require that the party requesting records make any showing of need, good faith or legitimate purpose" (*M. Farbman & Sons*, 62 NY2d at 79–80). Applying this principle, this Court in *M. Farbman & Sons* reversed the Appellate Division's denial of a FOIL petition on the grounds that the petitioner was using "FOIL to further in-progress litigation" (*id.* at 79–81).

In the decades since, this Court has reaffirmed the same principle time and again (*see e.g. Daily Gazette Co.*, 93 NY2d at 156 ["Our prior FOIL decisions have consistently rejected the purpose or status of the person making the FOIL request as a factor of critical significance . . . ."]; *Capital Newspapers Div. of Hearst Corp.*, 67 NY2d at 566–67 [same]). In *Data Tree*, this Court reversed a decision denying a FOIL petition filed by "a commercial provider of on-line public land records" seeking "certain land records" (9 NY3d at 459). "Although the [Appellate Division] failed to articulate the specific basis for its holding, it remarked that Data Tree is a commercial enterprise and was seeking the documents for 'data mining' purposes" (*id.* at 463). Even that implied rationale for denying the FOIL petition was sufficient basis for this Court to reverse. In no uncertain terms, this Court reiterated that a

requester's "motive for seeking the records" is almost always "irrelevant" and "constitutes an improper basis for denying [a] FOIL request" (*id.*).

In spite of this case law, the First Department put the NYCLU's motive directly at issue in ruling against the NYCLU. The Order opened by stating—without any factual basis in the record—"Petitioner's concern that [OCA] is privately instructing judges how to interpret and apply substantive law is unfounded, as the court is not bound by [OCA's] interpretations" (R. 285). For the court to consider whether it agreed with the NYCLU's purported motive was improper as a matter of law.

The First Department's statement also misunderstood the concerns prompting the NYCLU's FOIL request. The "premise" of FOIL is that New Yorkers have "an inherent right to know" how our government operates (*M. Farbman & Sons*, 62 NY2d at 79, quoting Public Officers Law § 84). Whether or not there is anything inappropriate about OCA's practice of issuing legal guidance to judges—and whether or not that guidance is binding—it is salutary for courts to provide transparency into the reasoning behind their decisionmaking rather than to withhold it. Courts themselves recognize the prophylactic benefits of judicial transparency. "As with other branches of government, the bright light cast upon the judicial process by public observation diminishes the possibilities for injustice, incompetence, perjury, and fraud" (*Leucadia, Inc. v Applied Extrusion Techs., Inc.*,

998 F2d 157, 161 [3d Cir 1993] [citation omitted]). And even when no impropriety is present, "the very openness of the process should provide the public with a more complete understanding of the judicial system and a better perception of its fairness" (*id.* [citation omitted]).

The Order's statement that "Petitioner's concern . . . is unfounded" (R. 285) highlights why FOIL exists and why public access to OCA's guidance is critical: so that the government cannot deflect concerns about its operations through its own say-so that there is nothing concerning to see (*see Richmond Newspapers, Inc. v Virginia*, 448 US 555, 572 [1980] ["People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing."]). Given this Court's institutional role in overseeing the Unified Court System (*see e.g.* NY Const, art VI, § 28; Judiciary Law § 210), it is particularly important to affirm here that a court's disagreement with the concerns animating a FOIL request cannot justify denying public access to documents that promote court transparency.

CONCLUSION

For these reasons, the NYCLU respectfully requests that the Court reverse and order OCA to produce the requested records.

Dated: February 19, 2025
New York, N.Y.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 500.13 (c) of the Rules of Practice of the Court of Appeals of the State of New York, I certify that the foregoing brief was prepared on a word processor, using 14-point Times New Roman proportionally spaced typeface, double-spaced, with 12-point single-spaced footnotes and 14-point single-spaced block quotations. The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the disclosure statement, table of contents, table of citations, certificate of compliance, and affidavit of service, is 11,673.

Dated: February 19, 2025
New York, N.Y.

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