To be Argued by: TERRY DING
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Court of Appeals
State of New York

NEW YORK CIVIL LIBERTIES UNION,

Petitioner-Appellant,

– against –

NEW YORK STATE OFFICE OF COURT ADMINISTRATION,

Respondent-Respondent.

REPLY BRIEF FOR PETITIONER-APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutional Provisions, Statutes, and Rules

Other Authorities

PRELIMINARY STATEMENT

The Office of Court Administration's brief throws the stakes of this case into sharp relief. OCA admits that it issues "confidential legal guidance . . . to assist [judges] in deciding cases" (Brief for Respondent ["OCA Brief"] at 2). This admission is important, but not remarkable, as the record already attests to the existence of such guidance. What *is* remarkable is OCA's ensuing argument: Even though the guidance affects the adjudication of their rights, New Yorkers have no right to know about it. In fact, OCA asserts, courts should not "provide transparency into the reasoning behind their decision-making" (*id.* at 38).

OCA is wrong as a matter of law and as a matter of policy, and all its arguments for withholding its guidance from the public are meritless. The agency has abandoned its claim of work-product privilege. Its attorney-client privilege argument fares no better because OCA cannot produce any evidence that its guidance was issued to judges within an attorney-client relationship; instead, it asks this Court to write that foundational requirement out of the law. Nor does OCA dispute that agency policies that affect the public, like the guidance here, cannot be privileged. And OCA's claim that New Yorkers should be kept in the dark about the bases for courts' decision-making is contrary to bedrock principles of democratic government.

As for the specificity of the FOIL request, OCA's attempts to complicate the issues cannot distract from the essential fact: OCA knows exactly what the New York

Civil Liberties Union is seeking. The record shows that the guidance at issue could only have been authored by a small number of senior agency attorneys and therefore can be identified through a targeted search. It defies logic for OCA to claim that it does not know what documents the NYCLU is requesting at the same time as it asserts privilege over those documents.

Finally, OCA does not dispute that the First Department erred in considering the NYCLU's motives for making the FOIL request. Under this Court's precedent, that error alone warrants reversal.

Accordingly, the NYCLU respectfully requests that this Court reverse.

ARGUMENT

I. OCA'S BRIEF CONFIRMS THE REQUESTED RECORDS ARE NOT PRIVILEGED.

OCA's responsive brief confirms that the agency's sweeping privilege claim fails on multiple grounds. First, OCA still cannot point to any evidence that it has an attorney-client relationship with Unified Court System ("UCS") judges for purposes of issuing guidance, and instead asks this Court to dispense with that requirement for establishing the attorney-client privilege. Second, OCA does not contest that privilege cannot attach to statements of agency policy that affect the public. Third,

OCA's policy argument that guidance informing the adjudication of cases must be kept concealed from the public only underscores why there is no privilege here.[1]

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

OCA claims attorney-client privilege over documents that it simultaneously insists it cannot identify. Although OCA asserts that the requested records "are, virtually by definition, protected by the attorney-client privilege" (OCA Brief at 41), it cites no authority to support its claim that a party can establish privilege "definitionally" without identifying any documents or establishing that an underlying attorney-client relationship exists. This is because OCA's claim is contrary to well-established law.

"[I]t is beyond dispute that no attorney-client privilege arises unless an attorney-client relationship has been established" and that the party invoking privilege must prove the existence of such a relationship through "independent facts" (*Matter of Priest v Hennessy*, 51 NY2d 62, 68, 70 [1980]). The NYCLU's opening brief explained why OCA's conclusory references to its FOIL officer's affidavit and Judiciary Law § 212 are insufficient to prove it has an attorney-client relationship with UCS judges (*see* Brief for Petitioner-Appellant ["NYCLU Brief"] at 13–18).

[1] OCA has also definitively abandoned its claim of work-product privilege (*see* OCA Brief at 14–16, 20, 37–48 [invoking only the attorney-client privilege]).

Yet OCA's brief repeats the same conclusory references to the same two sources (*see* OCA Brief at 45–46). Neither source establishes the requisite relationship.

