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Appellate Division–Third Department Case No. 531737

# Court of Appeals
*of the*
# State of New York

APPELLATE ADVOCATES,

*Petitioner-Appellant,*

– against –

NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION,

*Respondent-Appellee.*

## BRIEF OF NEW YORK COALITION FOR OPEN GOVERNMENT AND UNIVERSITY AT BUFFALO SCHOOL OF LAW CIVIL RIGHTS AND TRANSPARENCY CLINIC AS AMICUS CURIAE IN SUPPORT OF APPELLANT

ERIN GOLDBERG, ESQ.
CIVIL RIGHTS AND TRANSPARENCY CLINIC
*Attorney for Amicus Curiae New York Coalition for Open Government, Inc.*
507 O'Brian Hall
University at Buffalo School of Law
Buffalo, New York 14260
(716) 645-2167
erg6@buffalo.edu

CP COUNSEL PRESS (800) 4-APPEAL • (512809)

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 500.1(f) of the Rules of Practice of the Court of Appeals of the State of New York, the New York Coalition for Open Government states as follows:

The New York Coalition for Open Government is a not-for-profit organization that has no parents, subsidiaries, or affiliates.

## STATEMENT OF RELATED LITIGATION

Pursuant to Rule 500.13(a) of the Rules of Practice of the Court of Appeals of the State of New York, the New York Coalition for Open Government states that, as of the date of the completion of this Brief, there is no related litigation pending before any court.

## INTEREST OF THE AMICUS CURIAE

New York Coalition for Open Government (NYCOG) is a non-partisan, non-profit organization dedicated to government transparency. NYCOG works to ensure that all people have full access to government records and proceedings to foster responsive and accountable government, stimulate civic involvement, and build trust in government. NYCOG conducts Freedom of Information audits, accesses government records to conduct its watchdog function, and uses its expertise to propose legislative improvements to FOIL.

New York Coalition for Open Government files this brief pursuant to Rule 500.23 of the Rules of Practice of the Court of Appeals of the State of New York upon the accompanying motion for leave to file an amicus curiae brief, urging reversal.

## PRELIMINARY STATEMENT

This appeal concerns a Freedom of Information Law (FOIL) request from the petitioner, Appellate Advocates, to Respondent New York State Department of Corrections and Community Supervision (DOCCS). The FOIL request sought materials regarding the activities of the Board of Parole (BOP), and their decision-making, including the eleven records that are still at issue, which contain BOP's counsel's interpretations of the statutes and regulations of the laws governing those decisions. (Respondents Brief at 1). BOP's training materials should not be exempt from disclosure based on the intra-agency exemption or attorney-client privilege. The intra-agency exemption does not apply to an agency's final policy or instructions to staff that affect the public. Attorney-client privilege requires stricter scrutiny when a government agency is the client, as the government has a unique responsibility to the public.

## INTRODUCTION

The New York State Department of Corrections and Community Supervision argued, and the Third Department agreed, that the requested materials were properly withheld as records protected by attorney-client privilege and the intra-agency exemption. (Petitioners Brief at 11). DOCCS argues that these records contained professional knowledge of the statutory, regulatory, and decisional case law that governs the responsibilities of BOP. However, the documents requested contain materials that fall squarely within the purposes of FOIL and not within any of the statutory exemptions.

Provisions of FOIL are to be liberally construed to grant the public maximum access to governmental records. (*Stoll ex rel. Maas v New York State Coll. of Veterinary Med. at Cornell Univ.*, 94 N.Y.2d 162 [1999]). The documents at issue in this case are training materials developed by agency attorneys that have no direct connection to specific litigation. Rather, the documents contain policy that is to be implemented in training staff and board members. Attorney interpretations of the law are used to formulate the working law and final policy of the agency, making it available to the public under FOIL. Allowing attorney-client privilege and the intra-agency exemption to apply here would expand the exemptions to FOIL beyond their intended purpose.

For these reasons, the Third Department erred in its holding. Withholding these documents undermines and contradicts the purposes of FOIL, endangers our democracy, and creates unnecessary secrecy in the government. We join Petitioners in their request for reversal.

