**SUPREME COURT FOR THE STATE OF NEW YORK**

**APPELLATE DIVISION – THIRD DEPARTMENT**

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| APPELLATE ADVOCATES<br><br>Petitioner-Appellant,<br><br>v.<br><br>NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION<br><br>Respondent-Respondent. | Docket No. 531737 |

# BRIEF OF PETITIONER-APPELLANT

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## PRELIMINARY STATEMENT

This case involves attempts by Respondent-Respondent Department of Corrections and Community Supervision ("DOCCS" or "Respondent") to prevent documents from disclosure under New York's Freedom of Information Law ("FOIL"). Specifically, the matter turns on withheld training materials created by in-house counsel that did not contain, and were not based on, any client confidential information or communication. Instead, these training materials were similar to documents created for purposes of Continuing Legal Education programs in that they included broadly written legal information for general training purposes. The materials were *not* created in response to specific legal issues involving particular Board of Parole ("BOP") commissioners or specific parolees. Shielding these materials from disclosure solely because in-house counsel had some involvement in creating them undermines the governmental transparency FOIL seeks to advance.

Petitioner-Appellant Appellate Advocates ("Petitioner") is a non-profit legal organization that represents criminal defendants who cannot afford private counsel. Petitioner pursues the present appeal of an Article 78 proceeding because Respondent failed to produce a number of documents relating to the BOP's decision-making processes pursuant to § 84 of FOIL, which requires disclosure of non-exempt agency records. Namely, Respondent withheld eleven training materials authored by agency counsel to provide general training to BOP commissioners.

The court below held that the eleven withheld materials were (1) protected from disclosure by the attorney-client privilege pursuant to CPLR 4503(a), (2) protected as attorney work product pursuant to CPLR 3101(c), and (3) protected as intra-agency materials pursuant to Pub. Off. Law § 87(2)(g) ("POL § 87(2)(g)"). (R. 5–6). Errors of law underlie all three conclusions. The court improperly considered the attorney work product doctrine because it was not part of the administrative record, failed to identify and apply the correct legal standard for the attorney-client privilege, and did not consider the limitations of FOIL's intra-agency exemption. Accordingly, the training materials were subject to disclosure under New York Public Officers Law § 84. For the above stated reasons and those set forth below, this Court should compel Respondent to disclose the eleven withheld training materials and pay Petitioner's attorney's fees.

## QUESTIONS PRESENTED ON APPEAL

1. Whether the lower court erred as a matter of law in considering Respondent's argument under CPLR 3101(c) in response to the Article 78 Petition when Respondent failed to raise that argument during the underlying administrative proceeding.

2. Whether the lower court applied the wrong legal standard for the attorney-client privilege by protecting materials unilaterally provided by agency counsel to agency personnel that were not based on confidential information and instead were general training materials unrelated to any specific matter.

3. Whether the lower court erred in finding that the withheld materials were exempt from disclosure as intra-agency materials when it failed to require Respondent to show that said materials were neither final agency policy nor general instructions to BOP staff that affect the public.

4. Whether a party seeking disclosure of materials that were withheld without a reasonable basis was entitled to recover attorneys' fees from the agency for the ensuing litigation upon prevailing on appeal.

## RELEVANT FACTS

On October 31, 2019, Petitioner Appellate Advocates, a New York not-for-profit corporation, commenced a proceeding against Respondent pursuant to CPLR Article 78 and Pub. Off. Law § 84, seeking documents pertaining to one of Petitioner's clients, and to DOCCS' administration generally. (R. 8–71). The subjects of the instant appeal are training materials responsive to section 12 of Petitioner's FOIL request, that requested "any and all records, documents, and files referencing or relating to Board of Parole training, including but not limited to training policies, procedures, manuals, handbooks, and outlines received or created by Board of Parole commissioners, their employees, staff members, and agents." (R. 19) ("Request"). In response to the Request, on February 25, 2019, Respondent produced records it deemed responsive, but informed Petitioner that it was withholding a number of training materials under the attorney-client privilege, CPLR 4503(a), pursuant to Pub. Off. Law § 87(2)(a). (R. 31). In the course of Petitioner administratively appealing Respondent's decision, Respondent further

cited the "inter or intra-agency materials" exemption pursuant to Pub. Off. Law § 87(2)(g) ("POL § 87(2)(g)") as the reason it withheld the documents. (R. 66).

After exhausting all potential administrative remedies, Petitioner filed the Petition in this matter with the Supreme Court of the State of New York, County of Albany on October 31, 2019, pursuant to CPLR Article 78, seeking a judgment against Respondent for failing to disclose all requested documents. (R. 8–71). Pursuant to a stipulation and partial settlement agreement dated March 16, 2020, Respondent disclosed additional pages to Petitioner. (R. 101–06). Respondent also provided Petitioner with a privilege log, listing eleven documents responsive to the Request that remained withheld. (R. 158–59). The log identified the eleven documents as follows:

- Board of Parole Interviews Handout (dated Sept. 8, 2017);
- Minor Offenders Memorandum (dated May 21, 2018);
- Minor Offenders Memorandum (dated Sept. 16, 2016);
- BOP Interviews and Decisions Presentation Slides (dated July 26, 2018);
- Sample Decision Language Concerning Departure from COMPAS Handout (dated 2018);
- Parole Interviews and Decision-Making Under Revised Regulations Presentation Slides (dated June 15, 2017);
- Parole Interviews and Decision-Making Handout (dated May 2016);
- Favorable Court Decisions Handout (dated May 2016);
- Hypothetical Board Decisions Handout (dated May 2016);

- Parole Interviews and Decisions-Making Presentation Slides (dated May 2016); and
- Unfavorable Court Decisions Handout (dated May 2016).

