To Be Argued By: *Robyn L. Rothman*
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Appellate Division, First Department Case No. 2022-05629

Court of Appeals
State of New York

NEW YORK CIVIL LIBERTIES UNION,

Petitioner-Plaintiff-Appellant

-vs-

NEW YORK STATE OFFICE OF COURT ADMINISTRATION

Respondent-Respondent

BRIEF FOR RESPONDENT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

PRELIMINARY STATEMENT 1

BACKGROUND 4

The Original FOIL Request and FOIL Appeal 4

NYCLU's Hybrid Action and CPLR Article 78 Proceeding 10

The Appeal to the Appellate Division, First Department 15

ARGUMENT 18

I. The Denial of NYCLU's FOIL Request on the Ground that the Records Sought Were Not Reasonably Described in Conformity with POL § 89(3) Was Not Affected by an Error of Law 20

A. The FOIL Request Did Not Reasonably Describe the Records Sought 22

B. Contrary to NYCLU's Contention, the Appellate Division Correctly Applied This Court's Precedent in Concluding That NYCLU Had Failed to Reasonably Describe the Records It Sought. 27

C. NYCLU Did Not Clarify its Request During the Administrative Proceedings and Only Attempted to Do So During Litigation. .. 30

II. The Appellate Division Correctly Determined, in an Alternative Holding, that the FOIL Request Was Properly Denied Based on the Attorney-Client Privilege 37

A. Any Documents in Which OCA Counsel's Office Attorneys Provide "Substantive Legal Guidance to Judges" are Protected by the Attorney-Client Privilege 39

B. OCA Has Established the Privileged Relationship Between Counsel's Office Attorneys and the Judiciary 42

CONCLUSION 49

TABLE OF AUTHORITIES

Cases

Bader v. Bove, 273 A.D.2d 466 (2d Dep't 2000) 21

Chrysafis v. Marks, 141 U.S. 2482 (2021) 11

City Freedom Watch, Inc. v. CIA, No. 12-0721 (D.D.C Oct. 5, 2012) 26

Fink v. Lefkowitz, 47 N.Y.2d 567, 572 n. (1979) 25

Garcia v. U.S. Dept of Just., Off. Of Info. & Priv.,
181 F. Supp.2d 356 (SDNY 2002) 26

Gould v. New York City Police Dept., 89 N.Y.2d 267 (1996) 21

Kosmider v. Whitney, 34 N.Y.3d 48 (2019) 21

Lesher v. Hynes, 19 N.Y.3d 57 (2012) 25

Matter of Appellate Advocates v. New York State Dep't of Corrections & Community Supervision, 40 N.Y.3d 547 (2023) 2, 4, 39, 40, 47

Matter of Aron Law, PLLC v. New York City Dept. Of Education,
192 A.D.3d 552, (1st Dept. 2021) 21, 29

Matter of Brown v. DiFiore,
139 A.D.3d 1048, 33 N.Y.S.3d 327 (2016) 35

Matter of Crawford v. Ally et al.,
197 A.D.3d 27, 150 N.Y.S.3d 712 (2021) 5, 8

Matter of Gilbert v. Office of the Governor,
170 A.D.3d 1404 (3d Dep't 2019) 44

Matter of HLV Assocs. v. Aponte, 223 A.D.2d 362 (1st Dep't 1996) 34

Matter of Jewish Press v. New York State Police,
207 A.D.3d 971 (3d Dep't 2022) 22, 29, 37

Matter of Konigsberg v. Coughlin, 68 N.Y.2d 245 (1986) 19, 21, 22, 28

Matter of M. Farbman & Sons v. New York City Health & Hosps. Corp.,
62 N.Y.2d (1984) 19, 22, 28

Matter of Molloy v. New York City Police Dep't,
50 A.D.3d 98 (1st Dep't 2008) 34

Matter of Oustacher v. Clark et al., 217 A.D.3d 478 (1st Dept 2023) 29

Matter of Reclaim the Records v. New York State Dep't of Health,
185 A.D.3d 1268, 128 N.Y.S.3d 303 (2020) 22, 26, 31, 33, 35

Matter of Shooters Committee on Political Educations, Inc. v. Cuomo,
147 A.D.3d 1244 (3d Dep't 2017) 44

Mulgrew v. Board of Educ. of the City School Dist. of the City of N.Y.,
87 A.D.3d 506 (1st Dep't 2011) 20

New York Civil Liberties Union v. New York State Office of Court Administration, 224 A.D.3d 458 (1st Dept. 2024) 17, 29

Roman v. CIA, 2013 WL 210224 (EDNY Jan. 18, 2013) 26

Rossi v. Blue Cross & Blue Shield of Greater New York,
73 N.Y.2d 588 (1989) 40, 44

Town of Oyster Bay v. Preco Chemical Corp.,
74 A.D.2d 825 (2d Dep't 1980) 45

Statutes

5 USC § 522 (3)(a) 25

CPLR § 7803(3) 20, 21

CPLR § 2004 15

CPLR § 2005 15

POL § 84 1

POL § 87 6

POL § 87(2)(a) 10, 39

POL § 89(3) 18, 25

POL § 89(4)(d)(ii)(C) 15

Regulations

22 NYCRR § 1250.10(c) 15

22 NYCRR § 1250.9(b) 15

PRELIMINARY STATEMENT

New York's Freedom of Information Law ("FOIL") reflects our State's commitment to open government and public accountability. By requiring broad disclosure of government records to citizens who request them, FOIL provides a critical mechanism for furthering the public's "right to know the process of governmental decision-making" and its ability to understand and participate in government. Public Officers Law ("POL") § 84.

The Office of Court Administration ("OCA"), which serves not only as a public agency but as an arm of the judiciary, fully supports and deeply respects the values of government openness and transparency that animate FOIL. OCA, however, cannot produce records in response to a FOIL request that does not reasonably describe the records sought. And OCA must not produce records in violation of the equally important public policy of protecting privileged attorney-client communications that foster "free and candid communication between government lawyers and government actors" (*Matter of Appellate Advocates v. New York State Dep't of Corrections & Community Supervision*, 40 N.Y.3d 547, 555

(2023)) — particularly when the government actors are judges receiving confidential legal guidance from counsel to assist them in deciding cases.

The New York Civil Liberties Union ("NYCLU") has framed this case as a battle against judicial branch secrecy. Contrary to NYCLU's characterization, however, OCA is not privately dictating substantive rules of law or the outcomes of individual cases. Nonetheless, based on the misguided premise that OCA "plays a substantive role in judicial decision-making" (Appellant's Brief at 1) — a premise that fails to appreciate the concept of judicial independence and was appropriately rejected by the Appellate Division — NYCLU has invoked FOIL in an effort to uncover "instructions" (*id.* at 31) directing judges how to adjudicate cases. The issue now before this Court is whether the parties have complied with their respective obligations under FOIL with respect to both the language of the request and the determination that the requested records are privileged.