## ARGUMENT

When the Division of Parole was first consolidated with the Department of Corrections in 1971, the primary purpose was to better coordinate the efforts of the two agencies to reduce recidivism. (Department of Corrections and Community Supervision, About the Board, https://doccs.ny.gov/about-board [accessed May 22, 2023]). The primary role of the New York State Board of Parole today is to determine the degree of an incarcerated individual's liberty. BOP can grant community supervision, revoke community supervision, or discharge individuals from their sentence. According to BOP, its goal is to act in the best interest of society. (*Id.*). Therefore, with the public interest are at the forefront of BOP's priorities, it follows that the public should have access to the necessary information to accurately understand BOP's responsibilities and the role it plays in our society.

### I. The purposes of FOIL would be thwarted if the requested documents are deemed exempt from disclosure.

New York State's Freedom of Information Law enshrines the public's legal "right to know" about the government's actions. (Freedom of Information Law § 84). FOIL's creation and enforcement supports the foundational idea that official secrecy is "anathematic to our form of government." (*Matter of Abdur–Rashid v New York City Police Dept.,* 31 NY3d at 224–25 (quoting *Matter of Fink v Lefkowitz,* 47

NY2d 567, 571)); *see Matter of Capital Newspapers, Div. of Hearst Corp. v Whalen,* 69 NY2d 246, 252.) The legislative declaration of the statute is as follows:

> The legislature hereby finds that a free society is maintained when government is responsive and responsible to the public, and when the public is aware of governmental actions. The more open a government is with its citizenry, the greater the understanding and participation of the public in government.
>
> As state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible.
>
> The people's right to know the process of governmental decision-making and to review the documents and statistics leading to determinations is basic to our society. Access to such information should not be thwarted by shrouding it with the cloak of secrecy or confidentiality. The legislature therefore declares that government is the public's business and that the public, individually and collectively and represented by a free press, should have access to the records of government in accordance with the provisions of this article.

*(Id)*.

Agencies with grave responsibilities like BOP have a duty to disclose information to the public. The importance of this duty, shared by all government agencies, should not be understated. Its existence promotes open government and public accountability, two elements necessary for our democracy's survival.

When FOIL was reenacted in 1977, the purpose was to further expand its scope, making virtually all agency records "presumptively available." (*Weston v Sloan*, 84 NY2d 462, 466 [1994]). To remain faithful to the intent of its legislative

declaration, FOIL itself must be liberally construed, and its statutory exemptions narrowly interpreted. (*Matter of Abdur–Rashid v New York City Police Dept.,* 31 NY3d 217, 255 [2018]; *see Matter of Capital Newspapers, Div. of Hearst Corp. v Whalen,* 69 NY2d 246, 252 [1987]).

## II. Attorney-client privilege should not be used to exempt government agencies from making their records available to the public.

The attorney-client privilege is also a fundamental piece of the bedrock that makes up our legal system. Its purpose is to encourage disclosure between client and attorney regarding the legal matter in which the client seeks advice. (*Hurlburt v Hurlburt,* 128 NY 420, 424 [1891]; *Matter of Jacqueline F.,* 47 NY2d 215, 218 [1979]). This exception, however, inevitably constitutes an "obstacle" to the truth-finding process, putting it at odds with the public's right to know. (*Id.* at 219).

It is well established that the attorney-client privilege is not limitless. (*Matter of Priest v Hennessy,* 51 NY2d 62, 68 [1980]). Additionally, the line between legal and non-legal responsibilities is easily blurred when the client is a government agency. (*See Saran v Chelsea GCA Realty Partnership, L.P.*, 174 AD3d 759, 760 [2d Dept 2019]; *Rossi v Blue Cross & Blue Shield of Greater N.Y.*, 73 NY2d 588, 592-93 [1989]). The invocation of this privilege should be cautiously observed to ensure its application is consistent with its purpose. (*Matter of Jacqueline F.,* 47 NY2d at 219).

### A. Attorney-client privilege cannot be used to shield a government agency from disclosing information that directly impacts the public.