The FOIL officer's affidavit states only that "[OCA] Counsel's Office serves the *Chief Administrative Judge and OCA* in an 'in-house' capacity'" (R. 178 [emphasis added]). Even assuming that is true, the affidavit does not identify any basis for an attorney-client relationship with *UCS judges*. At most, it indicates that OCA Counsel's Office has an attorney-client relationship with other staff within OCA. But OCA concedes that judges "are officers of an independent branch of government" (OCA Brief at 38) who are "not considered staff of OCA" (R. 236 n 7; *see* R. 332 [same]; R. 6 [Supreme Court finding that "[j]udges are not employees of" OCA]). This concession is fatal to the agency's "in-house counsel" claim. What is more, none of the functions that the FOIL officer's affidavit ascribes to OCA Counsel's Office involves the issuance of guidance to judges within an attorney-client relationship (*see* R. 178).

Likewise, no provision of Judiciary Law § 212 states that OCA has an attorney-client relationship with UCS judges. Nor does Judiciary Law § 212 authorize OCA to provide those judges with privileged legal guidance shielded from public view (*see* NYCLU Brief at 18).

The cases OCA cites go no further in substantiating its attorney-client privilege claim (*see* OCA Brief at 44–45). OCA repeatedly references *Matter of*

Appellate Advocates v New York State Department of Corrections & Community Supervision (40 NY3d 547 [2023]), but concedes that the existence of an attorney-client relationship was not at issue in that case (OCA Brief at 43 n 6; *see* NYCLU Brief at 18–19). There also appeared to be no dispute over the existence of attorney-client relationships in *Rossi v Blue Cross & Blue Shield of Greater New York* (73 NY2d 588 [1989]) or *Matter of Shooters Committee on Political Education, Inc. v Cuomo* (147 AD3d 1244 [3d Dept 2017]). *Rossi* addressed "[c]ommunications from an attorney to a client"—specifically, "a corporate staff attorney to a corporate officer"—about "the substance of imminent litigation" (73 NY2d at 590, 594). And the emails at issue in *Shooters Committee* were between agency attorneys and staff regarding the agencies' responses to FOIL requests (147 AD3d at 1245–1246).

The remaining two cases OCA cites involved attorney-client relationships arising from specific legal duties. In *Town of Oyster Bay v Preco Chemical Corp.*, the communications were "between a town attorney and municipal officers" (74 AD2d 825, 826 [2d Dept 1980]). The town code specifies that the town attorney is "the Attorney for the Town Board and all of the Town officers in their official capacity" (Town of Oyster Bay Code, Art. VII, § 4-73). And the emails in *Matter of Gilbert v Office of the Governor of the State of New York* were "between representatives of [the Department of Transportation] and counsel in the Governor's Office" concerning the termination of a sublease (170 AD3d 1404, 1405 [3d Dept

2019]). The court determined there to be a privileged relationship because "DOT is an executive agency that was *required* to review with the Governor's Office the potential termination" (*id.* [emphasis added]). By contrast, OCA has not identified any source of legal duty or statutory authority for it to issue legal guidance to judges as part of an attorney-client relationship.[2]

In sum, OCA's assertion that it is "in-house counsel" to UCS judges is nothing more than a "mere statement that [a] party was a 'client,'" which "does not satisfy th[e] burden" to establish an attorney-client relationship (*Priest*, 51 NY2d at 70).

B. OCA's Suggestion that It Need Not Establish the Existence of an Attorney-Client Relationship Is Contrary to Law.

Having failed to establish the requisite attorney-client relationship, OCA now asks this Court to overlook that requirement altogether. In OCA's telling, there is no need to prove such a relationship as to any document that contains legal advice because it could only have been created by an attorney for a client (*see* OCA Brief at 41 ["[A]ny document in which a senior Counsel's Office attorney has provided

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[2] For the first time in this yearslong litigation, OCA contends the NYCLU "effectively conceded" that the agency has an attorney-client relationship with judges (OCA Brief at 43, 46). Not so. OCA cites, out of context, this sentence from the NYCLU's administrative appeal: "OCA counsels the court system and judges, which are primarily responsible for adjudicating cases between litigants and not litigating cases themselves" (R. 48). Here, the NYCLU was pointing out that OCA's invocation of the *work-product* privilege was at odds with the privilege's purpose to safeguard the adversarial process (*see* R. 47–48). The existence of an attorney-client relationship was not even at issue at that time because, as the NYCLU noted, it was not clear that OCA was asserting the attorney-client privilege at all (R. 48 n 3). And, of course, OCA *does* "counsel" (*i.e.*, advise) the court system on certain administrative matters (*see* Judiciary Law § 212), but providing administrative guidance is a far cry from issuing privileged attorney-client communications.

substantive legal guidance to judges . . . necessarily has been created for the purpose of facilitating the rendition of legal advice in the course of a professional relationship"]). That is not the law.