The Appellate Division correctly determined that NYCLU's breathtakingly broad and ill-defined FOIL request did not reasonably describe the records it sought consistent with longstanding precedent from this Court. Indeed, NYCLU's FOIL request failed to reasonably

describe an identifiable category of records, and a search of OCA's records utilizing the descriptors in the request would, therefore, have been impossible. Compliance with NYCLU's request would not only task OCA with finding a needle in a haystack but would require OCA to analyze every needle in a stack of needles to find the perfect needle. This Court should affirm the decision and order of the Appellate Division because OCA's records are simply not searchable by the vague descriptors set forth in NYCLU's FOIL request.

OCA also declined to produce the records NYCLU belatedly clarified it wanted — "OCA-created documents that provided 'instructions or guidance' to judges on 'how to interpret and apply substantive law'" (R. 360) — on the alternative ground that they were subject to the attorney-client privilege, and this determination was likewise proper and not affected by an error of law. OCA established that records similar to the Counsel's Office memoranda proffered by NYCLU as examples of the records it sought are privileged attorney-client communications by citing the exemplar documents themselves, an affidavit from its FOIL Officer, and statutory authority. Consistent with this Court's recent decision in *Matter of Appellate Advocates v. New York*

State Department of Corrections and Community Supervision, 40 N.Y.3d 547 (2023), it is clear from this record that the requested Counsel's Office memoranda are privileged. This Court should therefore affirm the decision of the Appellate Division denying the petition and dismissing the proceeding.

BACKGROUND

The Original FOIL Request and FOIL Appeal

On September 30, 2021, NYCLU submitted a FOIL request of remarkable breadth to OCA's FOIL Officer (R. 33-39). It requested three categories of materials, generated over a period of nearly a decade:

> (1) With respect to federal or state court decisions, all documents created by the OCA (including its Counsel's Office) between January 1, 2011 and the date of your final response to this request and distributed within OCA and/or to judges in the New York State Unified Court System in which the decisions are summarized, analyzed, interpreted, construed, explained, clarified, and/or applied;
>
> (2) With respect to federal or state statutes, regulations, or ordinances, all documents created by the OCA (including its Counsel's Office) between January 1, 2011 and the date of your final response to this request and distributed within the OCA and/or to judges in the New York State Unified Court system in which the statutes, regulations, and ordinances are summarized, analyzed, interpreted, construed, explained, clarified, and/or applied; and

(3) All policies, procedures, criteria, and/or guidance the OCA (including its Counsel's Office) has used since January 1, 2011 in issuing interpretations of federal and state court decisions, statutes, regulations, and/or ordinances.

(R. 34-35)

"Documents," in turn, were defined to "include[] memoranda, directives, orders, instructions, guidance, policies, procedures, rules, regulations, and/or other statements." (R. 34 n. 7).

NYCLU sought this broad swath of vaguely defined documents, it said, because of its "serious concern" that OCA was surreptitiously "instructing judges on how to interpret and apply substantive law" (R. 33-34). This concern was precipitated by NYCLU's discovery of an internal, confidential memorandum submitted by OCA's Deputy Counsel for Criminal Justice to three Deputy Chief Administrative Judges ("the *Crawford* Memorandum"). The *Crawford* Memorandum addressed the Appellate Division, First Department's decision in *Matter of Crawford v. Ally et al.*, 197 A.D.3d 27 (1st Dep't 2021), which required an evidentiary hearing prior to the issuance of a temporary order of protection in certain circumstances. The *Crawford* Memorandum, which was attached to NYCLU's FOIL request, summarized the facts, procedural history, and holding of *Crawford* (R. 34, 36-39). A few weeks later, OCA denied

NYCLU's request on the grounds that the request was overbroad and insufficiently described such that it was impossible to reasonably identify the records sought (R. 43-44). OCA did not have a centralized record-keeping system that would allow it to conduct a targeted search in a manner responsive to the request as written, it affirmed. OCA further explained that the FOIL request was not limited to documents authored by OCA's attorneys, but applied to "numerous divisions" within OCA that could potentially have records covered by the nebulous request (R. 43).

Even if the request were construed to only apply to documents generated and maintained by attorneys in Counsel's Office, OCA continued, the request still failed to "reasonably describe the records in a manner conducive to search" (R. 44). These documents were not "maintained or searchable by a specific subject matter, centrally or by individual attorneys," who worked in two locations (R. 44). And, in any event, the documents were subject to the attorney-client privilege pursuant to CPLR 3101 and the Public Officers Law, and exempt from disclosure on that basis ("POL") (R. 44-45).[1]

[1] OCA's Appeals Officer further determined that Counsel's Office documents were privileged as attorney-work product on the basis that the documents "are the work product of attorneys within Counsel's Office reflecting their research, analysis, advice, opinions, and impressions…". (R. 55).

NYCLU administratively appealed, maintaining that its request was "appropriately circumscribed and specific" (R. 46-48). Nevertheless, NYCLU did attempt to offer some clarification, stating: "Although we submit that the scope of these requests is apparent, by way of further explanation, they cover 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" (R. 47). NYCLU, again, cited the *Crawford* Memorandum as an example of the type of documents sought (R. 47).

NYCLU also contended that OCA had failed to meet its burden of establishing that the records were exempt from disclosure due to the attorney-client privilege (R. 47). On that point, NYCLU argued that OCA had invoked this privilege in a conclusory manner without evidentiary support (R. 47). Still, NYCLU acknowledged that "OCA counsels the court system and judges, which are primarily responsible for adjudicating cases between litigants," but that they were not attorneys and parties "litigating cases themselves" (R. 48).

OCA's FOIL Appeals Officer granted, in part, and denied, in part, NYCLU's appeal.[2] (R.46-48). The Appeals Officer reiterated that the documents sought in categories one and two of the FOIL request did "not reasonably describe records in a manner that permits a search for responsive records" (R. 51). Relying on cases decided by this Court and by all four Departments of the Appellate Division, the Appeals Officer noted that the burden is on the requestor to describe documents sufficiently enough to allow an agency to identify and locate them (R. 51). NYCLU had failed to meet this burden (R. 51-53).

The Appeals Officer went on to explain that a targeted search of OCA's records was not possible because the FOIL request, which sought records created since 2011, failed "to limit the subject matter to a specific time period or jurisdiction" (R. 52). Consequently, any document addressing "hundreds of years" of federal and state law, was implicated (R. 52). The request also failed to "describe or otherwise limit which units

[2] OCA's Appeals Officer granted NYCLU's third request, seeking "[a]ll policies, procedures, criteria, and/or guidance OCA has used since January 1, 2011 in issuing interpretations of federal and state court decisions, statutes, and/or ordinances." In its determination of the administrative appeal, OCA provided the statutory authority that establishes the position of Chief Administrator and that officer's oversight over the administration of the courts (R. 216). This third category of the FOIL request is not at issue on this appeal.

or personnel within OCA may have been involved in creating potentially responsive records" (R. 51). The Appeals Officer stated that FOIL did not require that OCA "interpret" the broad request or to "search several hundred email accounts and file storage, including off-site archives, to read through records to determine which units or personnel may have responsive records" (R. 52). Importantly, OCA would have to review every document, without the aid of any "search terms," to determine whether the document appeared to fall within the amorphous ambit of the FOIL request (R. 52). Simply stated, the FOIL request "failed to reasonably describe records to permit a narrow search" (R. 53).