The attorney-client privilege must be carefully applied so as not to allow a government agency to avoid disclosure by funneling relevant documents into the hands of lawyers. (*See Radiant Burners Inc. v American Gas Assn.*, 320 F2d 314, 324 [7th Cir. 1963]). The extension of this privilege must be limited so as not to inadvertently allow the kind of behavior that it was intended to prevent. (*Id.*)

This is especially true when the client is a government agency, and the attorney serves as in-house counsel. Government agencies have a unique obligation to the public, and therefore their claim of attorney-client privilege requires a strict level of scrutiny. Unfortunately, the privilege is often reflexively applied to the government without an examination of the rationale behind it. (*In re Grand Jury Investigation*, 399 F3d 527, 531 [2d Cir. 2005]). In this case, in which a government entity has the unilateral authority to determine a citizen's liberty, this Court must carefully balance the claim of privilege against the government's obligation to disclose and the public's interest in transparency.

#### i) Holding the requested documents as privileged and exempt from disclosure perpetuates government secrecy.

The public's right to know should be fervently protected because when citizens trust their government, democracy thrives. Shielding the decision-making process of a government agency creates government secrecy that directly contradicts the purposes of FOIL. (Freedom of Information Law § 84).

One reason for additional scrutiny in the government context is that the government is intended to hold a special position of public trust. This trust cannot be violated indiscriminately. (*In re Grand Jury Subpoena Duces Tecum*, 112 F3d 910, 920 [8th Cir. 1997]). Additionally, government attorneys serve more than one role inside the government. Attorneys can engage in policy formation, dissemination of formed policy, or neutral analysis of law unconnected to pending litigation. (*See Matter of Charles v Abrams*, 199 AD2d at 653 [3d Dept 1993]). Where an attorney operates to formulate policy, the attorney-client privilege does not apply (*See In re Lindsey*, 148 F3d 1100, 1106 [D.C. Cir 1998]; *Charles,* 199 AD2d at 653). Where a lower-level government employee provides an analysis of policy options that is ultimately adopted by the agency, the analysis is subject to disclosure under FOIL. (*See Matter of Miracle Mile Assoc. v Yudelson*, 68 AD2d 176, 182 [4th Dept 1979]). This holds true even when that lower-level employee is a government attorney. (*Charles,* 199 AD2d at 653).

Since a foundational element of any government agency's role is interpreting laws and promulgating regulations, it would be illogical to say that training materials created for the purpose of carrying out an agency's own regulations should be exempt. Since regulations are a part of an agency's final policy, the interpretation of the laws that created these regulations should not be considered privileged.

The need for government transparency is imperative on every level, but it is especially important when it comes to deciding an individual's fate. BOP's sole purpose is to decide what the future holds for an incarcerated person. There are many considerations that go into this, most of which are unavailable to the public. This begs the question: How can society benefit from the parole system if we do not know what is required to obtain it? Regardless of their detention status, individuals deserve to know the standards with which they are being judged.

The purpose of our criminal justice system is to achieve justice through conviction, detention when necessary, and rehabilitation. We have become proficient in conviction and in incarceration, but to rehabilitate, there must be a mutual understanding between incarcerated individuals and those deciding their fate. An ability to set realistic goals for the future is a crucial part of rehabilitation. The ability to see the light at the end of the tunnel is what keeps many incarcerated individuals motivated to change course and become a productive member of society. The power dynamic here is unbalanced and keeping this information hidden leads to secrecy and public distrust in the government.

**ii) Attorney-client privilege only applies to communications between client and attorney regarding specific legal action.**

The critical inquiry into whether communications are covered by attorney-client privilege is whether the communications are "primarily and predominately of a legal character, and in their full content and context, were made to render legal

advice or services to the client." (*Saran,* 174 AD3d at 760). The specter of possible litigation is not enough to claim privilege. *(Id)*.

In *Charles v Abrams*, the Third Department held that the documents at issue did not concern a particular lawsuit that was either pending or imminent. (*Charles,* 199 AD2d at 653). Instead, "the documents contain[ed] the agency's final policy, which [was] to be applied to all litigation in general." (*Id*.). When the purpose of the policy is not to facilitate the rendition of legal advice or services to any particular client, it should not be protected by privilege.

Similarly to *Charles*, Petitioners here requested documents containing the agency's final policy, their training materials. The purpose of the request is to achieve transparency into an incredibly elusive decision-making process. This is precisely what FOIL was intended to do: make information that affects the public available to the public.