In the privilege log, Respondent claimed that these eleven materials were protected by the attorney-client privilege pursuant to CPLR 4503(a), as attorney work product pursuant to CPLR 3101(c), and as intra-agency materials pursuant to POL § 87(2)(g). (R. 158–59). Respondent's reference to CPLR 3101(c) was not, however, part of the administrative record but only appeared for the first time in the log. (R. 31, 66, 139, 156, 166–67).

On June 26, 2020, the lower court ultimately denied Petitioner's request, holding that the materials sought in the request were protected by the attorney-client privilege, as attorney work product, and as intra-agency materials. (R. 6). Petitioner now appeals.

## ARGUMENT

As this Court has previously recognized, it is "axiomatic that FOIL imposes a broad standard of open disclosure, in that all government records are presumptively available to the public unless they fall within a specific statutory exemption." TJS of N.Y., Inc. v. N.Y. State Dep't of Tax'n & Fin., 89 A.D.3d 239, 241 (3d Dep't 2011) (internal quotations omitted); See Matter of Gould v. N.Y.P.D., 89 N.Y.2d 267, 274–75 (1996). These exemptions must be "narrowly construed with the burden resting on the government agency to demonstrate that the requested material indeed qualifies for exemption." Id. at 275 (quoting Matter of Hanig v. N.Y. Dep't of Motor Vehicles, 79 N.Y.2d 106, 109 (1992). Further,

the agency must articulate a "particularized and specific justification" for not disclosing the requested documents. Matter of Gould, 89 N.Y.2d at 275 (quoting Matter of Fink v. Lefkowitz, 47 N.Y.2d 567, 571 (1979)).

Importantly, Petitioner specifically sought materials "referencing or relating to Board of Parole training, including but not limited to training policies, procedures, manuals, handbooks, and outlines received or created by BOP commissioners, their employees, staff members, and agents," and Respondent itself identified the withheld materials as responsive to that request. (R. 165–66). Additionally, DOCCS agency counsel Kathleen Kiley and Michelle Liberty, in their affirmations, repeatedly referred to the withheld documents as "training materials." (R. 167). Their affirmations, moreover, established that the training materials were of a general nature and not tied to particular parole hearings or parole appeals. (R. 162).

It is therefore well-established that the materials were prepared to train the BOP and as such, were inherently *instructive* rather than advisory. Shirking its burden of showing why such general training materials fall within the narrow FOIL exemptions, Respondent focused only on the fact that they were drafted by an attorney. It gave no explanation about whether such "advice" contained confidential information from the BOP, or how it could potentially affect public-facing decisions.

Rather than engage in the required analysis, the court below merely parroted Respondent's affirmations. And by not applying the correct legal standard in this case, the court failed to exercise its discretion properly. See People v. Cronin, 60

N.Y.2d 430, 432–33 (1983) (in which the trial court failed to exercise its discretion due to its application of an incorrect legal standard).

## I. THE LOWER COURT ERRED AS A MATTER OF LAW IN CONSIDERING RESPONDENT'S ARGUMENT UNDER CPLR 3101(c) IN RESPONSE TO THE ARTICLE 78 PETITION BECAUSE RESPONDENT FAILED TO RAISE THAT ARGUMENT DURING THE UNDERLYING ADMINISTRATIVE PROCEEDING.

As a preliminary matter, although the court concluded that three different exemptions applied to the withheld documents, the application of attorney work product here should be reversed for one simple reason: it was improper for the court to consider it. The impropriety pertained both to Respondent's assertion of new facts and a new argument asserting that the documents were properly withheld as attorney work product under CPLR 3101(c). (R. 158–59, 161–64). "The review of an administrative determination is limited to the 'facts and record adduced before the agency.'" Kelly v. Safir, 96 N.Y.2d 32, 39 (2001) (internal citation omitted). By raising attorney work product for the first time in response to the Petition, Respondent prompted an improper review of the administrative proceeding.

"It is the settled rule that judicial review of an administrative determination is limited [solely] to the grounds invoked by the agency." Matter of Scherbyn v. Wayne-Finger Lakes Bd. of Co-op. Educ. Services, 77 N.Y.2d 753, 758 (1991) (internal citation omitted); see Matter of Madeiros v. N.Y. State Educ. Dept., 30 N.Y.3d 67, 74–75 (2017) (rejecting an agency's reliance on a FOIL exemption because the agency failed to invoke that exemption in the underlying

administrative denial of petitioner's FOIL request). The lower court here erred as a matter of law and abused its discretion when it considered, and accepted, Respondent's attorney work product exemption argument. As seen in both Appellant's Petition reciting the administrative proceedings, and DOCCS Attorney Liberty's affirmation describing proceedings prior to the Article 78 Petition, there was no reference to any assertion of attorney work product in the denials of Appellant's FOIL Request. (R. 31, 66, 139, 156, 166–67). Rather Respondent only first raised attorney work product in response to the Petition. (R. 158). Therefore, judicial review should have been limited to whether the withheld documents were protected by the two other exemptions originally offered by Respondent, and affirmed by its FOIL Appeals Officer. (R. 166–67).