The Appeals Officer stated that even if the search was limited to documents authored by members of OCA's "Counsel's Office" — which, by its terms, it was not — it still implicated two office locations and dozens of personnel who regularly analyze or interpret the law as part of their duties (R. 52). Even a search "solely of the records of the Counsel's Office would require specific search terms or other guidance to allow us to focus a search" (R. 52). The Appeals Officer explicitly stated that the denial of the request was "not an issue of burden"; it was based on

NYCLU's imprecise description of the documents sought, which prevented OCA from "conduct[ing] a targeted search" (R. 53).

Finally, relying on the attorney-client and work product privileges defined in CPLR 4503 and CPLR 3101(b) and (c), the Appeals Officer also upheld the denial of the FOIL request on the ground that any materials prepared by OCA attorneys that resembled the *Crawford Memorandum* "are exempt from disclosure because such materials are privileged by statute" and exempt from disclosure under POL § 87(2)(a). (R. 55-56).

NYCLU's Hybrid Action and CPLR Article 78 Proceeding

Thereafter, NYCLU commenced a hybrid declaratory judgment action and CPLR Article 78 proceeding (R. 17-166). NYCLU argued that its FOIL request was proper because it provided a time limitation and descriptive terms that identified a document type, source, and subject matter, and because the inclusion of the *Crawford* Memorandum should have provided OCA with a sufficient understanding of the type of records sought (R. 155-156). The FOIL request was, in other words, "sufficiently clear and limited." Nevertheless, NYCLU's characterization of what it was seeking shifted. For the first time, it described its request as seeking "memoranda in which OCA officials are providing instructions to judges

regarding the interpretation or application of case law or statutory law" (R. 158).

And, in a further attempt at clarification, NYCLU introduced (improperly) three other memoranda for the first time (R. 69-83). These documents were: a memorandum authored by a Deputy Counsel, discussing criminal law implications of the 2022-2023 State budget ("the 2022-2023 budget memorandum") (R. 73-81); a memorandum authored by former Chief Administrative Judge Lawrence K. Marks discussing the implications of the Supreme Court's decision in *Chrysafis v. Marks*, 141 U.S. 2482 (2021) ("the *Chrysafis* Memorandum") (R. 69-71); and an Operational Directive authored by Justin Barry, then Chief Clerk of the New York City Criminal Court, which included instructions to the staff of those courts regarding intake processing of certain cases ("Operational Directive") (R. 83-86). Despite its reliance on these very different types of memoranda, NYCLU insisted that it was merely seeking "disclos[ure] [of] a limited set of recently issued memoranda instructing judges on how to interpret or apply the law" (R. 150). NYCLU further contended that OCA had failed to meet its burden of establishing that the documents at issue were privileged in any respect (R. 162, n. 15, 163).

OCA filed an answer and opposition to the petition/complaint, arguing that the denial of the FOIL request was not affected by an error of law because OCA had fully complied with the requirements of the POL (R. 167-217). In a supporting affirmation, OCA's FOIL Officer explained that NYCLU's request, even supplemented by the *Crawford* Memorandum, did not provide OCA with any meaningful direction or limitation on how to target a search (R. 172-176). The *Crawford* Memorandum was simply one example of one type of document sought (R. 173). NYCLU's broad definition of the term "documents" — which was never altered, and which encompassed everything from "memoranda" and "directives" to "policies" and even "other statements" — was too vague and nondescript to enable a focused search of OCA's records. It required the FOIL Officer to make a threshold "interpretation of what type of document the requests sought," and required a further interpretation as to "which offices or units within OCA would maintain similar records" that would be responsive to the FOIL request (R. 173, 174). And since "there were no keywords or additional limitations proffered," the FOIL Officer would have been required to "interpret what type of language was contained within the universe of potential

documents that could be categorized as summarizing, analyzing, interpreting, construing, explaining, clarifying, and/or applying any federal or state court decisions, statutes, ordinances, or regulations without limitation" (R. 173-174). Thus, any attempt to comply with the FOIL request would have required a search of every physical and electronic file of all 900 current OCA employees and an undefined number of former OCA employees going back to 2011, and then parsing through potentially tens of thousands of records to interpret them and determine whether they appeared to be the type of document requested (R. 173-175).

OCA specifically noted that, as the administrative arm of the judiciary, much of its work entailed "summariz[ing], analyz[ing], interpret[ing], construe[ing], explain[ing], clarif[ying] and/or appl[ying]" state and federal court cases, statutes, regulations, and ordinances (R. 176, 235). This is part and parcel of its duty to provide administrative, operational, and educational support to the judges of UCS. Therefore, the vague legal descriptors provided offered no meaningful limitation of, or clearer understanding of, the FOIL request submitted. Moreover, these

functions and communications, when carried out by Counsel's Office, are covered by the attorney-client privilege (R. 178, 237-238).

In an order and judgment entered October 20, 2022, the Supreme Court granted the petition to the extent of directing OCA to comply with NYCLU's FOIL request (R. 5-6). Without elaboration, the court stated that it was not "persuaded" by OCA's position that the request was overbroad (R. 5). The court acknowledged OCA's inability to search for responsive records "by terms or content of documents," but it dismissed any such complication as "not persuasive" (R. 5). The court then found that NYCLU had "sufficiently tailored its request with respect to the documents it seeks." (R. 5). The court's order contained no analysis or determination as to whether documents authored by Counsel's Office (including any documents that might resemble the *Crawford* Memorandum) were protected by a privilege.

The order directed OCA to disclose "all documents directed to Judges and/or Judges' Chambers staff from January 1, 2011, through the present, in which federal or state court decisions, statutes, regulations, and ordinances are summarized, analyzed, interpreted, construed, explained, clarified, and/or applied" (R. 6). The language of the order,

then, effectively amended NYCLU's FOIL request because it omitted the requirement stated in the request that the documents were "created by the OCA."[3]

The Appeal to the Appellate Division, First Department

OCA appealed from the Supreme Court's order and judgment (R. 3-12).[4] OCA argued, again, that it properly denied the FOIL request because it did not reasonably describe the records sought. And, in any event, to the extent what NYCLU was seeking could be discerned by comparison to the *Crawford* Memorandum, any document along those lines would be exempt from disclosure because of the attorney-client privilege (R. 290-338).

NYCLU responded that OCA was attempting to "block public access to guidance that OCA issues to judges about how to interpret and apply

[3] The Supreme Court also narrowed the request by limiting it to documents sent to judges (rather than documents circulated within OCA), but that did not allow for a targeted search of OCA's records. OCA would have been required to review tens of thousands of documents generated since 2011 and determine the recipient of each document.

