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Court of Appeals

STATE OF NEW YORK

APPELLATE ADVOCATES,

Petitioner-Appellant,

—against—

NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION,

Respondent-Respondent.

BRIEF FOR PETITIONER-APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Sections 500.1(f) and 500.13(a) of the Rules of Practice of the Court of Appeals of the State of New York, Plaintiff-Appellant Appellate Advocates states that it is a not-for-profit corporation organized under the laws of the State of New York, and that it has no parents, subsidiaries, or affiliates.

STATEMENT OF RELATED LITIGATION

Pursuant to Section 500.13(a) of the Rules of Practice of the Court of Appeals of the State of New York, Plaintiff-Appellant Appellate Advocates states that there is no pending litigation related to this case.

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Petitioner-Appellant Appellate Advocates respectfully submits this brief in support of its appeal from the March 3, 2022, decision and order of the Supreme Court, Appellate Division, Third Department, which affirmed an order of the Supreme Court, Albany County, denying Appellate Advocates' petition.

PRELIMINARY STATEMENT

In 1974, New York became one of the first states to enact a statute designed to ensure public access to government records. That law, New York's Freedom of Information Law ("FOIL") was enacted to facilitate broad public access to government records and records of government decision-making. As the Legislature made clear at the time of FOIL's enactment, "access to such information should not be thwarted by shrouding it with the cloak of secrecy or confidentiality." N.Y. Pub. Off. Law (POL) § 84.

This case raises fundamental questions about the government's use of FOIL's exemptions to shield material of public importance from disclosure. Appellant Appellate Advocates is a non-profit public defender organization that represents criminal defendants who cannot afford private counsel. The FOIL request submitted by Appellate Advocates—the subject of this appeal—sought records "referencing or relating to Board of Parole ['BOP'] training" to aid in "understanding the decision-making process and reviewability of BOP parole determinations." R19.

That sort of records is material of public importance and falls within the traditional heartland of FOIL. Despite the increased liberty interests at stake in parole hearings, incarcerated individuals do not have representation. FOIL thus represents the only pathway through which such individuals can gain any insight into the decision-making process that will determine their freedom. And public access to those materials also serves as a necessary safeguard to ensure decisions by BOP commissioners are not immune from scrutiny.

The Third Department nonetheless held that virtually all materials providing insight into this vitally important government process could be exempt from disclosure based on an extraordinary and unprecedented expansion of the attorney-client privilege. The Third Department held the training materials at issue here—which only describe legal standards without applying them to real-world factual scenarios—constitute "legal advice" protected by the attorney-client privilege simply because they contain a lawyer's assessment of the law. For example, the Third Department concluded several of the materials were subject to the privilege because they: "regard[ed] the state of law and how the Board should conduct interviews in accord with such law," R202-203; contained "counsel's summary, view and impression of recent case law," R203; "discuss[ed] various legal standards and regulations," *id.*; and involved "how to reach decisions on parole matters so as to be in compliance with applicable regulations." *Id.*

That remarkable view of attorney-client privilege would expand the doctrine far beyond its historically limited role. As this Court has repeatedly explained, application of the privilege "constitutes an 'obstacle' to the truth-finding process," and must be applied narrowly. *Ambac Assur. Corp. v. Countrywide Home Loans, Inc.*, 27 N.Y.3d 616, 624 (2016) (citing *Matter of Jacqueline F.*, 47 N.Y.2d 215, 219 (1979); *see also Spectrum Sys. Int'l Corp. v. Chem. Bank*, 78 N.Y.2d 371, 377 (1991). Accordingly, this Court's precedent has always required that counsel be rendering legal advice on real-world factual scenarios for the privilege to attach. That common-sense limitation is also reflected in federal law and provides a critical check against improper use of the privilege to shield government processes from public scrutiny.

The approach adopted by the court below, by contrast, would create a version of the privilege unmoored from its foundation and purpose. Indeed, under the Third Department's view, communications universally understood to *not* fall within the privilege—such as a confidential update to clients on a newly issued decision—would qualify for protection. This Court should not endorse such an unbounded view of the privilege.