When the attorney acts as in-house counsel to an organization, the attorney client privilege attaches when the communications are regarding specific, imminent litigation. In *Rossi v Blue Cross & Blue Shield of Greater N.Y.*, this Court acknowledged that an attorney's day-to-day involvement in their employers' affairs could cause complications when invoking privilege. (*Rossi,* 73 NY2d at 592-93). This is because the attorney's advice may stem from their ongoing, permanent

relationship with the organization and not from a client's consultation about a particular legal problem. (*Id).*

Though the ultimate holding in *Rossi* was that the documents were privileged, this case is distinguishable because there is no evidence that the requested documents in the case at bar were dealing with any imminent litigation. The holding is still relevant, though because it further solidifies that a claim of privilege needs to be closely scrutinized because of this complicated relationship. The implications of giving a broad exemption to all documents that contain a government attorney's interpretation of the statutory language could open the door to court sanctioned corruption within the government.

The fact that attorneys are engrossed in many aspects of the organization further emphasizes the need for disclosure. In order for the privilege to attach, the information must be given with the expectation of confidentiality and for the purpose of obtaining legal, rather than business advice. (*People v Belge*, 59 AD2d 307, 308–09 [1977]). Here, although the communications may technically be interpretations of law, they should be treated as business advice because making policy and regulations is one aspect of the "business" of a government agency. Allowing communication conducted in the course of business, and not in reference to a specific legal matter, to be protected by privilege would expand the scope of attorney-client privilege into dangerous territory.

The presumption of disclosure under FOIL is purposefully expansive as per the intent of the legislature. Documents should be withheld only when they fit within one of the narrowly applied statutory exemptions. Here, the public's legitimate interest, and the lack of any specific legal matter make disclosure the preferred course of action. The attorney-client privilege cannot be used as a shield for government agencies to keep information from the public.

## III. The intra-agency exemption does not apply to the BOP's training materials.

The requested training materials are not exempt from disclosure based on the intra-agency exemption because these documents constitute the agency's (1) working law and final policy decisions, and (2) instructions to staff that affect the public.

DOCCS has withheld releasing BOP's training materials on the basis that it believes the materials to fall under the intra-agency exemption of FOIL. Section 87 (2)(g) of the Freedom of Information Law states that inter-agency or intra-agency materials are exempt from public disclosure. (Freedom of Information Law § 87[2][g]). However, Sections 87(2)(g)(ii) and (iii) list two applicable carve-outs to these exemptions: "instructions to staff that affect the public" and "final agency policy or determinations." (*Id*).

### A. BOP's training materials constitute instructions to staff that affect the public and are releasable under FOIL.

FOIL requires agencies release documents that are considered "instructions to staff that affect the public." (*Id.* at § 87[2][g][ii]). It also affirms the idea that such accountability is critical. (*See* Freedom of Information Law § 84, ("Access to such information should not be thwarted by shrouding it with the cloak of secrecy or confidentiality")).

The disputed documents are used to advise board members on how best to implement decisions made by the board as a whole. One document is literally titled "Parole Interviews and Decision-Making," and is used to advise the members of BOP on the factors they must consider when conducting interviews and making final parole decisions. (Respondent's Brief at 8). It is clear that these training materials should be considered "instructions to staff" for the purposes of FOIL. To argue that these instructions do not affect the public and should be exempt from disclosure is not only dehumanizing to incarcerated people, but also creates a willfully obtuse view of the impact of BOP's decisions.

The public is defined as "[t]he body politic, or the people of a state, nation, or municipality." (Cornell Law Legal Information Institute, 2020.) Whether a person is granted parole or not affects more than the incarcerated person. This decision affects family members, friends, loved ones, victims, members of the community, and anyone else who may have a vested interest in the fate of the incarcerated

individual that is in front of BOP. It is indisputable that these individuals fall within the definition of the "public" and therefore have a legal right to know how BOP makes decisions that directly impact their lives. (Freedom of Information Law § 87 [2][g][ii]). Applying the intra-agency exemption would allow BOP to hold pertinent information hostage, giving the board an inappropriate amount of control over people who are not within its jurisdiction.