[4] Due to an inadvertent error, OCA failed to perfect the appeal within sixty days after filing its Notice of Appeal, as required by POL § 89(4)(d)(ii)(C). Consequently, on June 28, 2023, OCA filed a motion to vacate the dismissal of the appeal, to reinstate the appeal, and for an enlargement of time to perfect the appeal pursuant to POL § 89(4)(d)(ii)(C), 22 NYCRR § 1250.9(b), 22 NYCRR § 1250.10(c), CPLR 2004, and CPLR 2005. On August 3, 2023, the Appellate Division granted OCA's motion and ordered that the appeal be perfected for the December 2023 Term.

cases and laws" (R. 348). Seemingly recognizing that its initial FOIL request was overbroad, NYCLU stated that it had tried "to work constructively with" OCA by clarifying in its administrative appeal that it only sought documents that provid[ed] "substantive legal guidance like the *Crawford* memorandum" (R. 349). And "only a small number of senior attorneys within the agency," NYCLU suggested, "could have authored the substantive legal guidance at issue" (R. 350).

With respect to the attorney-client privilege, OCA argued that the records sought by NYCLU — as defined in its belated attempt to clarify its FOIL request — are covered by the attorney-client privilege because those records were authored by attorneys within Counsel's Office whose sole purpose in generating such records is to "serve as legal counsel to the Unified Court System's judicial and non-judicial personnel." (R. 334). In its reply brief, OCA reiterated that the "central function of Counsel's Office is to provide legal counsel to and representation of judges and non-judicial employees." (R. 414).

NYCLU argued that OCA had provided "no authority" or evidence for the proposition that its attorneys served as in-house counsel to judges in the Unified Court System (R. 382-383). NYCLU persisted with this

contention even as it characterized its FOIL request as seeking documents authored by OCA attorneys providing "legal guidance" to judges (R. 367-368). NYCLU concluded by arguing that public policy required disclosure: "Withholding from the public documents that provide instructions or guidance to judges on adjudicating cases that affect the public is antithetical to bedrock principles of democracy and transparency" (*id.* at pp. 38-39).

In a decision and order dated February 8, 2024, the Appellate Division unanimously reversed the order and judgment of the Supreme Court, denied the petition, and dismissed the portion of the proceeding brought pursuant to CPLR Article 78. (R. 284-286). *New York Civil Liberties Union v. New York State Office of Court Administration*, 224 A.D.3d 458 (1st Dept. 2024). The court initially rejected the premise of NYCLU's claim, that OCA was "privately instructing judges how to interpret and apply substantive law," since it "has always been the province of the court to declare what the law is" (R. 285). The court then went on to hold that OCA properly denied NYCLU's FOIL request "on the ground of overbreadth." (R. 285). The court noted, in this regard, that "[i]t does not avail petitioner to argue that their [FOIL] request should

have been interpreted in a much more limited form, where nothing in the language of the original request or the administrative appeal supports such an interpretation." (R. 285). Relatedly, the court concluded that "[u]nder the circumstances presented, respondent made a particularized showing that attempting to comply with this broad request would be impracticable." (R. 285).

As an alternative holding, the Appellate Division determined that, to the extent NYCLU sought documents similar to the *Crawford* Memorandum (R. 36-39), such documents were privileged attorney-client communications and work product and thus were properly withheld on those bases (R. 286).

On October 22, 2024, this Court granted NYCLU's application for leave to appeal.

ARGUMENT

NYCLU seeks reversal of the Appellate Division's decision on the ground that the First Department has consistently misapprehended and inconsistently applied this Court's precedents with respect to the "reasonably described" requirement of POL § 89(3) and the standard for

establishing the attorney-client privilege. NYCLU fails to support its contention that the Appellate Division's decision in this case departed from the principles articulated by this Court in *Konigsberg*, *M. Farbman*, and *Appellate Advocates*. Rather, NYCLU relies upon its improper and belated attempts to clarify its request, seeking an impracticable application of this Court's precedents in its quest for reversal.

The Appellate Division applied the correct standard when it determined that NYCLU's vast request — for over a decade's worth of "documents" created by OCA, ranging from formal memoranda and directives, to "instructions" and "statements," and distributed either internally or to Unified Court System judges, that "summarized, analyzed, interpreted, construed, explained, clarified, and/or applied" state and federal case law, statutes, regulations, and ordinances — was plainly overbroad and did not reasonably describe the records sought because it failed to identify particular records and contained vague terms and descriptors that made it impossible for OCA to conduct a targeted search. *See Matter of M. Farbman & Sons v. New York City Health & Hosps. Corp.,* 62 N.Y.2d 75 (1984); *Matter of Konigsberg v. Coughlin,* 68 N.Y.2d 245 (1986).

The Appellate Division also properly concluded, in the alternative, that the records sought by NYCLU from the OCA — ultimately characterized in the appellate court as memoranda authored by "senior attorneys" that provided "substantive legal guidance to judges throughout the Unified Court System" (NYCLU's App. Div. Br. at 18) — are privileged attorney-client communications. These memoranda are, in fact, indistinguishable from the legal analysis and guidance supplied by counsel to the Board of Parole, which was deemed privileged by this Court in *Appellate Advocates*.

I. The Denial of NYCLU's FOIL Request on the Ground that the Records Sought Were Not Reasonably Described in Conformity with POL § 89(3) Was Not Affected by an Error of Law

In a CPLR Article 78 proceeding, judicial review of an agency's determination of a FOIL request is limited to whether the agency's decision "'was affected by an error of law.'" *Mulgrew v. Board of Educ. of the City School Dist. of the City of N.Y.*, 87 A.D.3d 506, 507 (1st Dep't 2011) (quoting CPLR § 7803(3)). An agency may withhold records if it "articulate[s] particularized and specific justification for not disclosing

requested documents." *Gould v. New York City Police Dept.*, 89 N.Y.2d 267, 275 (1996); *see Kosmider v. Whitney*, 34 N.Y.3d 48, 54 (2019).

FOIL "places the burden on the petitioners to 'reasonably describe' the documents requested so that a search can be made by the agency." *Bader v. Bove*, 273 A.D.2d 466, 467 (2d Dep't 2000) (quoting POL § 89(3)). This statutory requirement is designed to enable agencies to locate and identify the documents sought. *See Matter of Konigsberg v. Coughlin*, 68 N.Y.2d 245, 249 (1986).

A FOIL request that reasonably describes the records sought is one that gives the agency the ability to conduct a directed search. A court will determine that the "descriptions [of the requested records] were insufficient" for this purpose where the agency shows that the descriptors used are incompatible with its record-keeping practices. *Konigsberg,* 68 N.Y.2d at 249. Regardless of the type of filing system it maintains, an agency may deny a FOIL request where the description of the records sought does not enable the agency to conduct a search that would allow it to locate the records with reasonable effort. *See Matter of Aron Law, PLLC v. New York City Dept. Of Education*, 192 A.D.3d 552, 552-553 (1st Dept. 2021); *see also Matter of Jewish Press v. New York State Police,* 207

A.D.3d 971 (3d Dep't 2022). Appellate Division decisions have applied these principles to both electronic and physical filing systems by requiring FOIL requests to contain keywords and descriptors that would enable the agency to locate the records by use of either an electronic search engine or a physical review of the files. *See Reclaim the Records v. New York State Dep't of Health*, 185 A.D.3d 1268, 1272 (3d Dep't 2020).