In any event, even if this Court concluded the Third Department's expansive view of the privilege is technically correct, it should nonetheless reverse the lower court's decision because the public policy exception to the attorney-client privilege

mandates disclosure here—and the court below failed to even consider the exception despite Appellate Advocates raising it. This is a quintessential case where the privilege should yield. The Department has a weak interest in nondisclosure; indeed, other agencies routinely disclose the same type of training materials at issue here. And the public interest in disclosure is at its apex here, given that (1) FOIL was specifically enacted "to increase the accountability of the government to its citizens by recognizing the public's 'right to know' more about the operation of the government," *Weston v. Sloan*, 84 N.Y.2d 462, 466 (1994), and (2) the material at issue speaks to a monumental government decision to grant or deny a person's freedom. If the public interest exception does not apply even here, the exception is a dead letter. This Court should not countenance that result.

Finally, the documents here also are not protected from disclosure under the "intra-agency materials" exemption—which the Government raises in conclusory fashion as a backup justification to withhold plainly responsive documents. The intra-agency materials exemption does not apply here for several reasons: First, the training materials are not subject to the exemption because they are non-deliberative, final agency policy. They are not communications exchanged for discussion purposes, i.e., they were not part of a "fluid" "give-and-take" and are, instead, "final agency policy." Second, the materials are also not subject to the exemption because they constitute "instructions to staff that affect the public." All of the materials at

issue are training materials issued to BOP staff that govern and guide parole decisions. Accordingly, the materials are subject to disclosure. Any other rule would result in a dramatic expansion of the intra-agency exemption.

In short, the documents here are within the heartland of the sort of materials that FOIL was intended to shed light upon. The courts below found otherwise only by misapplying this Court's precedent and embracing an indefensibly broad conception of FOIL's limited exceptions. The decision below should be reversed.

QUESTIONS PRESENTED

(1) Whether in response to a FOIL request, an agency may use the attorney-client privilege to shield from disclosure general training materials that are concededly unrelated to any specific matter and are not based on confidential, particularized information?

The Appellate Division majority incorrectly answered this in the affirmative.

(2) Whether in response to a FOIL request, an agency may withhold materials under the intra-agency exemption despite the fact that those materials are non-deliberative, final agency policy and general instructions to staff that affect the public?

The Appellate Division did not reach this issue, but the Supreme Court's decision incorrectly answered this in the affirmative.

STATEMENT OF JURISDICTION

This Court has jurisdiction under CPLR § 5601(a) because two justices dissented on a question of law. All arguments raised in this appeal were made to the courts below and are therefore preserved for this Court's review. *See generally* Pet'rs Br. in Appellate Advocates v. New York State Dep't of Corr. and Cmty. Supervision, No. 531737 (3d Dep't March 16, 2021) (*hereinafter* "Pet'r 3d Dep't Br.").

BACKGROUND

I. LEGAL BACKGROUND

FOIL was enacted to protect "[t]he people's right to know the process of governmental decision-making" by allowing the public to access government records. POL § 84. For almost half a century, this Court has safeguarded that right by holding the government "responsive and responsible to the public" in order to maintain a "free society." POL § 84; *see, e.g.*, *Matter of Doolan v. Bd. of Coop. Educ. Servs.*, 48 N.Y.2d 341 (1979). To that end, it is well settled under New York law that the public is entitled to "broad access . . . under [FOIL]." *Friedman v. Rice*, 30 N.Y.3d 461, 477 (2017).

That broad obligation of disclosure is subject only to narrow, delineated exemptions. Agencies may withhold documents that "are specifically exempted from disclosure by state or federal statute," POL § 87(2)(a), including CPLR § 4503,

which codifies the attorney-client privilege. Agencies may also withhold certain documents under an "intra-agency exemption," which applies to materials that contain advice or opinions that reflect an agency's deliberation and pre-decisional communications. *Miracle Mile Assocs. v. Yudelson*, 68 A.D.2d 176, 182 (4th Dep't 1979). But, by statute, intra-agency materials must be disclosed in response to FOIL requests when they are either "instructions to staff that affect the public" or "final agency policy or determinations." POL § 87(2)(g).

Importantly, because "FOIL established a general policy [in favor of] disclosure," "exemptions [to FOIL] are to be narrowly interpreted so that the public is granted *maximum access* to the records of government." *Friedman*, 30 N.Y.3d at 477 (internal quotation marks and citations omitted, emphasis added).