A fundamental principal of administrative law is that a court engaged in judicial review cannot consider an argument an agency failed to invoke during the administrative proceeding. See Matter of Scherbyn, 77 N.Y.2d at 758. A court must not substitute what it considers a more adequate or proper basis for the agency's action when it is absent from the administrative record. Id. In other words, the administrative order "cannot be affirmed on an alternative ground that would have been adequate if cited by the agency." See Matter of Nat'l Fuel Gas Distrib., 16 N.Y.3d 360, 368 (2011) (citing Matter of Scherbyn, 77 N.Y.2d at 758). As the exemption and supporting facts to assert attorney work product were raised for the first time in a privilege log that was part of Respondent's Answer to the Petition, the lower court "went beyond its mandate to 'judge the propriety of [the agency's] action solely by the grounds invoked by the agency.'" Union Carbide

Corp. v. N.Y. State Dep't of Envtl. Conservation, Case No. 530766, 2020 WL 7249528, at *3 (3d Dep't Dec. 10, 2020) (quoting Matter of Nat'l Fuel Gas Distrib., 16 N.Y.3d at 368); (R. 158). As such, the court's erroneous finding should be reversed.

## II. THE LOWER COURT APPLIED THE WRONG LEGAL STANDARD FOR THE ATTORNEY-CLIENT PRIVILEGE BY PROTECTING MATERIALS UNILATERALLY PROVIDED BY AGENCY COUNSEL TO AGENCY PERSONNEL THAT WERE NOT BASED ON CONFIDENTIAL INFORMATION AND INSTEAD WERE GENERAL TRAINING MATERIALS UNRELATED TO ANY SPECIFIC MATTER.

In its decision, the lower court stated that the attorney-client privilege applied because "the materials are clearly the unique product of an attorney's professional skills and were confidentially disseminated to the Board of Parole Commissioners for the purpose of rendering legal advice." (R. 5). The court's explanation confused the attorney-client privilege with the attorney work product doctrine. It also ignored that these privileges are to be narrowly construed, in addition to the narrow application that they should receive in a FOIL response. See Spectrum Sys. Int'l Corp. v. Chem. Bank, 78 N.Y.2d 371, 377 (1991); Matter of Hanig v. N.Y. Dep't of Motor Vehicles, 79 N.Y.2d 106, 109 (1992). For the attorney-client privilege to apply, Respondent needed to prove that the materials: (1) included confidential information that the BOP provided agency counsel, (2) for the purpose of obtaining legal advice, and (3) was exchanged as part of an established attorney-client relationship. See Rossi v. Blue Cross and Blue Shield of Greater N.Y., 73 N.Y.2d 588, 593 (1989). Respondent's burden was especially

onerous in this context given that FOIL favors disclosure. See Matter of Hanig, 79 N.Y.2d at 109. The court's conclusion that information unilaterally disseminated from in-house counsel to the BOP was protected legal advice failed to consider whether the information was confidential in the first place. Other than providing a conclusory, written recitation that states the materials were drafted to provide "legal advice," Respondent failed to explain on what basis general training materials involved confidential and privileged communications.

### A. Respondent Failed To Meet Its Burden Of Showing That The Withheld Materials Were Protected By The Attorney-Client Privilege And The Lower Court Failed To Exercise Its Discretion.

By asserting the attorney-client privilege, Respondent bore the burden of demonstrating that it applied. See Matter of Gartner v. N.Y. State Att'y Gen.'s Off., 160 A.D.3d 1087, 1090 (3d Dep't 2018). Respondent's privilege log and affirmations laconically asserted that the withheld materials included legal advice. These assertions were insufficient to satisfy their burden that may not be "discharged by mere conclusory or *ipse dixit* assertions." In re Grand Jury Subpoena Dated Jan. 4, 1984, 750 F.2d 223, 225 (2d Cir. 1984) (quoting In re Bonanno, 344 F.2d 830, 833 (2d Cir. 1965). Critically, the affirmations did not establish that the materials reflected confidential information received by in-house counsel from the BOP to provide legal advice. (R. 161–67). Instead, the court relied upon the claim that the relationship between in-house counsel and BOP commissioners was privileged. (R. 5). This was an incorrect analysis. The fact that an attorney communicated information to a client does not end the privilege

analysis, but rather begins it. See Matter of Priest v. Hennessy, 51 N.Y.2d 62, 68–69 (1980). The communication must have also involved legal advice related to confidential information the client shared with counsel. See id. Because DOCCS counsel did not create the training materials using information provided to them by the commissioners, the materials were merely training documents that provided general information rather than privileged legal advice.