As noted by this Court in *Konigsberg* and *M. Farbman & Sons*, FOIL's "reasonably described" requirement is designed to permit the agency to both recognize the type of record requested and know where to perform a search for that record. Although a requestor may not have any knowledge of an agency's record keeping practices, its description of the records sought must still be sufficient to ensure that the agency, at the very least, understands and can discern what type of record is being requested. Here, OCA established that NYCLU's FOIL request did not satisfy this standard.

A. The FOIL Request Did Not Reasonably Describe the Records Sought

NYCLU's FOIL request was plainly inconsistent with any notion of what constitutes a reasonable description of the records sought. Indeed,

the FOIL request was inadequate in four key aspects. First, NYCLU expansively defined "document" to encompass "memoranda, directives, orders, instructions, guidance, policies, procedures, rules, regulations, and/or other statements." (R. 34). Because this definition does not provide a meaningful limitation on the type of "documents" to be produced, it potentially implicates tens of thousands of records generated by OCA over the course of more than a decade. Second, the use of the term "OCA," without specifying any of OCA's 40 different divisions or units, seemingly encompasses the entire agency and its approximately 900 current employees who work across multiple divisions and locations. (R. 174-175). Third, the nominal "subject matter" of the records sought was vast: summaries, analyses, interpretations, explanations, clarifications, and applications of both federal and state court decisions, statutes, regulations, and ordinances, potentially implicating a massive quantity of records generated by the administrative arm of the Unified Court System. (R. 34-35). Fourth, contrary to NYCLU's belated attempts at streamlining, its FOIL request was not limited to OCA documents directed to judges. It demanded instead records "distributed ***within*** the OCA ***and/or*** to judges." (R. 34-35 [emphasis added]). Thus, it sought both

purely internal records, as well as documents that were created for broader dissemination to the judiciary. For all of these reasons, NYCLU's FOIL request obviously failed to provide a reasonable, workable description of what was being sought.

The request's lack of an identifiable subject matter, beyond the vague requirement that a sought-after record would contain "summaries, analyses, interpretations, explanations, clarifications, and applications" of decisional and statutory law, is its most glaring deficiency. That "description" by itself would not begin to assist OCA's FOIL officer in formulating any meaningful or effective search parameters. Without any subject matter limitations to narrow the type of statute or case law, the FOIL request provided only the vaguest hints of the sort of documents NYCLU wanted produced.

Offering only a single characteristic of a responsive record — in this case, "legal guidance," as NYCLU belatedly describes it — did little to clarify the matter, given the nature of what OCA does in its capacity as the administrative arm of the judiciary. As OCA's FOIL Officer explained, "there are numerous divisions within OCA" where employees regularly generate documents that apply legal principles as part of their

duties and responsibilities. (R. 43). It is apparent that NYCLU's failure to adequately define the subject matter of the records it sought, or to include any keywords or guiding language such as specified fields of law, or particular judicial decisions or statutes, made a directed search by OCA impossible. Asking OCA to conduct a search based on a broad characteristic, like "legal guidance," fails to offer OCA any assistance in identifying, with reasonable effort, any particular document or subset of documents that would be responsive to the FOIL request.

Throughout its many iterations, the state legislature has consistently modeled FOIL on its federal counterpart, the Freedom of Information Act ("FOIA"). (Senate Mem in Support, Bill Jacket L. 1974-CH-0578; Senate Mem in Support, Bill Jacket L. 1977-CH-0933) Identical to FOIA, the 1977 amendment to the Public Officers Law required a request for records to be "reasonably described." See POL § 89(3); 5 USC § 522 (3)(a). "'FOIL's legislative history…indicates that many of its provisions…were patterned after the Federal analogue. Accordingly Federal case law and legislative history…are instructive when interpreting such provisions." *Lesher v. Hynes*, 19 N.Y.3d 57, 64 (2012) (*quoting Fink v. Lefkowitz*, 47 N.Y.2d 567, 572 n. [1979]). In

interpreting FOIA, federal courts have consistently held that the descriptors used in a request must be specific enough for the agency to be able to locate the records with "reasonable effort." *See City Freedom Watch, Inc. v. CIA,* No. 12-0721, 2012 WL 4753281 at *6 (D.D.C Oct. 5, 2012). This is so because freedom of information laws "[were] not intended to reduce government agencies to full time investigators on behalf of requesters." *Roman v. CIA*, 2013 WL 210224 (EDNY Jan. 18, 2013). And "[a]gencies need not 'take extraordinary measures to find the requested records.'" *Reclaim the Records v. United States Department of State,* No. 23-1650, 2024 WL 4123416 at *4 (SDNY Sept 9, 2024)(*quoting Garcia v. U.S. Dept of Just., Off. Of Info. & Priv.,* 181 F. Supp.2d 356, 368 (SDNY 2002)).

To be clear, though, in denying NYCLU's FOIL request on the ground that the records were not "reasonably described," OCA did not take the position that producing a large number of documents would have been unduly burdensome. Rather, attempting to comply with NYCLU's FOIL request — including its failed and belated attempts to clarify it — would have required herculean efforts just to divine which documents were responsive to the vague and ambiguous terms of the request, and

then to locate documents that were, at least potentially, responsive. As the Appellate Division correctly held, the law does not require OCA to expend such efforts.

B. Contrary to NYCLU's Contention, the Appellate Division Correctly Applied This Court's Precedent in Concluding That NYCLU Had Failed to Reasonably Describe the Records It Sought.

NYCLU misapprehends the reason that OCA indicated that a search under the parameters set forth in NYCLU's FOIL request would have required a review of potentially tens of thousands of records. This assertion was not an attempt to argue that the denial of the FOIL request was justified simply because producing a large number of documents would be burdensome. OCA's point, instead, was that the broad and vague language of the FOIL request would have necessitated a review of the records maintained by the entire agency because it did not provide any language identifying an author, custodian, specific subject matter, or document type. It would have then required a review of all memoranda, directives, orders, instructions, guidance, policies, procedures, rules, regulations, and/or "other statements" mentioning either federal or state decisional or statutory law. And then a further inspection of each

document to try to ascertain if it contained "summaries, analyses, interpretations, explanations, clarifications, and applications" of the decisional or statutory law. And, after all of that, a final determination would need to be made as to whether each potentially responsive record was the type of document NYCLU was interested in. FOIL's reasonable description requirement was meant to avoid sending an agency on such an unfocused fishing expedition.

In concluding that NYCLU's request failed to provide a reasonable description, the Appellate Division applied the proper standard, as articulated by this Court in cases such as *Matter of M. Farbman & Sons v. New York City Health & Hosps. Corp.,* 62 N.Y.2d 75 (1984), and *Matter of Konigsberg v. Coughlin,* 68 N.Y.2d 245 (1986). This Court has consistently held that a FOIL request is not reasonably described when the terms of the request "[are] insufficient for purposes of locating and identifying the documents sought." *M. Farbman*, 62 N.Y.2d at 83; *see also Konigsberg,* 68 N.Y.2d at 249.