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Appellate Advocates' Request

Appellate Advocates is a New York nonprofit public defender organization that represents criminal defendants who cannot afford private counsel. R9. As part of its mission, Appellate Advocates seeks to understand how the Department of Corrections and Community Supervision ("Department") and the Department's BOP make parole determinations. *Id.* Parole hearings are veiled in obscurity: incarcerated individuals have no access to counsel during the hearings, and they often lack any information as to how the BOP will reach its decision. *See generally*

Noah Epstein, *An Uncertain Participant: Victim Input and the Black Box of Discretionary Parole Release*, 90 FORDHAM L. REV. 789, 798-99 (2021) ("[M]ore than two-thirds of parole boards do not publicize their deliberations . . . . Further, some boards' explanations of their release decisions are hardly informative, as their rationales are often short one-line sentences . . . ."). Moreover, New York Executive Law § 259-i—which governs conduct for the BOP's parole hearings—provides the BOP with vast discretion to grant or deny parole. *See, e.g.*, NY EXEC § 259-i(2)(c)(A) (McKinney 2021) ("Discretionary release on parole shall not be granted merely as a reward for good conduct or efficient performance of duties while confined but after considering if there is a reasonable probability that, if such inmate is released, he will live and remain at liberty without violating the law, and that his release is not incompatible with the welfare of society and will not so deprecate the seriousness of his crime as to undermine respect for law."); *see also* Epstein, *supra*, at 798-99 ("[S]tatutes that describe when an inmate is suitable for release are often written in general terms, which provide boards with significant discretion regarding their assessment of individual cases."). As a result, inmates are left with little guidance on how parole determinations are made, and when inmates are denied parole, they often have no idea why.

On March 19, 2018, Appellate Advocates submitted a FOIL request, which sought "[a]ny 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." R19 (Section 12 of FOIL Request).[1] Appellate Advocates requested this information to aid in "understanding the decision-making process and reviewability of BOP parole determinations." R9.

In response to Appellate Advocates' request, the Department initially provided 119 pages of records, but none were training materials provided to BOP commissioners and thus offered little insight into the decision-making process prospective parolees need to understand. *See, e.g.*, R11; R32-39 (documents produced addressing the frequency with which staff must take in-service training programs). The Department indicated "certain training materials are being withheld pursuant to attorney client privilege." R31 (citing POL § 87(g) (containing intra-agency exemption); POL § 87(a); and CPLR § 4503(a)). The Department did not describe the documents it was withholding or indicate how many documents were being withheld. Nor did the Department offer any information, explanation, or justification of its decision to withhold the documents beyond citing to the statutes.

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[1] Appellate Advocates also sought other materials, including certain documents related to an individual parolee, which are not relevant to this appeal. Section 12 is the only portion of the request at issue. *See* R101-106 (stipulation of settlement regarding other disputed sections).

On June 17, 2019, Appellate Advocates administratively appealed the adequacy of the Department's response, explaining the Department had failed to meet its burden of showing particularized and specific justification for its nondisclosure, and that the exemptions the Department cited were inapplicable. R58-59 (letter to FOIL Appeals, The Office of General, NYS Department of Corrections & Community Supervision). The Department denied the appeal, summarily concluding its "response to [the request at issue] clearly outlined what was being withheld (training materials) and why (exemptions listed)." R66.

On October 31, 2019, having fully exhausted the available administrative remedies, Appellate Advocates filed a petition in the Supreme Court of the State of New York, County of Albany against the Department under CPLR Art. 78 and POL § 84. R8-16; R72-73 (notice of petition); R74-91 (memorandum in support). The petition alleged that the Department violated FOIL by wrongfully withholding records. R74-91. During the proceedings, the parties reached a partial settlement of the dispute in which the Government agreed to disclose approximately 400 pages of previously unproduced materials. R114. Following the settlement, the Department produced a privilege log, specifying eleven documents that it was withholding. R158-159. The production of this privilege log, nearly two years after its FOIL request was made, marked the first time Appellate Advocates was even informed of what documents were being withheld. Each entry asserted protection under the

attorney-client privilege and intra-agency exemption to FOIL. *Id.* The Government provided no explanation distinguishing the eleven withheld documents from the 400 pages it produced pursuant to the partial settlement.