Kathleen Kiley and Michelle Liberty, agency counsel for Respondent, frequently referred to the documents as "training materials" in their affirmations, indicating that they were created and disseminated with the aim of informing, not advising, clients. (R. 161–67). Notably, there is no indication in Respondent's privilege log, or elsewhere, that the materials withheld by Respondent contained confidential information that was shared by the BOP while seeking legal advice. Respondent described the documents as training materials created by counsel to inform BOP commissioners about relevant laws and regulations, and never claimed that any of the documents included confidential information. (R. 161–67).

To the contrary, the flow of information originated with counsel was not created in response to any BOP request for legal advice regarding a specific case or issue. See id. Because neither Kiley nor Liberty indicated that the withheld documents contained confidential communications from the BOP to DOCCS counsel, Respondent failed to meet its burden and withheld the materials in error. See Bloss v. Ford Motor Co., 126 A.D.2d 804, 805 (3d Dep't 1987) (finding documents are not protected by privilege when there is no indication in the record

that they contained confidential communications between defendant and its attorneys).

In addition, the court below merely repeated Respondent's conclusory assertion, without any accompanying analysis, when it stated the documents were "confidentially disseminated to the Board of Parole commissioners for the purpose of rendering legal advice." (R. 5). The court's failure to analyze the materials in terms of the attorney-client privilege amounted to a non-exercise of discretion that was itself, a reversible error. See People v. Cronin, 60 N.Y.2d 430, 432–33 (1983). The lower court not only failed to hold Respondent to its burden of showing that the privilege applied, but did not itself explain whether any client-specific information contained within the documents were sufficient to bring them within the purview of the attorney-client privilege. See Saxton v. N.Y. State Dep't of Tax'n and Fin., 130 A.D.3d 1224, 1226 (3d Dep't 2015) (finding that the record did not allow for an assessment of the lower court's discretion and that remand for further proceedings was necessary when the lower court did not explain how an analysis of the relevant legal factors led to their decision). Because the lower court did not require Respondent to meet their burden and failed to exercise its own discretion in analyzing the documents properly, this Court should vacate the judgment and compel disclosure of the incorrectly withheld records.

### B. The Withheld Materials Were Not Protected By The Attorney-Client Privilege Because They Do Not Contain Legal Advice.

Respondent also failed to demonstrate that the withheld materials were given to the BOP for the purpose of providing legal advice. When analyzing whether

communications constitute legal advice, courts consider proximity to litigation, legal rights and obligations, and evidence of a lawyer's judgment and evaluation concerning legal strategies. See Spectrum Sys. Int'l Corp. v. Chem. Bank., 78 N.Y.2d 371, 380 (1991); Rossi v. Blue Cross and Blue Shield of Greater N.Y., 73 N.Y.2d 588, 594 (1989). Contrary to the lower court's finding that the documents "set forth legal advice and strategies relating to the interview and decision-making procedure," the training materials withheld by Respondent contained general descriptions of settled law unconnected to any specific legal matter facing the BOP.

### i. The Withheld Materials Do Not Constitute Legal Advice Because They Were Training Materials Containing General Descriptions Of The Law.

The attorney-client privilege is not meant to shield the instructions of agency personnel in their general duties. "New York law governing the attorney-client privilege is generally similar to accepted federal doctrine." Bank of Am., N.A. v. Terra Nova, Ins. Co., 211 F. Supp. 2d 493, 495 (S.D.N.Y. 2002) (quoting Bowne of N.Y.C., Inc. v. AmBase Corp., 150 F.R.D. 465, 470 (S.D.N.Y. 1993); see also HSH Nordbank AG N.Y. Branch v. Swerdlow, 259 F.R.D. 64, 70 n.6 (S.D.N.Y. 2009) ("[T]he New York law of attorney-client privilege is, with certain exceptions, substantially similar to the federal doctrine"); NXIVM Corp. v. O'Hara, 241 F.R.D. 109, 124 (N.D.N.Y. 2007) ("[T]he distinction between New York and federal law on attorney-client privilege is quite indistinguishable, as the law intersects in all of its facets, and are viewed interchangeably").

In Amadei v. Nielsen, the federal district court upheld a magistrate's ruling that training materials on the Fourth Amendment to the United Stated Constitution, created for U.S. Customs and Border Patrol ("CBP") officers by in-house counsel, were not protected by the attorney-client privilege when they merely instructed officers on how to apply legal standards and act lawfully. 17-CV-5967, 2019 WL 8165492, at *7 (E.D.N.Y. Apr. 17, 2019). Similarly, in the instant case, materials were created to train BOP commissioners on the current status of applicable law. As in Amadei, the withheld documents identified by DOCCS in-house counsel as training materials contained general instruction on the law, not legal advice incorporating confidential client communications deserving of protection. See id. at *8 (agreeing with the magistrate's statement that the training materials were "not legal advice…[T]he fact that your employees apply legal standards and need to act within the law is not attorney-client information."); see also A.C.L.U. of San Diego and Imperial Cntys. v. U.S. Dep't of Homeland Sec, No. 8:15-cv-00229, 2017 WL 9500949, at *11 (C.D. Cal. Nov. 6, 2017) (holding that CBP training materials were not privileged, but were rather general-purpose legal manuals that incorporated examples from case law); Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 863 (D.C. Cir. 1980) (holding that legal memoranda are not privileged when "they do not contain private information concerning the agency").