The First Department's case law applying the "reasonably described" requirement is entirely consistent with these precedents. *See, e.g.*, *Matter of Aron Law v. New York City Dept. of Educ.*, 192 A.D.3d 552

(1st Dep't 2021) (agency "met its burden of establishing that the descriptions in the FOIL request were insufficient for purposes of locating and identifying the documents sought before denying a FOIL request for reasons of overbreadth" [internal quotation marks omitted]); *Matter of Jewish Press v. Metropolitan Transp. Auth. of the State of N.Y.*, 193 A.D.3d 460, 461 (1st Dep't 2021) (same); *Matter of Oustacher v. Clark et al.*, 217 A.D.3d 478, 479 (1st Dept 2023) (same).

In arguing that the Appellate Division conflated the reasonable description requirement with the burden of producing a voluminous number of documents, NYCLU misinterprets the record and this Court's precedents construing what constitutes a "reasonable description." The Appellate Division's determination that the records requested by NYCLU were not reasonably described was based on the request's lack of specificity as to author and custodian; its overly expansive description of the type of documents sought; and its use of vague descriptors pertaining to subject matter. *See New York Civil Liberties Union v. New York State Office of Court Administration*, 224 A.D.3d at 459. Having determined that the language of the FOIL request did not comply with the POL, the Appellate Division went on to conclude that OCA had shown that due to

a lack of a centralized searchable record-keeping system, any efforts by OCA's FOIL Officer to identify and search for responsive documents would be futile. *Id.*

Thus, the Appellate Division applied the proper standard in determining that the Supreme Court erred in finding that the FOIL request was "sufficiently specific" (R. 6) and granting NYCLU's Article 78 petition.

C. NYCLU Did Not Clarify its Request During the Administrative Proceedings and Only Attempted to Do So During Litigation.

In support of its administrative appeal from the denial of its FOIL request, NYCLU submitted a letter to OCA's FOIL Appeals Officer, which attempted to establish that the grounds for denying the FOIL request were without merit and that the request should have been granted. NYCLU claims that it "clarified" its FOIL request in the course of its administrative appeal, but this claim is based on a single sentence in its appeal letter: "Although we submit that the scope of these requests is apparent, by way of further explanation, they cover 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" (R. 46-47 [footnote omitted]). Putting aside the fact that, even in this sentence, NYCLU denied that any clarification was needed, NYCLU was not entitled to simultaneously call upon the Appeals Officer to overturn the decision denying the FOIL request it had submitted and, in effect, seek a new decision from the original FOIL Officer based on an amended, or "clarified," request. As the Appeals Officer explained in her determination of the appeal, in response to the denial of its FOIL request, NYCLU did not "provide a new request attempting to clarify the records sought. Rather than narrow [its] terms, provide clarification, or enhance specifications to permit a search by OCA, [NYCLU] instead submitted the instant appeal" (R. 51).

The Appeals Officer's analysis echoed the well-reasoned opinion in *Reclaim the Records v. New York State Dep't of Health*, 185 A.D.3d 1268 (3d Dep't 2020), where Presiding Justice Garry, writing for the Appellate Division, Third Department, explained:

> "We reject petitioners' claim that the administrative appeal provided additional descriptive information that should have permitted respondent to satisfy the request. Significantly, the administrative appeal did not specify that it was intended to be treated as a new request or an amendment or clarification of the

> original request — which could, in turn, have resulted in a new determination by respondent and, if necessary, a new administrative appeal. Instead, the administrative appeal merely argued that respondent had erred in denying the request. The purpose of an administrative appeal from a denial of a FOIL request is to challenge the correctness of 'such denial' (Public Officers Law § 89[4][a]). As such, new document descriptions that are provided for the first time in an administrative appeal are not pertinent to the correctness of the original denial (*see generally* 21 NYCRR 1401.7)." *Reclaim the Records*, 185 AD3d at 1272.

Thus, when its FOIL request was denied, NYCLU had two options: It could appeal from that determination, or it could amend or clarify its FOIL request and seek a new determination. NYCLU chose to appeal. Any attempt it may have made to clarify its FOIL request in the letter setting forth its arguments on that appeal was not cognizable, since the only issue before the Appeals Officer was whether the denial of the original FOIL request was proper.

Even if it had been appropriate for the Appeals Officer to take into account, as a clarification, the single sentence in NYCLU's appeal letter purporting to offer a "further explanation" of the scope of the FOIL request, NYCLU, as the Appellate Division appropriately recognized,

clarified nothing. As in *Reclaim the Records*, "little new information was included within the administrative appeal." 185 AD3d at 1272.

Indeed, the sentence in NYCLU's appeal letter that it now cites as "clarification" stated that the first two categories of its request "*cover* 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" (R. 47 [emphasis added]). Yet, this attempted explanation did not alter the language in the original request which indicated that any documents that were distributed to either judges or OCA employees which contained any legal analysis of decisional and statutory law would also be responsive to the request. NYCLU's administrative appeal made no attempt to disclaim or withdraw that portion of the original request. Instead, while it referred to documents containing "instructions and guidance" and cited the *Crawford* Memorandum as an example, NYCLU's appeal letter "also reiterated the same broad range of other document categories that had been previously requested." *Reclaim the Records*, 185 A.D.3d at 1273.

NYCLU then improperly attempted to submit additional clarifications to the Supreme Court in its Article 78 petition that it did

not submit to OCA during the agency proceedings. Doing so during the judicial review of a FOIL denial is too late, of course, because the reviewing court is prohibited from considering materials outside of the administrative record. *See Matter of Molloy v. New York City Police Dep't*, 50 A.D.3d 98, 100 (1st Dep't 2008); *see also Matter of HLV Assocs. v. Aponte*, 223 A.D.2d 362 (1st Dep't 1996). First, NYCLU annexed three other memoranda to the Verified Petition, identified as further examples of the records it sought, that it did not submit to OCA during the agency proceedings (R. 69-86). Second, in discussing these newly included memoranda, NYCLU argued for the first time that it sought only records that "pertain to *recently* enacted laws or recently decided cases." (R. 156). Third, NYCLU asserted in the Supreme Court that it sought memoranda from "OCA *officials*." (R. 158). And, in its reply papers, NYCLU made still more untimely alterations, arguing that it "[sought] only documents that *substantively* explain[ed] … court decisions" authored by a "*small number of senior attorneys"* within OCA [that] create the memoranda at issue." (R. 250). And, as previously mentioned, to be effective, each instance of clarification should have come during the administrative FOIL process or in the form of a new FOIL request, which OCA invited NYCLU to

submit. NYCLU's efforts to advocate for further narrowing and clarification of its request during the judicial proceedings were unavailing.

In the administrative appeal and again during the Article 78 proceeding, NYCLU used the word "cover" in an attempt to, in effect, revise its FOIL request and argue that it was limited to records that were similar to the *Crawford* Memorandum. Yet, arguing that the *Crawford* Memorandum was "covered" by its FOIL request did nothing to narrow or clarify the scope of the request, particularly since NYCLU still failed to limit its request by subject matter and continued to rely on its overly broad definition of "documents." In any event, NYCLU failed to show that, after the supposed "clarification" made within the administrative appeal, the request was limited to only formal memoranda or records similar to the *Crawford* Memorandum.