Both statute and case law make clear that the existence of an attorney-client relationship and the provision of confidential legal advice are distinct elements for establishing privilege. CPLR 4503 provides that, to be protected, a communication must be "confidential," "between the attorney . . . and the client," and "in the course of a professional employment" (CPLR 4503 [a] [1]). Consistent with these requirements, this Court has held that for the privilege to apply, there must be (1) a "communication from attorney to client"; (2) "made for the purpose of facilitating the rendition of legal advice or services, in the course of a professional relationship"; and (3) "[t]he communication itself must be primarily or predominantly of a legal character" (*Appellate Advocates*, 40 NY3d at 552 [citation and internal quotation marks omitted]).

Courts have rejected claims of privilege where parties have failed to prove an attorney-client relationship, even when the documents in dispute conveyed legal advice or analysis. For example, in *Matter of Williams & Connolly v Axelrod*, the court determined that a memorandum from an attorney to an agency's associate director was not privileged, even though it contained the attorney's "legal opinions on the State's right to obtain" certain reports and the agency's "compliance with the

Public Health Law" (139 AD2d 806, 807–808 [3d Dept 1988]). The court so concluded because "[s]ufficient facts [were] not alleged to permit a finding that the requisite confidential relationship" existed, explaining that the agency needed to "demonstrate that an attorney-client relationship was established *and* that the information sought to be withheld was a confidential communication made . . . to obtain legal advice or services" (*id.* at 808–809 [emphasis added]; *see also Gilbert*, 170 AD3d at 1405–1406 [in evaluating an attorney-client privilege claim over emails pertaining to legal advice, first assessing whether an attorney-client relationship existed, and then assessing whether the emails' content was privileged]).

Other examples abound of legal advice and analysis that are not communicated as part of an attorney-client relationship. Bar associations provide resources for lawyers that analyze developments in the law and furnish advice on legal practice.[3] Law firms also routinely publish analyses and advice relating to legal

[3] *See e.g.* American Bar Association, *Topics & Resources*, https://www.americanbar.org/topics/ (last accessed Apr. 16, 2025); New York State Bar Association, *Practice Resources*, https://nysba.org/practice-resources/ (last accessed Apr. 16, 2025).

developments.[4] And many legal organizations issue practice advisories containing substantive analysis and guidance on a variety of legal topics.[5]

In short, OCA's suggestion that it need not prove the existence of an attorney-client relationship based on the mere fact that the requested records convey legal guidance is contradicted by black-letter law. It also cannot be reconciled with this Court's admonition that "the attorney-client privilege is—like all privileges—a limitation on the truth-seeking process" and therefore must be "strictly construed" (*Madden v Creative Servs.*, 84 NY2d 738, 745 [1995], citing *Priest*, 51 NY2d at 68). OCA has failed to meet its burden to substantiate its privilege claim.

C. OCA Does Not Dispute that Agency Statements of Policy that Affect the Public Cannot Be Privileged.

As the NYCLU detailed in its opening brief, FOIL requires agencies to disclose "final agency policy" and "instructions to staff that affect the public," reflecting that such materials cannot be privileged (Public Officers Law

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[4] *See e.g.* Gibson Dunn, *Insights*, https://www.gibsondunn.com/insights/ (last accessed Apr. 16, 2025) ("expert analysis, timely advice, and unique industry insights" on various legal topics); Arnold & Porter, *News & Perspectives*, https://www.arnoldporter.com/en/perspectives/all (last accessed Apr. 16, 2025) ("Advisories," "Publications," and "Blogs" providing analysis and advice on various legal topics); Covington, *News and Insights*, https://www.cov.com/en/news-and-insights (last accessed Apr. 16, 2025) ("Memorand[a] and Report[s]," "Blog[s]," and "Article[s]" providing analysis and advice on various legal topics).

[5] *See e.g.* American Immigration Council, *Practice Advisories*, https://www.americanimmigrationcouncil.org/practice-advisories (last accessed Apr. 16, 2025); New York State Defenders Association, *Criminal Defense Resources*, https://www.nysda.org/page/CrimDefResource (last accessed Apr. 16, 2025); International Refugee Assistance Project, *Legal Practitioner Resources*, https://refugeerights.org/news-resources-2/legal-practitioner-resources (last accessed Apr. 16, 2025).