Additionally, attorney authored materials are not privileged absent showing that the materials rest on confidential communications from the attorney's client. In Am. Immigr. Council v. U.S. Dep't of Homeland Sec., the court held PowerPoint slides used by the Office of Chief Counsel to train U.S. Citizenship

and Immigration Services ("USCIS") employees were protected because the USCIS failed to show how the slides relied on confidential communications from the agency as a client. 905 F. Supp. 2d 206, 222–223 (D.D.C. 2012). The PowerPoint slides were used for general training and contained generally applicable legal advice that did not rest on confidential communications from the USCIS. Id. Similarly, Respondent asserted that the withheld materials were privileged in this case, but did not assert that they included confidential information from the BOP. (R. 31, 161–67). Respondent did not meet the burden of showing that the materials were privileged absent any indication agency counsel relied on confidential communications from the BOP.

**ii. The Withheld Materials Do Not Constitute Legal Advice Because They Were Not Connected To A Specific Legal Issue.**

New York courts have held that when documents do not concern a particular legal matter that is either pending or imminent, they are not considered to contain legal advice and are therefore not protected by the attorney-client privilege. See Matter of Charles v. Abrams, 199 A.D.2d 652, 653 (3d Dep't 1993) (finding that documents are not exempt from disclosure under the attorney-client privilege when they contain the agency's final policy and are not promulgated about any particular issue or specific litigation). In the instant case, Respondent failed to establish that the withheld materials were connected to any specific legal issue under the BOP's consideration.

The U.S. District Court for the Southern District of New York's decision in Hartford Life Ins. v. Bank of Am. Corp., is instructive. No. 06 Civ. 3805, 2007

WL 2398824 (S.D.N.Y. Aug. 21, 2007). In that case, training materials created by in-house counsel were not protected by the attorney-client privilege because they contained only generic descriptions of the law as it might apply to the securities industry, such as generalized references to "What Courts Have Said," and did not apply the summarized case law to specific factual situations faced by the bank. See id. at *6. Similarly, as Kiley's affirmation conceded here, Respondent withheld materials about "Favorable and Unfavorable Court Decisions," without any showing that the summarized case law was applied to a specific issue confronted by the BOP. (R. 163).

The lower court also misapplied this Court's precedent. (R. 5–6). In Matter of Gilbert v. Off. of the Governor of the State of N.Y., emails exchanged between attorneys were considered protected by the attorney-client privilege because they concerned the potential termination of a *specific* sublease. 170 A.D.3d 1404, 1405–06 (3d Dep't 2019). Similarly, in Matter of Shooters Comm. on Pol. Educ. v. Cuomo, emails between government attorneys were exempt from disclosure as attorney-client communications because they were part of an effort at formulating the government's response to a *specific* FOIL request. 147 A.D.3d 1244, 1246 (3d Dep't 2017). Because the documents withheld by Respondent do not pertain to any specific legal issue or particular BOP determination, the lower court's reliance on Gilbert and Shooters Committee was misplaced. Indeed, Respondent never asserted that the withheld documents contained materials connected to a specific legal matter or that they were created with the purpose of providing legal advice on a distinct matter. (R. 161–67). In fact, eight of the documents contained general

instructions on how to prepare and conduct interviews, as well as reach and draft decisions in compliance with the relevant law and regulations. (R. 158–59, 162). The remaining three documents contained instructions on interviewing minors in compliance with laws and regulations and on how to depart from COMPAS assessments. Id. The record is devoid of any evidence that the documents advised Board of Parole commissioners on the application of regulations and case law to specific parolees or particular parole decisions. (R. 4–6, 161–63, 167). As such, the withheld materials contained general descriptions of current law which were no more privileged than the contents of a legal textbook or the DOCCS website, which, while created by lawyers, are not privileged and confidential.

**C. Public Policy Dictates Disclosure Of The Withheld Materials.**

It is important to note that the materials withheld by Respondent were not drafts of documents that were being deliberated on by DOCCS staff or that were still being finalized by in-house counsel. Rather, they were documents reflecting DOCCS final policy which BOP commissioners were to follow. (R. 162–64). As a matter of public policy, these materials should be available to the eyes of the public. Indeed, government agencies have been known to publicly disseminate similar materials. For example, the City of New York publishes the NYPD Patrol Guide that "contains the rules that NYC police officers must follow in carrying out their official duties."[1] The training materials at issue here are no different in nature

[1] NYPD Patrol Guide, CIVILIAN COMPLAINT REV. BD.: NYC, https://www1.nyc.gov/site/ccrb/investigations/nypd-patrol-guide.page (last visited Dec. 17, 2020).

than these patrol guides, which the city has disclosed to the public so that people can review and judge the policies that direct their public servants. These materials, which do not contain sensitive or confidential information about any particular parolee or then-pending BOP decision, should thus also be disclosed as a matter of public policy.

Moreover, it is well established that "even where the technical requirements of the privilege are satisfied, it may, nonetheless, yield in a proper case, where strong public policy requires disclosure." Matter of Priest v. Hennessy, 51 N.Y.2d at 68–69. Respondent should not be permitted to shield agency policy from public view by asserting the attorney-client privilege. The public is entitled to know how its institutions are run, and specifically, how BOP commissioners are trained to make parole determinations that have widespread impact. Respondent especially should not be permitted to withhold these materials absent any showing that the documents were created to provide specific legal advice. To the contrary, Respondent's own descriptions conceded that the withheld materials were created as training materials intended to *instruct* BOP commissioners on how to carry out their duties, rather than *advise* them on how to approach a specific legal issue.