NYCLU's request was not limited to *only* records analogous to the *Crawford* Memorandum, and its supposed clarification did not alter the definition of the term "documents" that appeared in a footnote to its initial request: "As used here, 'documents' includes memoranda, directives, orders, instructions, guidance, policies, procedures, rules,

regulations, and/or other statements." (R. 34 n.7). In stating that the FOIL request "covers" records like the *Crawford* Memorandum, neither the administrative appeal nor the Article 78 petition actually narrowed the definition of the records sought in NYCLU's overly broad request.

Whatever "clarification" was gained by including the *Crawford* Memorandum was undermined by NYCLU's submission, during the Article 78 proceedings, of two other exemplar documents, which NYCLU claimed were also covered by its request (R. 68-86). At least one of those documents—the Operational Directive—contradicted each and every "clarification" that NYCLU offered (R. 83-86). That document was authored by Justin Barry, who at the time was the Chief Clerk of the New York City Criminal Court, and not an OCA employee and the Operational Directive itself is clear that it was not exclusively directed to judges but also directed towards courthouse staff. As a result, this was not a record "created by" or "distributed within the OCA" and therefore was not, on its face, responsive to the FOIL request.[5]

[5] This document, or any others like it, would not have been subject to FOIL at all, because "judiciary records" are specifically excluded from coverage under FOIL. *See* POL § 86(3). OCA was not given the opportunity to assert and rely on that exclusion in responding to the FOIL request because the Operational Directive was not

Similarly, the *Chrysafis* Memorandum, issued not by senior OCA attorneys but by the former Chief Administrative Judge, was sent to two former Deputy Chief Administrative Judges ("DCAJs") and distributed not only to judges but to non-judicial personnel as well (R. 73-81). The 2022-2023 New York State Budget Memorandum was also directed to the DCAJs (R. 69-71). Each of these memoranda, then, effectively expanded upon the initial request, rather than clarifying it.

Accordingly, the Appellate Division did not err in determining that, to the extent any clarification was effected, or even attempted, neither the language of the original request nor the language introduced by NYCLU in its administrative appeal should be given the narrow interpretation for which NYCLU now advocates.

II. The Appellate Division Correctly Determined, in an Alternative Holding, that the FOIL Request Was Properly Denied Based on the Attorney-Client Privilege

Persisting in its failure to account for judicial independence, NYCLU's arguments concerning the attorney-client privilege reflect a lack of appreciation for how that independence is served by maintaining

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presented until after the commencement of the Article 78 proceeding.

the public's interest in preserving the confidentiality of attorney-client communications which, as here, serve to provide support and assistance in the judicial decision-making process. NYCLU asserts that, in light of the policies served by FOIL — "public accountability" and "[t]he people's right to know the process of governmental decision-making" (POL § 84) — "it is salutary for courts to provide transparency into the reasoning behind their decision-making." Appellant's Brief at 47. In fact, the opposite is true. In reaching a decision in any given case, a judge is accountable only to the law. Judges are not employees of an executive branch agency, receiving instructions from senior management on the implementation of public policy initiatives that citizens have a right to know about. Judges are officers of an independent branch of government, charged with effectuating and protecting the rule of law. In fulfilling that vital role, judges must be free to rely on the legal advice and guidance of counsel, and this exchange of ideas must be unencumbered by the chilling prospect of public disclosure.

As this Court unanimously recognized in a recent decision, while FOIL reflects state policy in favor of government transparency and public access to government records, "the attorney-client privilege exemption

also reflects the state's policy to protect attorney-client communications to foster candid discussion between lawyer and client. This policy is important in the public setting, where society at large benefits immensely from the free and candid communication between government lawyers and government actors. The public is well served when counsel advises government clients on how to lawfully fulfill their public duties." *Matter of Appellate Advocates v. New York State Dep't of Corrections & Community Supervision,* 40 N.Y.3d 547, 555 (2023). This observation firmly supports the Appellate Division's alternative holding in this case that the records sought in NYCLU's FOIL request were exempt from disclosure pursuant to the attorney-client privilege

A. Any Documents in Which OCA Counsel's Office Attorneys Provide "Substantive Legal Guidance to Judges" are Protected by the Attorney-Client Privilege.

Under FOIL, an agency "may deny access to records or portions thereof that . . . are specifically exempted from disclosure by state or federal statute." Public Officers Law § 87(2)(a). Since CPLR 4503(a)(1) codifies the common-law attorney-client privilege, confidential attorney-client communications are exempt from disclosure under FOIL. *See Appellate Advocates,* 40 N.Y.3d at 552.

The attorney-client privilege "fosters the open dialogue between lawyer and client that is deemed essential to effective representation." *Spectrum Systems Int'l Corp. v. Chemical Bank,* 78 N.Y.2d 371, 377 (1991). "[F]or the privilege to apply when communications are made from attorney to client — whether or not in response to a particular request — they must be made for the purpose of facilitating the rendition of legal advice or services, in the course of a professional relationship" (*Rossi v. Blue Cross & Blue Shield of Greater New York,* 73 N.Y.2d 588, 593 (1989)), and "[t]he communication itself must be primarily or predominantly of a legal character." *Spectrum Systems,* 78 N.Y.2d at 378. "In determining whether the privilege attaches, 'the critical inquiry is whether, viewing the lawyer's communication in its full content and context, it was made in order to render legal advice or services to the client.'" *Appellate Advocates,* 40 N.Y.3d at 552, *quoting Spectrum Systems,* 78 N.Y.2d at 379.

After attempting to apply several limitations and refinements to its FOIL request during the litigation of its Article 78 petition, NYCLU, in its argument to this Court, has, at last, settled on a description of the records it seeks: memoranda authored by "senior [OCA] attorneys" who

have "the authority to issue substantive legal guidance to judges throughout the UCS." Appellant's Brief at 33. While this description is still not sufficient to facilitate a directed search, it does establish that the documents sought by NYCLU are, virtually by definition, protected by the attorney-client privilege. That is, any document in which a senior Counsel's Office attorney has provided substantive legal guidance to judges, including the exemplar document submitted by NYCLU with its FOIL request (the *Crawford* Memorandum), necessarily has been created for the purpose of facilitating the rendition of legal advice in the course of a professional relationship, and is primarily or predominantly of a legal character. Thus, the Appellate Division properly concluded, without the need for any in-camera inspection, that the records sought by NYCLU are exempt from disclosure based on the attorney-client privilege.

The "substantive legal guidance" to judges sought by NYCLU (Appellant's Brief at 33) is, in fact, indistinguishable from the privileged legal analysis and "guidance for the [Board of Parole] commissioners on how to exercise their discretionary authority" provided by counsel in the *Appellate Advocates* case. 40 N.Y.3d at 553. In that case, the petitioner sought documents authored by counsel to the Board of Parole and

directed to the Board's commissioners, which contained "counsel's advice regarding compliance with legal requirements concerning parole interviews and parole determinations" and reflected "counsel's legal analysis of statutory, regulatory, and decisional law." *Id.* at 550-551, 552. The materials were generated for the purpose of "provid[ing] guidance on matters relevant to the commissioners' exercise of their discretionary authority." *Id.* at 551. Recognizing that "society at large benefits immensely from the free and candid communication between government lawyers and government actors" (*id.* at 555), this Court determined that these documents were privileged attorney-client communications and thus not subject to disclosure under FOIL. The fact that the agency referred to the documents as "training materials" did not alter this conclusion, because the documents nonetheless conveyed confidential legal advice. *Id.* at 554. The same result logically follows with respect to the documents central to NYCLU's FOIL request.