Notably, the Government initially stated that it was withholding the materials at issue based on "attorney client privilege." R31. While the Government listed POL § 87(a) and (g) in its denial, it did not expressly refer to the intra-agency exemption in its response and provided no explanation regarding why the exemptions applied to the training materials. *Id.* Only later, after Appellate Advocates filed its petition, did the Government contend in the privilege log that the intra-agency exemption also applied, as a backstop for its privilege claims. R158-159. The Department also asserted in the privilege log—for the first time—that the attorney work product doctrine prevented disclosure. *Id.*

In the Government's Memorandum of Law in Support of its Answer, the Department argued that the materials were "properly withheld pursuant to [POL] § 87(2)(a), (g) and CPLR § 4503(a) as records protected by attorney-client privilege." R158-159. The Department did not assert that the materials contained any advice as to a specific parole determination or other particular factual situation, but noted that the materials contained "Counsel's professional knowledge of the statutory, regulatory, and decisional case law that governs the Commissioner's responsibilities in conducting parole interviews and rendering determinations, as

well as her interpretation of the impact that amendments and recent case law will have on these duties." R118-119.

B. The Decisions Below

The Supreme Court denied the petition on June 26, 2020. R184-191. The court explained the documents "contain discussion and analysis of the relevant statutes, regulations and case law to be applied during the parole determination process, and set forth legal advice and strategies relating to the interview and decision-making procedure" as a general matter. R189. 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," the court concluded that the documents were privileged attorney-client communications. R188-189. And, because "the documents contain counsel's recommendations and were disseminated confidentially in furtherance of the decision making process," the court held "they are also exempt from FOIL as intra-agency materials." R190.

Appellate Advocates appealed that ruling on July 29, 2020. On appeal, Appellate Advocates argued the Supreme Court erred as a matter of law in finding that the Department met its burden to show the attorney-client privilege or intra-agency exemption applied to the generic training materials at issue. Pet'r 3d Dep't Br. at 10-17; 20-28. Appellate Advocates further argued that, even if the attorney-

client privilege applied, the materials should nonetheless be disclosed under the well-recognized rule that the privilege may yield "where strong public policy requires disclosure." *Id.* at (quoting *Matter of Priest v. Hennessy*, 51 N.Y.2d 62, 69 (1980)).[2]

On March 3, 2022, in a split decision, the Appellate Division, Third Department affirmed. A three-justice majority held that the withheld materials were protected by the attorney-client privilege, and thus did not reach the issue of whether the intra-agency exemption applied. R203. The majority's view was that materials prepared by a lawyer that "discuss . . . legal standards and regulations" receive attorney-client privilege, regardless of whether the materials contain any application of those standards to real or hypothetical facts. *Id.* For the majority, it was apparently enough that training materials were made to help staff "understand the requirements imposed by the [legal standards and regulations] and how it can comply with them." *Id.* The majority did not address Appellate Advocates' alternative argument that a public policy exception to the privilege applied.

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[2] While the Supreme Court addressed the agency's belated assertion of the attorney work product doctrine, R79-80, the Department ultimately abandoned it on appeal, conceding it was not raised at the agency level. Resp't Br. in *Appellate Advocates v. New York State Dep't of Corr. and Cmty. Supervision*, No. 531737 (3d Dep't March 16, 2021) (*hereinafter* "Resp't 3d Dep't Br.") at 11

Two justices wrote separate opinions disagreeing with the majority about the scope and application of the attorney-client privilege. R203-206 (Lynch, J., concurring in part and dissenting in part); R206-210 (Pritzker, J., concurring in part and dissenting in part). In these justices' view, it was not enough that the materials contained general statements of law. Justice Lynch argued that materials "devoted solely to informing the [client] of its duly codified statutory and regulatory duties . . . , without any *fact-specific discussions* or legal advice on *how to apply the law to particular scenarios*" are not privileged. R205 (emphasis added). And Justice Pritzker similarly noted that "general training materials" are not privileged. R209. Applying this rule, both justices would have held that a handout that simply provided a "checklist of materials to be brought to parole interviews, the factors that must be considered during the interviews and [other general legal] requirements" must be disclosed in its entirety. R206 (Lynch, J.); R207 (Pritzker, J.).

Justice Lynch would have held that four documents in which hypothetical "facts . . . are intertwined with counsel's advice and opinions" were privileged in their entirety, but the remaining seven documents were not. R204. Justice Pritzker would have held that three documents were not protected by the attorney-client privilege, but that two of those documents (which Justice Lynch thought were privileged) were instead subject to FOIL's intra-agency exemption. R210.

On May 23, 2022, Appellate Advocates appealed to this Court. After conducting a jurisdictional inquiry, the Court determined the issues in the petition warranted full briefing and argument. (Letter from Hon. Letitia James to Appellate Advocates (Nov. 29, 2022) at 1 ("The appeal now will proceed in the normal course of briefing and argument.")).