Any attempt to use the attorney-client privilege to withhold materials that express general agency policy rather than legal advice is also contrary to the fundamental purpose of the privilege. See Falcone v. I.R.S., 479 F. Supp. 985, 989–990 (E.D. Mich. 1979) ("it is clear that the purpose of the privilege is not to protect communications which are statements of policy and interpretations adopted by the agency"). At its core, the attorney-client privilege "exists to ensure that one

seeking legal advice will be able to confide fully and freely in his attorney, secure in the knowledge that his confidences will not later be exposed to public view to his embarrassment or legal detriment." Matter of Priest v. Hennessy, 51 N.Y.2d 62, 67–68 (1980). This prime concern is not particularly relevant in the instant case because counsel and its client are part of the same state agency. As employees of DOCCS, the BOP commissioners would be expected to communicate with in-house counsel as a necessary function of their duties. The extent to which any privilege would apply to such communications would not be a primary concern to them, particularly because it is unlikely that anything they discuss with counsel would lead to personal "embarrassment or legal detriment." When a private citizen speaks with retained counsel, the threat of disclosure may have a chilling effect on the attorney-client relationship; in the context of state agency employees interacting with in-house counsel, such concerns are much less relevant.

Because of FOIL's presumption favoring disclosure, and the fact that it cannot be established from the record that the withheld materials included the types of communications that should be protected by the attorney-client privilege, the lower court's judgment should be reversed and the materials disclosed.

## III. THE LOWER COURT ERRED IN FINDING THAT THE WITHHELD DOCUMENTS WERE EXEMPT FROM DISCLOSURE AS INTRA-AGENCY MATERIALS BECAUSE IT FAILED TO REQUIRE RESPONDENT TO SHOW THAT SAID MATERIALS WERE NEITHER FINAL AGENCY POLICY NOR GENERAL INSTRUCTIONS TO BOP STAFF THAT AFFECT THE PUBLIC.

FOIL exempts from disclosure any intra-agency materials containing advice or opinions that reflect an agency's deliberation and pre-decisional communications. Miracle Mile Assocs. v. Yudelson, 68 A.D.2d 176, 183 (4th Dep't 1979). Deliberative and pre-decisional materials are "communications exchanged for discussion purposes not constituting final policy decisions." Moody's Corp. v. N.Y. State Dep't of Tax'n & Fin., 141 A.D.3d 997, 1002 (3d Dep't 2016). By statute, however, intra-agency materials must be disclosed in response to FOIL requests when they are either (1) instructions to staff that affect the public or (2) final agency policy because they are *not* considered pre-decisional or deliberative materials. POL § 87(2)(g).

Agencies have the burden of showing that the withheld documents fall within the intra-agency exemption. Matter of Gartner v. N.Y. State Att'y Gen.'s Off., 160 A.D.3d 1087, 1090 (2018). Here, Respondent has failed to show that the training materials were not final agency policy nor instructions to staff. On the contrary, Respondent's papers and affirmations were silent on the issue, and the lower court also failed to address this requirement despite Petitioner's arguments on the issue in Petitioner's papers. (R. 6, 88–9, 181). Based on the record here, the court's error should therefore be reversed.

### A. The Withheld Documents Were Instructions To Staff That Affect The Public And Should Have Been Disclosed.

Instructions to staff that affect the public do not fall within FOIL's intra-agency exemption and must be disclosed. POL § 87(2)(g)(ii). The BOP is within DOCCS and the BOP commissioners are DOCCS staff members. Exec. L. § 259; Exec. L. § 259-b. Incarcerated persons are members of the public who may seek disclosure of agency documents for "public inspection" under POL § 87(2) and are directly affected by BOP decisions. See e.g., Konigsberg v. Coughlin, 68 N.Y.2d 245 (1986); Faulkner v. Del Giacco, 529 N.Y.S.2d 255 (Sup. Ct. Albany Cnty. 1988). Parole boards make decisions that affect essential freedoms. Even without the presumption of disclosure under FOIL, it stands to reason that BOP training materials are comprised of instructions to staff that affect the public. Respondent failed to explain how the instructions within the withheld materials do not affect the public, and the court below failed to consider whether the withheld documents were instructions to staff that affect the public. (R. 6). The court instead erroneously focused on the documents' authors. Whether the materials were written by attorneys is immaterial in determining if they fall under the intra-agency exemption. See e.g. Matter of Gartner v. N.Y. State Att'y Gen.'s Off., 160 A.D.3d 1087, 1090 (2018); Matter of Austin v. Purcell, 103 A.D.2d 827, 828 (2d Dep't 1984).