§ 87 [2] [g] [ii], [iii]; *see* NYCLU Brief at 21–23). The NYCLU also pointed out that the OCA guidance at issue sets forth policies that affect the public (*see* NYCLU Brief at 21–22). Given that OCA offers no response to these points (*see generally* OCA Brief), this is an independent reason to reject the agency's privilege claim.

D. OCA's Contention that Legal Guidance Informing the Adjudication of New Yorkers' Rights Should Be Concealed from the Public Is Anathematic to the Public Interest and Cannot Cure OCA's Failure to Establish Privilege.

The NYCLU has argued throughout this litigation that there is an overriding public interest in the disclosure of the requested records, even assuming the technical requirements of privilege are met (*see* NYCLU Brief at 28–30; *Spectrum Sys. Intl. Corp. v Chemical Bank*, 78 NY2d 371, 380 [1991] ["[W]e have several times noted that the privilege may give way to strong public policy considerations."]). OCA had never previously contested this point (*see* NYCLU Brief at 28). Now, however, OCA declares that policy considerations cut the other way—that it is in the public interest to keep New Yorkers in the dark about guidance that courts consider in adjudicating their rights. This contention is misguided for several reasons.

First, OCA's argument is unavailing because policy considerations cannot make up for a party's failure to establish the elements of privilege. "[W]here strong public policy requires disclosure" of information that is technically privileged, that privilege may "yield" (*Priest*, 51 NY2d at 69). OCA, however, seeks the opposite—to rely on policy arguments to *withhold* otherwise public information and to

overcome its failure to establish privilege in the first place. No authority allows policy arguments to be used in this way.

Second, the policy considerations discussed in *Appellate Advocates* do not help OCA (*see* OCA Brief at 39 ["[S]ociety at large benefits immensely from the free and candid communication between government lawyers and government actors"], quoting *Appellate Advocates*, 40 NY3d at 555). This Court stated clearly that those considerations were grounded in "the state's policy" to "foster candid discussion *between lawyer and client*" (*Appellate Advocates*, 40 NY3d at 555 [emphasis added]). That rationale does not apply here because OCA did not issue its guidance as an attorney to a client (*see* Argument I.A, *supra* at 3–6). Further, *Appellate Advocates* addressed guidance from attorneys to commissioners within the Board of Parole (40 NY3d at 552). That is a very different context to agency guidance informing the decision-making of judges, whom OCA recognizes "are officers of an independent branch of government, charged with effectuating and protecting the rule of law" (OCA Brief at 38).[6]

[6] OCA does not dispute that keeping its guidance secret would not advance the purpose of the attorney-client privilege, which is "to protect the integrity and vitality of the adversarial system" (NYCLU Brief at 28, quoting *Corcoran v Peat, Marwick, Mitchell & Co.*, 151 AD2d 443, 445 [1st Dept 1989]). Federal courts have declined to apply the attorney-client privilege to legal memoranda wherein the agency was not "acting in a capacity similar to a private party seeking advice to protect personal interests" (*Lee v Fed. Deposit. Ins. Corp.,* 923 F Supp 451, 457–458 [SD NY 1996] [internal quotation marks omitted]).

Third, OCA's position—remarkable on its face—is contrary to bedrock principles of FOIL and government transparency (*see Cuomo v New York State Commn. on Ethics & Lobbying in Govt.*, — NY3d —, 2025 NY Slip Op 00902, *4 [2025] ["[T]he integrity of our constitutional design depends on the public's trust in government."]). OCA admits that "judges receiv[e] confidential legal guidance" from OCA "to assist them in deciding cases" (OCA Brief at 1–2; *see id.* at 38 [guidance "serve[s] to provide support and assistance in the judicial decision-making process"]; R. 296 [guidance "inform[s] members of the judiciary in their decision-making processes"]). Yet OCA rejects the notion that "citizens have a right to know about" this guidance (OCA Brief at 38). Indeed, in response to the NYCLU's observation that "it is salutary for courts to provide transparency into the reasoning behind their decision-making," OCA proclaims "the opposite is true" (*id.*, quoting NYCLU Brief at 47).