STANDARD OF REVIEW

This Court decides issues of statutory construction de novo, where there is "little basis to rely on any special competence." *New York City Transit Auth. v. New York State Pub. Emp. Rels. Bd.*, 8 N.Y.3d 226, 231 (2007). While agency actions are typically reviewed under an arbitrary and capricious standard, "[t]he standard of review in a CPLR article 78 proceeding challenging an agency's denial of a FOIL request is much more stringent than the lenient standard generally applicable to CPLR article 78 review of agency actions. A court is to presume that all records are open and it must construe the statutory exemptions narrowly." *Luongo v. Recs. Access Officer*, 161 A.D.3d 1079, 1080 (2d Dep't 2018); *see also New York Comm. for Occupational Safety & Health v. Bloomberg*, 72 A.D.3d 153, 158 (1st Dep't 2010) ("When reviewing the denial of a FOIL request, a court must apply a far different rule [than typically applicable to agency action]. It is to presume that all records of a public agency are open to public inspection and copying, and must

require the agency to bear the burden of showing that the records fall squarely within an exemption to disclosure.”).

ARGUMENT

This Court has made clear that “[a]ll government records are . . . presumptively open for public inspection and copying unless they fall within one of the enumerated exemptions of Public Officers Law § 87(2).” *Gould v. New York City Police Dep’t*, 89 N.Y.2d 267, 274-75 (1996). “To ensure maximum access to government documents, the ‘exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption.’” *Id.* at 275 (quoting *Matter of Hanig v. State of New York Dep’t of Motor Vehicles*, 79 N.Y.2d 106, 109 (1992)).

In the FOIL context, this means that information must “fall[] *squarely* within the ambit of one of these statutory exemptions” to be withheld. *Id.* (emphasis added) (quoting *Matter of Fink v. Lefkowitz*, 47 N.Y.2d 567, 571 (1979)). Here, the materials at issue do not fall—let alone “fall squarely”—within the statutory exemptions and, accordingly, should have been produced. The Third Department’s decision holding otherwise should be reversed.

I. THE MATERIALS WERE NOT PROPERLY WITHHELD UNDER THE ATTORNEY-CLIENT PRIVILEGE

This Court has explained that that the attorney-client privilege attaches to materials that are (1) “confidential”; (2) “transmitted in the course of professional

[attorney-client] employment"; and (3) "convey[] the lawyer's assessment of the client's legal position." *Spectrum*, 78 N.Y.2d at 378; *see Priest*, 51 N.Y.2d at 68-69. Satisfying the three requirements is necessary but not sufficient to invoke the privilege. "[E]ven where the technical requirements of the privilege are satisfied," the privilege does not apply "where strong public policy requires disclosure." *Priest*, 51 N.Y.2d at 69; *see Rossi v. Blue Cross & Blue Shield of Greater N.Y.*, 73 N.Y.2d 588, 593 (1989). Because withholding documents under the privilege "constitutes an obstacle to the truth-finding process," this Court narrowly construes its scope. *Ambac Assur. Corp.*, 27 N.Y.3d at 624; *see Spectrum*, 78 N.Y.2d at 377. That is doubly true in the context of FOIL, which mandates a baseline of disclosure. As a result, when dealing with withholding under FOIL, material must "fall[] *squarely*" within the bounds of the attorney-client privilege to qualify. *Gould*, 89 N.Y.2d at 275.

The party asserting the attorney-client privilege, here the Department, "bears the burden of establishing its entitlement to protection by showing that the communication at issue was between an attorney and a client for the purpose of facilitating the rendition of legal advice or services." *Ambac Assur. Corp.*, 27 at 624; *In re Nassau Cnty. Grand Jury Subpoena Duces Tecum Dated June 24, 2003*, 4 N.Y.3d 665, 678 (2005).

The materials at issue here are not subject to the attorney-client privilege. Training materials that address an agency's legal obligations in a purely abstract way—i.e., not in the context of any concrete case or real-world factual situation—do not fall within the privilege's ambit. Such communications lack what this Court has described as a fundamental "earmark[] of a privileged communication," because they do not "convey[] the lawyer's assessment of the *client's legal position*." *Spectrum*, 78 N.Y.2d at 378 (emphasis added). The Third Department disregarded this Court's precedent by adopting an unprecedented view of the privilege that does not require *any* connection to a particular, real-world factual situation. Such an expansive view would have far-reaching harmful consequences, and place New York law in direct conflict with federal law. The decision below should be reversed for that reason alone.