B. OCA Has Established the Privileged Relationship Between Counsel's Office Attorneys and the Judiciary

Apparently recognizing the force of the foregoing authority, NYCLU does not seek to convince this Court that "the *content*" of the requested records was not privileged. Appellant's Brief at 18 (original

emphasis). Instead, NYCLU insists that OCA has not demonstrated that "an underlying attorney-client relationship existed." *Id*.[6]

Attorneys within OCA Counsel's Office serve as in-house counsel to the judiciary, and thus maintain a privileged relationship with the judiciary. NYCLU effectively conceded as much in its administrative appeal, where it argued: "The OCA counsels the court system and judges, which are primarily responsible for adjudicating cases between litigants and not litigating cases themselves." R. 48. Even now, NYCLU represents that it is seeking documents authored by senior attorneys "with the authority to issue substantive legal guidance to judges throughout the UCS." Appellant's Brief at 33.

Despite these concessions, NYCLU advances the specious argument that OCA Counsel's Office could not possibly have an attorney-client relationship with each individual judge in the Unified Court System. This oversimplification should be rejected. Counsel's Office attorneys, when they provide advice or guidance on legal issues, have a

[6] Notwithstanding the similarity between the role of Counsel's Office in this case and that of counsel in the *Appellate Advocates* case, NYCLU finds an opening to challenge the existence of the attorney-client relationship here, since the petitioner in *Appellate Advocates* did not raise that issue and this Court therefore did not expressly decide it.

confidential relationship with the judiciary as a whole. Like any in-house counsel, these attorneys do not serve an individual client who retains them for representation in a legal proceeding, but instead serve a larger body or entity. *See generally Rossi v. Blue Cross & Blue Shield of Greater New York,* 73 N.Y.2d at 591-594. And government attorneys frequently engage in confidential communications with public officials or entities, not only while engaged in litigation, but also to provide legal advice to guide such officials or entities in, among other areas, the exercise of their discretionary authority, thereby establishing an attorney-client relationship. *Cf., e.g., Matter of Gilbert v. Office of the Governor*, 170 A.D.3d 1404, 1405-1406 (3d Dep't 2019) (emails between Department of Transportation representatives and counsel in the Governor's Office discussing termination of a lease were protected by attorney-client privilege); *Matter of Shooters Committee on Political Educations, Inc. v. Cuomo,* 147 A.D.3d 1244, 1245 (3d Dep't 2017) (communications from deputy counsel at Office of General Services to assistant counsel to the Governor were protected by attorney-client privilege because they were part of the formulation of the government's response to FOIL requests; additional emails among assistant counsel to the Governor, FOIL

attorneys, and a records access officer for the State Police were also covered by attorney-client and attorney work product privileges); *Town of Oyster Bay v. Preco Chemical Corp.,* 74 A.D.2d 825 (2d Dep't 1980) (communications between a town attorney and municipal officers were privileged attorney-client communications).

NYCLU asserts that OCA failed to supply proof that Counsel's Office serves as in-house counsel to the judiciary and that its communications providing the judiciary with legal advice and guidance are protected by the attorney-client privilege. To the contrary, in opposing NYCLU's Article 78 petition, OCA submitted an affidavit of its records access officer — also an attorney in Counsel's Office — who explained that "Counsel's Office serves the Chief Administrative Judge and OCA in an 'in-house' capacity providing legal assistance on all administrative matters affecting the Unified Court System." (R. 178). The creation of Counsel's Office was within the broad authority of the Chief Administrative Judge under Judiciary Law § 212, and certainly the function of providing legal advice and guidance through the distribution of memoranda to the judiciary that explain or summarize statutory and

decisional law is in furtherance of the Chief Administrative Judge's exercise of that authority.

In any event, the need for proof of Counsel's Office's role as in-house counsel to the judiciary has been obviated due to NYCLU's concessions that OCA "counsels the court system and judges" (R. 48) and that documents responsive to its request would be authored by attorneys "with the authority to issue substantive legal guidance to judges throughout the UCS." Appellant's Brief at 33.

Aside from these concessions, the role played by Counsel's Office in producing a document like the *Crawford* memorandum is obvious from the content of the *Crawford* memorandum itself, which consisted of exactly the kind of substantive legal advice in-house counsel would be expected to offer. *See Appellate Advocates,* 40 N.Y.3d at 552 ("It is clear from the documents' content and the context in which they were prepared and presented — i.e. for training and advising commissioners on how to dispatch their duties and obligations in deciding parole applications — that these documents are privileged communications from counsel to client"). Similarly, the content of the 2022-2023 Budget Memorandum, also authored by a Deputy Counsel, reflects that this document was

generated "for the purpose of facilitating the rendition of legal advice or services, in the course of a professional relationship." *Rossi*, 73 N.Y.2d at 593.

In fact, if, as NYCLU contends, OCA Counsel's Office attorneys should not be recognized as in-house counsel to the judiciary, it is not clear what role is being played by those attorneys when they produce a document like the *Crawford* memorandum. Surely, it is not NYCLU's position that the author of the *Crawford* memorandum was an imposter who circulated an unauthorized memorandum containing legal advice to the judges of the Unified Court System. *See Rossi,* 73 N.Y.2d at 593 (attorney-client privilege applied to memorandum where its author "functioned as a lawyer, and solely as a lawyer, for defendant client; he had no other responsibility within the organization. His communication to his client was plainly made in the role of attorney.").

NYCLU's contention that the attorney-client relationship between OCA Counsel and UCS judges can only be established through statute, express agreement, or request for advice, is unavailing. This Court rejected arguments along the same lines in *Appellate Advocates*. *See Appellate Advocates,* 40 N.Y.3d at 553. Imposing such an additional

requirement upon government in-house counsel — or in-house counsel for any entity — in order to establish an attorney-client relationship is not only impractical but would upend this Court's precedent concerning the privileged relationship between government attorneys and the entities they serve. Accordingly, OCA established throughout this litigation that OCA Counsel's Office attorneys maintain a privileged attorney-client relationship with the judiciary.

In short, New York public policy places the utmost importance on the privileged nature of attorney-client communications, which "foster candid discussion between lawyer and client." *Appellate Advocates*, 40 N.Y.3d at 555. This is especially important to the relationship government lawyers share with government clients because "the public is well served when counsel advises government clients on how to lawfully fulfill their public duties." *Id*. Here, the Appellate Division properly applied these principles and correctly held that the records sought by NYCLU are exempt from disclosure based on the attorney-client privilege. For this independent reason, the Appellate Division's decision should be affirmed.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision and order of the Appellate Division.

Dated: New York, New York
April 2, 2025

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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 computer. A proportionally spaced typeface was used as follows:

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Dated: April 2, 2025
New York, New York

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