OCA is simply wrong that courts should *not* provide transparency into the reasoning behind their decision-making. The very premise of FOIL is that the people have a "right to know the process of governmental decision-making and to review the documents . . . leading to determinations" (Public Officers Law § 84). And "the primary purpose of a judicial opinion is to inform the participants and any reviewing court of the rationale underlying the court's decision" (*Levy v Endicott*, 26 Misc 3d 1203[A], 2009 NY Slip Op 52651[U] *2, n 2 [Sup Ct, NY County 2009]). In fact,

"the whole work done by the judges constitutes the authentic exposition and interpretation of the law, which . . . is free for publication to all" (*Georgia v Public.Resource.Org, Inc.*, 590 US 255, 264 [2020] [citation omitted]). Put another way, because the law "bind[s] every citizen," "all should have free access to its contents" (*id.* at 264–265 [citation and internal quotation marks omitted]). It benefits no one for courts to interpret law and decide cases based on undisclosed sources of authority. Here, without access to—or even awareness of—the guidance OCA issues to assist judges in interpreting and applying the law, litigants in New York cannot make any arguments about the guidance in their cases (*see* NYCLU Brief at 26).

OCA's bid to use privilege to keep its guidance concealed from the public, even while admitting its impact on the public, cannot be squared with this Court's teaching that "official secrecy is anathematic to our form of government" (*Matter of Madeiros v New York State Educ. Dept.*, 30 NY3d 67, 73 [2017], quoting *Matter of Fink v Lefkowitz*, 47 NY2d 567, 571 [1979]). It should be rejected.

II. THE NYCLU HAS REASONABLY DESCRIBED THE RECORDS SOUGHT.

OCA also has not met its burden to establish that it is unable to identify the requested records (*see Matter of Konigsberg v Coughlin*, 68 NY2d 245, 249 [1986] ["[T]he agency had to establish that the [FOIL] descriptions were insufficient for purposes of locating and identifying the documents sought"] [citation and internal quotation marks omitted]; R. 312 [OCA recognizing its burden]). For all of OCA's

efforts to confuse the issue, the facts are straightforward: In response to OCA's objections to the original FOIL request, the NYCLU's administrative appeal clarified the request, and this clarified request is more than sufficient to allow OCA to identify responsive records.

A. The NYCLU's Clarified Request Reasonably Describes the Records Sought and Allows OCA to Conduct a Targeted Search.

The NYCLU's clarified request unambiguously describes the records it seeks: "[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 further help OCA understand what records are responsive, the NYCLU appended the *Crawford* memorandum as "an example of the type of documents sought" (R. 47). The clarified request is "circumscribed as to subject matter, groups of individuals to whom they pertained, and time period" (*Matter of Goldstein v Incorporated Vil. of Mamaroneck*, 221 AD3d 111, 120 [2d Dept 2023]; *see* NYCLU Brief at 32).[7] The Supreme Court recognized that the request was "sufficiently tailored" (R. 5).[8] Crucially, so has OCA (*see* R. 415 ["NYCLU's clarifications to date do identify a subset of documents"]).

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[7] As the NYCLU pointed out in its opening brief, its original FOIL request was also reasonably described because it was limited by subject matter, time period, author, and recipient, and appended the *Crawford* memorandum as an exemplar (*see* NYCLU Brief at 32 n 11).

[8] OCA contends that, in granting the NYCLU's FOIL claim, Supreme Court's order "effectively amended NYCLU's FOIL request" (OCA Brief at 14–15 & n 3). As the NYCLU has explained, this contention relies on an unreasonable reading of the order (*see* R. 374–375).

Because it is tailored and circumscribed, the request allows OCA to identify responsive records. Courts have found FOIL requests to be "reasonable and sufficiently detailed to enable [an agency] to locate and identify the requested records" when the records could only have come from a limited set of sources (*Matter of Puig v New York State Police*, 212 AD3d 1025, 1027 [3d Dept 2023] [noting that the requested disciplinary records of state troopers in three counties were "confined to two identifiable troops"]). And here, the record shows that the requested guidance to judges could only have been authored by a small number of senior OCA attorneys (*see* NYCLU Brief at 33–34). As a result, OCA can identify the documents through a limited, targeted search—for example, by asking senior attorneys to produce the guidance they have authored (*see id.*). To date, OCA has not given any reason why it cannot do this (*see generally* OCA Brief).