The affirmation of Respondent's own counsel characterized the materials as "training materials." (R. 161–63). Under the intra-agency exemption, training materials are inherently final agency policy because they are intended to instruct

trainees and do not constitute deliberation on a matter that is made prior to a final decision. See generally Matter of Charles v. Abrams, 199 A.D.2d 652 (3d Dep't 1993) . Respondent's choice of language is a concession that the withheld materials were more than advisory in nature; the BOP commissioners were expected to do as they were instructed in these training sessions. By instructing, rather than advising the BOP commissioners on how to carry out their duties and make parole determinations, Respondent essentially propagated agency law that was not covered by the attorney-client privilege. See Tax Analysts v. I.R.S., 117 F.3d 607, 619 (D.C. Cir. 1997) ("FOIA exemption 5 and the attorney-client privilege may not be used to protect this growing body of agency law from disclosure to the public"); Nat'l Council of La Raza v. Dep't of Just., 411 F.3d 350, 360 (2d. Cir. 2005) ("the attorney-client privilege may not be invoked to protect a document adopted as, or incorporated by reference into, an agency's policy"). In Tax Analysts, the court ruled that the Office of Chief Counsel for the IRS had created non-privileged agency law when it interpreted tax laws for application by personnel in the field. 117 F.3d at 619. DOCCS counsel in this case also created non-privileged agency law when they instructed the BOP commissioners on how to apply the law while carrying out their official duties.

In N.Y.C.L.U. v. Erie Cnty. Sheriff's Off., the court found that a memorandum instructing law enforcement officers on record keeping and data handling obligations were instructions to staff that affected the public that must be disclosed pursuant to a FOIL request. 47 Misc.3d 1201(A), 2015 N.Y. Slip Op. 50353(U) (Sup. Ct. Erie Cnty. 2015). Similarly, the documents withheld by

Respondent, "training materials consist[ing] of handouts, memoranda and presentation slides" instructing BOP commissioners on "how to best conform parole interviews and decisions with the governing statutes and regulations," are general instructions to staff that affect the public and must be disclosed under FOIL. (R. 167). Based on Respondent's privilege log, the eleven withheld materials each instructed BOP commissioners on processes pertaining to either *all cases* before the BOP or *all cases in a given category* before the BOP. (R. 158–59, 162). The documents contained general instructions relating to interviews and decisions as well as instructions on interviewing minors and departing from COMPAS assessments. (R. 158–59, 162; see supra Part II.B.ii). The record is devoid of any evidence that the documents advised BOP commissioners with regard to specific parolees or particular parole decisions. (R. 4–6, 161–63, 167; see supra Part II.B.ii).

Federal case law supports the contention that training materials containing general instructions must be disclosed as instructions to staff that affect the public. As FOIL was modeled after the Freedom of Information Act (FOIA), federal case law interpreting FOIA is instructive and persuasive when interpreting provisions of FOIL that are analogous to those in FOIA. See Matter of Lesher v. Hynes, 19 N.Y.3d 57, 64 (2012) (quoting Matter of Fink v. Lefkowitz, 47 N.Y.2d 567, 572 n. (1979)) ("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"); see also Matter of McAulay v. Bd. of Educ. of City of N.Y., 61 A.D.2d 1048, 1048–1049

(2d Dep't 1978), aff'd sub nom. McAulay v. Bd. of Educ. of City of N.Y., 48 N.Y.2d 659 (1979) (noting that its holding accords with and is based upon decisional law interpreting FOIA, upon which FOIL is based). This holds true for the issue at hand because both statutes allow for the withholding of intra-agency documents, but not when those documents are statements of policy and interpretations that have been adopted by the agency, as well as administrative staff manuals and instructions to staff that affect the public. Compare Freedom of Information Act, 5 U.S.C. §§ 552(a)(2)(B), 552(a)(2)(C), and 552(b)(5) with POL § 87(2)(g).

Federal courts have found that documents drafted for training purposes must be disclosed under FOIA. In Leadership Conf. on Civ. Rights v. Gonzales, the court denied intra-agency exemption for a draft of a training manual entitled the *7th Edition of Federal Prosecution of Election Officials* because the manual had been adopted as guidance for the Department of Justice's decision-making process and thus constituted final and non-deliberative agency instruction. 404 F. Supp. 2d 246, 255 (D.D.C. 2005). The U.S. Court of Appeals for the Fifth Circuit has also recognized that instructor and student manuals, training slides, training films, visual aids, and other training materials are "established policy designed to be utilized as an educational and reference tool, not for policy-making or deliberative purposes" under FOIA. Stokes v. Brennan, 476 F.2d 699, 700, 704 (5th Cir. 1973). Similarly, the withheld materials here were handouts and presentations intended to educate and instruct BOP commissioners generally, without reference to specific matters before the BOP.

## B. The Withheld Documents Were Final Agency Policy and Should Have Been Disclosed.

Final agency policy, which is not deliberative or pre-decisional, must be disclosed by statute. POL § 87(2)(g)(iii). Respondent failed to establish that the withheld materials were not final policy, and the lower court, while holding the materials were protected as intra-agency records, failed to consider whether they amounted to final agency policy. (R. 6). In her affirmation, Kiley asserted that the materials were attorney-client communications and attorney work product protected from disclosure, but she did not describe them as deliberative or pre-decisional intra-agency materials. (R. 164). The withheld materials were final agency policy because (1) language in the materials was intended to be incorporated into final decisions by the BOP and (2) training materials were inherently final agency policy.