**B. The intra-agency exemption does not apply to final agency policy.**

The business responsibility of a government attorney is to conduct the core functions of the agency, including determining what the law is or should be. Agencies and their in-house attorneys who analyze the law for compliance are empowered to determine what the law is. (*See Charles*, 199 AD2d at 653; *Fink*, 47 NY2d at 572). Agencies have expansive power to "prescribe all that may fairly be thought necessary to foster … its essential functions." (*Metro. Life Ins. Co. v New York State Labor Relations Bd.*, 280 NY 194, 208 [1939]). It is this expansive and potentially worrisome power of the administrative state that spurred the passage of FOIL. (Freedom of Information Law §84 [noting the increased "sophistication and complexity" of the government]). The legislature found it imperative that the public have access to an agency's internal workings because of how integral the process of making law is to the business of an administrative agency.

Final agency policy is available from each employee in a multilevel administrative process. (*Metro. Life Ins. Co.,* 280 NY at 182). Where a lower-level government employee provides an analysis of policy options that is ultimately adopted by the agency, the analysis is subject to disclosure under FOIL. (*Id*.; *See Yudelson*, 68 AD2d at 182; *see also Matter of Ramahlo v Bruno*, 273 AD2d 521, 522 [3d Dept 2000]). This applies even to lower-level government employees. (*Charles*, 199 AD2d at 653; *Coastal States Gas Corp v Dept of Energy*, 617 F2d 854, 863 [D.C. Cir. 1980]).

FOIL requires that agencies disclose records that are final agency policy or which clarify or justify the agency's interpretation of procedural or substantive law. (Freedom of Information Law § 87[2][g][iii]; *Fink,* 47 NY2d at 572; *Yudelson,* 68 AD2d at 182). These interpretations constitute the working law of an agency, and are not included under the intra-agency exemption. (Freedom of Information Law § 87[2][g][iii]). FOIL does not require the disclosure of the deliberative process that led to the adoption of a final policy determination. (*NLRB v Sears Roebuck & Co.,* 421 US 132, 152-53 [1975]). The exemption is intended to "foster open and candid discussion" within an agency by protecting pre-decisional documents, and communications between agency administrators to reach such final decisions. (*Id*). FOIL does not require the disclosure of the deliberative process of the agency, in the interest of preventing "injury to the decision-making process" of the agency (*Id*).

Nevertheless, the reasons for a policy's adoption, if expressed within the agency, are also a part of the working law, and "constitute 'final dispositions' of matters by an agency," and thus are not exempt. (*Id.; Yudelson*, 68 AD2d at 182.)

The very existence of training materials for BOP implies that there are consistent standards under which it operates, which would constitute the working law of the agency. (Freedom of Information Law § 87[2][g][iii]). To argue that there are not consistent decision-making standards would imply that BOP has and exercises a level of discretion that crosses the line into arbitrariness when making decisions that substantively affect the lives of the individuals they do or do not grant parole to. All documents in question are interpretations of "statutory and regulatory law as it relates to parole matters. (Respondent's Brief at 6). Agencies create their manuals, policies, and working agency law based on interpretations of governmental laws and regulations, and those interpretations are necessarily required to be open to public scrutiny. (*See, e.g.*, *Chinese Staff & Workers' Ass'n v Burden*, 88 AD3d 425, 429 [1st Dept 2011] (utilizing an agency's manual to determine if its environmental review process was lawful); *Fink,* 47 NY2d at 572; *Nicholas v Kahn,* 47 NY2d 24, 31 [1979]).

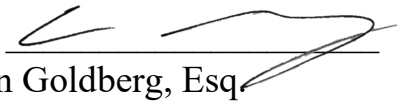
## CONCLUSION

For the foregoing reasons, the Court should reverse the Supreme Court Appellate Division Third Department's judgment entered on March 3, 2022.

Dated: September 5, 2023
Buffalo, New York

Respectfully submitted,

CIVIL RIGHTS AND
TRANSPARENCY CLINIC

by: 
Erin Goldberg, Esq.
*Attorneys for Amicus Curiae*
507 O'Brian Hall
University at Buffalo School of Law
(716) 645-2167
erg6@buffalo.edu

## WORD COUNT CERTIFICATION

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