But instead of accepting the clarified request and undertaking a search, OCA has spent three years litigating this case and making it appear much more complicated than it is. The agency's latest brief continues to invoke the specter of an array of procedural and linguistic complications, all of which are illusory.

To begin, OCA now takes the position that the NYCLU was not permitted to clarify its request in the administrative appeal. Rather, OCA asserts, the NYCLU had only "two options": appeal the denial of its original request or "amend or clarify its FOIL request and seek a new determination" (OCA Brief at 32). The Court need not

consider this argument because OCA has not raised it before (*see* R. 320 [OCA previously acknowledging that "[a] requestor is permitted to clarify its FOIL request . . . during the administrative FOIL process"]; *Henry v New Jersey Tr. Corp.*, 39 NY3d 361, 367 [2023]). In any event, it is meritless. This Court has never held that FOIL petitioners may not clarify or amend their request in an administrative appeal, and lower courts have allowed petitioners to do just that (*see e.g. Matter of Sell v New York City Dept. of Educ.*, 135 AD3d 594, 595 [1st Dept 2016]; *Matter of Lane v County of Suffolk*, — AD3d —, 2025 NY Slip Op 01368, *1 [2d Dept 2025]). In the only case OCA cites in support of its position, the court did not hold that the petitioner could not amend or clarify its request in an administrative appeal, merely that "the administrative appeal did not specify that it was intended to be treated as a new request or an amendment or clarification" (*Matter of Reclaim the Records v New York State Dept. of Health*, 185 AD3d 1268, 1272 [3d Dept 2020]).

Accepting OCA's rigid rule would make the FOIL process less efficient for everyone. The FOIL regulations expressly direct agencies to "assist persons seeking records to identify the records sought" by explaining how records are maintained and "ascertain[ing] the nature of records of primary interest" (21 NYCRR 1401.2 [b] [2]–[3]). In keeping with the letter and spirit of these regulations, FOIL requesters and agencies frequently engage in constructive dialogue during the administrative process to facilitate the completion of requests. But the novel rule OCA proposes

effectively requires clarifications or amendments to be submitted as new FOIL requests rather than allowing them to be made in the existing administrative proceeding. So, each time a requester wants to clarify or amend their request, they must start the entire FOIL process anew. This would severely hamper the collaborative resolution of requests and create perverse incentives for agencies to resist engaging with requesters, all in contravention of FOIL's command for the "government [to be] responsive and responsible to the public" (Public Officers Law § 84).

Next, OCA asserts that the NYCLU's administrative appeal did not clarify the scope of the request. To the contrary, the clarifications cabined the request in two concrete ways. First, in response to questions raised by OCA, the NYCLU explicitly excluded "documents that merely '*implicate* a federal or state court decision, statute, regulation, or ordinance'" (R. 46, quoting R. 44). Rather, the documents must "contain instructions or guidance" regarding the interpretation or application of substantive law (R. 47). Second, the NYCLU specified that the instructions or guidance must be directed to judges, thus eliminating any purely internal OCA documents (*id.*).[9]

[9] OCA purports to be unclear on whether the request includes documents "not exclusively directed to judges but also directed towards courthouse staff" (OCA Brief at 36–37). Such documents plainly are within the scope of the request because they were directed to judges.

OCA then attempts to inject ambiguity where none exists by isolating two words in the request: "cover" and "documents" (OCA Brief at 33–36). According to OCA, the use of "cover" expands the request beyond "records similar to the *Crawford* Memorandum" (*id.* at 35–36). The surrounding context dispels this misimpression, as the NYCLU stated specifically that the *Crawford* memorandum exemplified "the type of documents sought" (R. 47). Nowhere did the request suggest that documents dissimilar to the memorandum would be responsive.[10]

Nor is the term "documents" ambiguous. OCA has repeatedly protested that it was unreasonable for the NYCLU to define "documents" to include "memoranda, directives, orders, instructions, guidance, policies, procedures, rules, regulations, and/or other statements" (R. 313; *see also e.g.* R. 173–174; R. 233). In response, the NYCLU has repeatedly explained that it defined "documents" in this way simply to indicate that, regardless of the different titles or labels that OCA may apply to similar documents, the NYCLU's request focuses on the *substance* of the documents (*see* R. 149 n 6; R. 252 n 4; R. 368–369). Put differently, "OCA's guidance on the *Crawford* decision would be responsive to the NYCLU's request whether the agency had

[10] The NYCLU recognizes that one of the memoranda it filed with its Article 78 petition was erroneously included; that memorandum was authored by Justin Barry, who later became Executive Director of OCA but at the time was Chief Clerk of the New York City Criminal Court (*see* R. 83–86). The NYCLU has not cited the memorandum as an exemplar since OCA pointed out this discrepancy.

chosen [to] label it as a 'memorandum' or not" (R. 368). FOIL proceedings would become very difficult if the word "documents" were deemed ambiguous.