In any event, even if the privilege attached, the materials here should be disclosed under the well-established public policy exception. *Priest*, 51 N.Y.2d at 68-69. Other agencies routinely disclose similar information, and the public has a weighty interest in the materials here: both incarcerated individuals and the public have a strong interest in the parole decision-making process.

Finally, even if the Third Department's radical view were correct, reversal would *still* be warranted in the context of this case. That is because, in the context of FOIL, materials must "fall squarely" within a statutory exemption to be withheld.

Gould, 89 N.Y.2d at 275. And, whatever else is true, the materials here were not "squarely" within the scope of the attorney-client privilege—as the multiple dissents below underscore. For any or all of these reasons, the decision below should be reversed.

A. The Materials Do Not Qualify As Privileged

The Third Department's holding in this case cannot be squared with this Court's precedent, the purpose of the privilege, analogous federal law, or common sense.

1. Under New York State Law, The Privilege Protects Client Confidences, Not Abstract Training Materials

Although this Court has never directly confronted this issue, its opinions make clear a real-world factual situation is an essential attribute of "legal advice." Absent such a real-world application, the definition of legal advice would not align with the core purpose underlying the attorney-client privilege—namely, to protect client confidences. *See Spectrum*, 78 N.Y.2d at 377 ("[A]pplication [of the attorney-client privilege] must be consistent with the purposes underlying the immunity."); *Priest*, 51 N.Y.2d at 67-68.

In *Rossi*, this Court confronted the issue of whether a memorandum authored by a corporate staff attorney regarding a company form was protected by the attorney-client privilege. 73 N.Y.2d at 590. In that case, the client (a medical insurer) had denied a series of reimbursement claims, noting that the insureds'

contracts did not cover experimental treatments or treatments not approved by the federal government. *Id.* A medical provider whose patients had their claims denied by the insurer subsequently filed suit, alleging defamation and contending the insurer knew the treatments he provided were actually approved by the government when the denials were sent to his patients. *Id.* at 591. The memorandum at issue began by "refer[ring] to conversations between [the staff attorney] and [medical provider's] attorney regarding a possible defamation suit" and conversations between the attorney and the government regarding a piece of equipment involved in the dispute and then set forth the attorney's "understanding of [his client's] reimbursement policy" and the "new language that was going to be used" by the client for denying medical claims. *Id.* This Court ultimately concluded the memorandum was privileged. *Id.* at 594.

In *Spectrum*, this Court further elaborated on the meaning of "legal advice" when it considered a claim of privilege over a portion of a report produced by a law firm. 78 N.Y.2d at 376. There, the legal advice at issue (in the form of a report produced by a law firm hired as outside counsel) addressed specific instances of employee conduct that potentially amounted to fraud. *Id.* at 378 ("[I]t is uncontested that the law firm was specially retained as outside counsel for the purpose of conducting an internal investigation into possible fraud on Chemical and rendering legal advice about that problem, including counseling about litigation options.").

The report, "after presenting facts, sets forth the firm's assessment regarding a possible legal claim, its approximate size and weaknesses." *Id.* In concluding that the report was privileged, this Court observed "that facts were selected and presented in the . . . report as the *foundation* for the law firm's legal advice." *Id.* at 379 (emphasis added); *id.* at 380 ("Rather, the narration relates and integrates the facts with the law firm's assessment of the client's legal position.").

In both *Rossi* and *Spectrum*, a critical component was that the privilege was being applied to an assessment of the "client's legal position," i.e., the advice given was a legal assessment in the context of real-world situations facing each client. *Spectrum*, 78 N.Y.2d at 378. Indeed, assessing a client's "legal position" *necessarily* involves application of the law to some real-world set of facts that the client is grappling with. A client cannot have a "legal position" with respect to an abstract assessment of the law. *Spectrum*, 78 N.Y.2d at 378; *see also* Paul Rice, et. al., *Attorney-Client Privilege in the U.S.* § 7:10 (Dec. 2022) ("Fundamentally, the legal standard requires that the lawyer's services involve interpretation and application of legal principles *to specific facts* in order to guide future conduct." (emphasis added)).