### i. Material From The Training Documents Were Intended To Be Incorporated Into Final Decisions By The Agency.

The intra-agency exemption does not protect words that are intended to be passed on verbatim to the world at large. The N.Y. Times Co. v. City of N.Y. Fire Dep't, 4 N.Y.3d 477, 489 (2005). When material is written in a memorandum by counsel and, by express reference incorporated into a final agency decision, the material is no longer pre-decisional and therefore not exempt from disclosure. N.Y. 1 News v. Off. of President of Borough of Staten Island, 631 N.Y.S.2d 479, 483 (Sup. Ct. N.Y. Cnty. 1995), aff'd, 231 A.D.2d 524, 647 (2d Dep't 1996) ("if, in explaining its decision, the agency '…expressly adopts or incorporates any element of…a staff member's prior oral or written discussion of the matter, those

incorporated portions of earlier minutes or documents would no longer qualify as pre-decisional.'").

As indicated in the privilege log, one withheld document was titled "Sample Decision Language Concerning Departure from COMPAS." (R. 158). The document's title suggests that its content was unambiguously intended to be passed on verbatim and incorporated into the BOP's final decisions. The intra-agency exemption does not protect these types of documents. See City of N.Y. Fire Dep't, 4 N.Y.3d at 489. Respondent therefore had the burden to show that language included in the withheld materials was not copied into decisions published by BOP commissioners. See Matter of Gartner v. N.Y. State Att'y Gen.'s Off., 160 A.D.3d 1087, 1090 (2018). Respondent, however, failed to establish that the language in these training materials had not been incorporated into parole decisions. Respondent would have not provided these training materials, with general instructions and sample decision language for carrying out decisions, to BOP commissioners if the training materials were not intended as final agency policy. Respondent therefore needed to either (1) show that despite the intention for the BOP to use this sample language in future decisions, no such use was ever made, or (2) disclose the documents in response to Petitioner's FOIL request. Respondent failed to do either.

### ii. Memoranda, Handouts, and Slideshow Presentations Used in Training Are Inherently Final Agency Policy.

Guidance and instruction to agency staff are inherently final policy when they are intended to be applied to all cases. See Matter of Charles v. Abrams, 199

A.D.2d 652, 653 (3d Dep't 1993) ("[T]he documents at issue herein do not concern a particular lawsuit which is either pending or imminent. Rather, documents contain agency's final policy, which is to be applied to all litigation in general."). The fact that documents may be discussed or deliberated in the course of education and training does not determine whether the documents themselves are deliberative. Russo v. Nassau Cty. Cmty. Coll., 81 N.Y.2d 690 (1993) ("[T]here is no valid reason to hold that the items used do not constitute 'final agency policy or determinations.' Although respondents argue that the classroom environment is one of 'deliberation,' that in itself does not alter the status of the items used in the classroom."). That DOCCS Counsel Kiley may have orally provided legal advice relating to specific BOP decisions in the course of training is irrelevant. At issue are eleven training materials themselves, including memoranda, handouts and slideshow presentations, which were not part of the deliberative process and constituted final agency policy. (R. 167). Respondent itself identified the withheld materials as training materials in response to the Request. (R. 31). As detailed above, the record is devoid of any evidence that the documents advise Board of Parole commissioners on the application of regulations and case law to specific parolees or specific parole decisions. (R. 4–6, 161–63, 167; see supra Part II.B.ii). Because the information in the training materials was provided to BOP commissioners for general application, the materials were comprised of final policy and did not fall within the intra-agency exemption. The lower court's finding that the intra-agency exemption applied should therefore be reversed.

## IV. PETITIONER IS ENTITLED TO ATTORNEY'S FEES BECAUSE THE AGENCY WITHHELD NON-EXEMPT MATERIALS WITHOUT A REASONABLE BASIS.

In a FOIL proceeding, a court may award attorney's fees to a litigant when (1) the litigant substantially prevails; (2) the records requested are of significant interest to the general public; and (3) the agency lacks a reasonable basis in law for withholding the records. Powhida v. City of Albany, 147 A.D.2d 236, 238 (3d Dep't 1989).

Because the lower court incorrectly found that Respondent had a reasonable basis for withholding the eleven documents, it denied Petitioner's request for attorney's fees. (R. 6). To the extent this Court reverses the lower court's determination, this Court should grant Petitioner's request for attorney's fees associated with compelling disclosure of the withheld eleven documents. See Matter of N.Y. State Defs. Ass'n v. N.Y. St. Police, 87 A.D.3d 193, 197 (3d Dep't 2011) (reversing the lower court's denial of an award of attorney's fees because its decision was based on an "erroneous conclusion that the statutory prerequisites were not satisfied."); Matter of N.Y.C.L.U. v. City of Saratoga Springs, 87 A.D.3d 336, 339 (3d Dep't 2011) ("particularly in view of the fact that it was only through the use of the judicial process that petitioner was able to obtain the required disclosure and respondents evinced a clear disregard of the public's right to open government—we find that the denial of petitioner's request for an award of counsel fees was an abuse of discretion.").

## CONCLUSION

For all the foregoing reasons, the Court should reverse the Supreme Court's order entered on June 26, 2020.

Dated: March 16, 2021
Beachwood, Ohio

Respectfully Submitted,

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