Finally, OCA claims the NYCLU made belated clarifications to its request during this litigation (*see* OCA Brief at 33–35). The NYCLU has already refuted this claim (*see* NYCLU Brief at 37–38; *see also* R. 360–363 [NYCLU's First Department brief addressing same claim]), to which OCA makes no response. Helpfully illustrating that OCA's contention is unfounded, the agency points to this description in the NYCLU's First Department brief as a belated clarification: "OCA-created documents that provided 'instructions or guidance' to judges on 'how to interpret and apply substantive law'" (OCA Brief at 3, quoting R. 360). This description is a *direct quote* from the NYCLU's administrative appeal (*see* R. 360, quoting R. 46–47).

OCA's acontextual parsing of linguistic minutia should not obscure the essential point: All a FOIL request needs to do is "reasonably describe[]" documents so that the agency can "locate the records in question" (*Konigsberg*, 68 NY2d at 249). Or, as OCA put it, a request is proper if the agency "can discern what type of record is being requested" (OCA Brief at 22). The NYCLU's clarified request more than meets this standard. OCA's own statements show that it knows full well what records are responsive (*see e.g.* R. 53 n 2 [OCA's denial of administrative appeal acknowledging the clarified request sought OCA documents providing "judicial

instructions, interpretations and application of substantive law"]; R. 22 [OCA spokesperson stating it was the agency's "normal practice to issue" guidance like the *Crawford* memorandum]).

B. OCA's Arguments Illustrate the Problems with Conflating the "Reasonably Described" Requirement with the Burden of Searching for Records.

OCA argues the First Department's Order correctly applied precedent in denying the NYCLU's request on "reasonably described" grounds (*see* OCA Brief at 27–30). In fact, OCA's arguments illustrate that the Order not only conflated the "reasonably described" requirement with the burden of searching for responsive records, but also accepted too readily the agency's cursory claims of burden.

OCA insists it "did not take the position that producing a large number of documents would have been unduly burdensome" (*id.* at 26). This is contradicted by its FOIL officer, who stated in his affidavit that responding to the NYCLU's request "would have been extremely burdensome" (R. 175). OCA claims what it meant was that the request "necessitated a review of the records maintained by the entire agency" (OCA Brief at 27)—"every physical and electronic file of all 900 current OCA employees and an undefined number of former OCA employees" (*id.* at 13). This, too, is belied by the evidence. Given that only senior OCA attorneys could have authored legal guidance to judges (*see* Argument II.A, *supra* at 15), the agency's

claim that it would have to search every record ever generated by every employee is a dramatic overstatement.

Nevertheless, the Order accepted OCA's rote assertion that responsive documents are "not stored in any centralized manner, and responding to the FOIL request would involve manually reviewing employees' . . . files" (R. 285 [alteration in original]). This conclusion is at odds with this Court's holding that agencies "cannot evade the broad disclosure provisions of [FOIL] upon the naked allegation that the request will require review of thousands of records" (*Konigsberg*, 68 NY2d at 249 [citation omitted]).

The New York Legislature crafted FOIL to "encourage every unit of government to make a good faith effort to comply with [its] requirements" (Senate Introducer's Mem in Support, Bill Jacket, L 2006, ch 492 at 5). Allowing agencies to deny FOIL requests based on cursory claims that responsive records are "not stored in any centralized manner" (R. 285) would frustrate FOIL's purpose and incentivize agencies to maintain inexact recordkeeping practices (*see* NYCLU Brief at 42–43). The workings of the federal Freedom of Information Act ("FOIA") confirm that the Legislature could not have intended FOIL's requirements to be so easily circumvented (*see* OCA Brief at 25 [agreeing that "[f]ederal case law and legislative history [on FOIA] . . . are instructive when interpreting" FOIL] [second alteration in original], quoting *Matter of Lesher v Hynes*, 19 NY3d 57, 64 [2012]).