In *Spectrum*, for example, the Court's analysis was fundamentally dependent on the fact that the protected material related to actual facts (employee conduct that had occurred) and assessed that conduct in light of a risk of litigation (a possible legal claim). 78 N.Y.2d at 378 ("The report itself, after presenting facts, sets forth

the firm's assessment regarding a possible legal claim, its approximate size and weaknesses."). This Court would plainly not have applied the privilege absent those two features, as would be the case with outside counsel updating a client with a description of recent employment law cases. Even though such a description would be conveyed by a lawyer, and might potentially guide a client's future decision-making, it would not implicate the client's "position" vis-à-vis any real-world circumstance, and thus disclosure would not interfere with a client's ability to "confide fully and freely in his attorney." *Priest*, 51 N.Y.2d at 67-68.

In short, a rule permitting a completely abstract assessment to qualify as privileged would be totally unmoored from this Court's precedent.

2. Application of the Privilege Here Would Be Inconsistent With the Core Purpose of the Attorney-Client Privilege.

Moreover, such a rule would be at odds with core purposes of the privilege. *See Spectrum*, 78 N.Y.2d at 377 ("[A]pplication [of the attorney-client privilege] must be consistent with the purposes underlying the immunity.").

As courts have recognized, the attorney-client privilege is ultimately grounded in the right of an individual to confer with counsel. *See, e.g.*, *Manufacturers & Traders Tr. Co. v. Servotronics, Inc.,* 132 A.D.2d 392, 395 (4th Dep't 1987) ("The attorney-client privilege . . . is strongly rooted in the constitutional right to counsel (U.S. Const. 6th Amend.; N.Y. Const., art. I, § 6)."); *In re Donald Sheldon & Co., Inc*., 191 B.R. 39, 49 (Bankr. S.D.N.Y. 1996) ("The

reason for the confidential communications privilege in the attorney-client arena is to guarantee the constitutional right to counsel and the best representation available to the client."). Absent privilege, individuals will be reluctant to share inculpatory information with their counsel and will not "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." *Priest*, 51 N.Y.2d at 67-68. Application of the privilege is thus warranted only to the extent materials "disclos[e] either directly or by implication, . . . information which the client has previously confided to the attorney's trust." *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980).

By contrast, generic descriptions of legal standards and a lawyer's application of abstract legal concepts to hypothetical facts contain no confidences and do not carry the same risk of embarrassment or legal detriment to the client. In cases where there is no concrete prospect of litigation or real-world facts involved, protection of those materials would extend far beyond the purpose of the privilege, which is to ensure effective representation and safeguard the right to counsel. Such a rule might protect a client's *preference* for having a particular communication remain confidential. But that bare interest in confidentiality has never been deemed sufficient to invoke the privilege. *See Priest*, 51 N.Y.2d at 69-70 (explaining that communications concerning fee arrangements have "no direct relevance to the legal

advice to be given"–and thus are not privileged—and the payment of legal fees by a third person is not "sufficient to sustain a claim of privilege" because "while such an arrangement may well be intended to be confidential, it is not, under ordinary circumstances, undertaken for the purpose of obtaining legal advice for the third party").

Following this Court's lead, and in accordance with the purpose of the privilege, lower courts have likewise recognized that a particularized factual context is required for the privilege to apply. In *Matter of Charles v. Abrams*, 199 A.D.2d 652 (3d Dep't 1993), the Third Department specifically rejected a claim of privilege over materials that did not include a specific set of facts. In that case, the FOIL request was for "any documents that provide agency staff attorneys with final agency policy with regard to legal representation under Public Officers Law § 17." *Id.* at 652-53. There, the state asserted privilege based on *Rossi*. *Id.* But the court explicitly rejected that argument, explaining that, unlike the materials in *Rossi* that addressed a particularized factual situation, "the documents [at issue] contain[ed] the agency's final policy, which is to be applied *to all litigation in general*." *Id.* (emphasis added). The fact that a policy will eventually "be implemented within the context of litigation" does not matter if the policy "was promulgated without regard to any particular or specific litigation" and "exists regardless of whether there is any

pending or imminent litigation." *Id.*[3]; *see also Theroux v. Resnicow*, 147 N.Y.S.3d 892 (N.Y. Sup. Ct. 2021), *on reargument*, 155 N.Y.S.3d 309 (N.Y. Sup. Ct. 2021) (interpreting *Spectrum*'s "discuss[ion] of what it means to seek legal advice" to exclude "communications [that] reference[] only basic legal concepts, none of which specifically related to and integrated the facts of this case"), *aff'd*, No. 154642/17, 2022 WL 1632229 (1st Dep't May 24, 2022); *Matter of Gilbert v. Off. of the Governor of the State of N.Y.*, 170 A.D.3d 1404, 1405-06 (3d Dep't 2019) (materials concerning potential termination of a specific sublease); *Matter of Shooters Comm. on Pol. Educ. v. Cuomo*, 147 A.D.3d 1244, 1246 (3d Dep't 2017) (materials concerning government's response to a specific FOIL request). The primary concern then is whether the materials "relate[] to and integrate[]" actual facts rather than reference "basic legal concepts." *Theroux*, 155 N.Y.S.3d at 892. If the materials do not relate to and integrate actual facts, they are not protected. The Third Department's ruling here thus breaks with its own precedent, as well as that of other departments.