As to FOIA, Congress gave the "explicit admonition that agencies are not to use the 'reasonably describes' requirement 'to obstruct public access to agency records'" (*Natl. Sec. Counselors v Cent. Intelligence Agency*, 898 F Supp 2d 233, 277 [DDC 2012], *affd* 969 F3d 406 [DC Cir 2020], quoting S Rep 93-854, 93d Cong, 2d Sess at 10). This means that when "an agency becomes reasonably clear as to the materials desired, FOIA's text and legislative history make plain the agency's obligation to bring them forth" (*Truitt v Dept. of State*, 897 F2d 540, 544 [DC Cir 1990]).

The request here is sufficiently specific to make OCA reasonably clear as to the documents requested. The NYCLU asks only that OCA work in good faith to produce them.[11]

III. OCA DOES NOT DISPUTE THAT THE FIRST DEPARTMENT IMPROPERLY CONSIDERED THE NYCLU'S MOTIVES FOR MAKING ITS FOIL REQUEST.

Finally, OCA does not dispute that the First Department committed reversible error in considering the NYCLU's purported motives for making its FOIL request (*see* NYCLU Brief at 45–48). In fact, OCA admits that the Order on its face "rejected the premise of NYCLU's claim, that OCA was 'privately instructing judges how to interpret and apply substantive law'" (OCA Brief at 17, quoting R. 285). Such

[11] If, however, this Court concludes that the NYCLU's request is not reasonably described, OCA does not dispute that the appropriate remedy would be for the Court to affirm on that basis only and to vacate the First Department's alternative privilege ruling (*see* NYCLU Brief at 45 n 14).

consideration of a FOIL petitioner's "motive for seeking the records . . . constitutes an improper basis for denying the FOIL request" (*Matter of Data Tree, LLC v Romaine*, 9 NY3d 454, 463 [2007]). Therefore, reversal is warranted (*see e.g. id.*; *Matter of M. Farbman & Sons v New York City Health & Hosps. Corp.*, 62 NY2d 75, 79–81 [1984]).

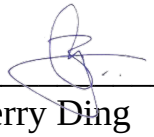
CONCLUSION

The NYCLU respectfully requests that the Court reverse and order OCA to produce the requested records.

Dated: April 17, 2025
New York, N.Y.

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION FOUNDATION



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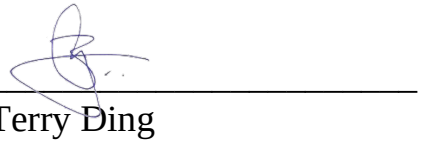
CERTIFICATE OF COMPLIANCE

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 5,600.

Dated: April 17, 2025
New York, N.Y.



Terry Ding

COURT OF APPEALS
STATE OF NEW YORK

NEW YORK CIVIL LIBERTIES UNION, *Petitioner-Appellant,* v. NEW YORK STATE OFFICE OF COURT ADMINISTRATION, *Respondent-Respondent.*	Court of Appeals Docket No. APL-2024-00143 **Affirmation of Service**

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss:

I, LOURDES CHAVEZ, being duly sworn, depose and say that:

1. I am not a party to the above-captioned action, am 18 years of age or older, and am an employee of the New York Civil Liberties Union.

2. On the 17th day of April, 2025, I served three true and correct copies of the following documents on each party in the above-captioned matter, namely, the New York State Office of Court Administration and Chief Administrative Judge Joseph A. Zayas:

   a. Reply Brief for Petitioner-Appellant; and

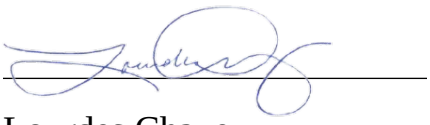
   b. Affirmation of Service of the Reply Brief on all parties.

3. The method of service was by USPS Overnight Mail to the attorneys authorized to accept service for the parties in this action.

4. The names of the individuals served and the address at which service was made on the New York State Office of Court Administration and the Chief Administrative Judge are as follows:

Robyn L. Rothman
David Nocenti
OFFICE OF COURT ADMINISTRATION
NEW YORK STATE UNIFIED COURT SYSTEM
25 Beaver Street, 10th Floor
New York, N.Y. 10004

I affirm this 17th day of April 2025, under the penalties of perjury under the laws of New York, which may include a fine or imprisonment, that the foregoing is true, and I understand that this document may be filed in an action or proceeding in a court of law.



Lourdes Chavez