[3] *Charles* also held that no attorney-client relationship existed. But that alternative basis for denying application of the privilege does not alter the opinion's primary holding that the privilege did not apply based on the nature of the documents at issue. 199 A.D.2d at 653.

3. Federal Case Law Bolsters Appellate Advocates' Position

The Third Department's decision also breaks with federal law. Reversing that decision and clarifying that the privilege attaches only where an attorney is applying law to a real-world factual scenario would align New York's privilege law with federal law, which this Court "ha[s] repeatedly looked to . . . when interpreting FOIL" because it "was modeled after" the Freedom of Information Act ("FOIA"). *Abdur-Rashid v. New York City Police Dep't*, 31 N.Y.3d 217, 231 (2018). The vast majority of federal courts that have analyzed this issue have come down *against* materials containing only generalized legal advice, like training materials, being privileged. Importantly, the D.C. Circuit, the pre-eminent authority in federal FOIA law, does not exempt from disclosure materials providing only "neutral, objective analyses of agency regulations," even if the analysis considers non-confidential "factual situations." *Coastal States Gas Corp.*, 617 F.2d at 863 (requiring disclosure of what were essentially "question and answer guidelines which might be found in an agency manual"); *see also Tax Analysts v. IRS*, 117 F.3d 607, 618 (D.C. Cir. 1997) ("The privilege also protects communications from attorneys to their clients *if the communications 'rest on confidential information obtained from the client*.'" (quoting *In re Sealed Case*, 737 F.2d 94, 98-99 (D.C. Cir. 1984) (emphasis added))).

As the D.C. Circuit has explained, there is no "purpose which would be served by applying the attorney-client privilege" in such circumstances. *Coastal States*,

617 F.2d at 863. The information from the client incorporated into the materials at issue would have been made with or without the privilege, because it did not involve private or inculpatory information. *Id.* Accordingly, there was no reason to apply the privilege to the resulting communications from attorney to client.

The same is true in other federal courts, including those in New York. Federal courts have been consistent in finding that the privilege does not attach to materials containing "general explanation[s]" of certain legal concepts if there is no "appl[ication of] any of these generalized legal principles to specific factual situations" because such materials do not reflect clients' sensitive information and therefore fall outside of the purpose of the privilege. *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) (materials that "contain[] no 'fact-specific legal advice and communication' and [instead] function[] as a general-purpose legal manual" must be disclosed under FOIA); *In re Sulfuric Acid Antitrust Litig.*, 235 F.R.D. 407, 430 (N.D. Ill. 2006) ("[C]ompliance manuals" that are "merely a compendium of policies and rules," are not privileged because they "neither reveal client confidences nor constitute the giving of legal advice[.]"); *Am. Immigr. Council v. U.S. Dep't of Homeland Sec.*, 905 F. Supp. 2d 206, 222-23 (D.D.C. 2012) (attorney-client privilege does not apply to PowerPoint slides that "were used for general trainings by USCIS lawyers," which contained only "generally applicable

legal advice" and did not "rest on . . . [any] factual particularities"); *Amadei v. Nielsen*, 17-CV-5967, 2019 WL 8165492, at *8-9 (E.D.N.Y. Apr. 17, 2019) (generic training materials are not privileged).

In short, this Court's precedent and that of the lower and federal courts confirm that the attorney-client privilege only covers legal advice that applies the law to a real-world set of facts that a client is facing. It plainly cannot apply to an abstract assessment of the law, untethered from the client's own "legal position." *Spectrum*, 78 N.Y.2d at 378. The Third Department's decision to the contrary breaks with established law, and works a virtually limitless expansion of the privilege. It must be reversed.

B. The Materials At Issue Here Do Not Apply Law To A Specific Set Of Facts

The materials at issue here do not qualify for the attorney-client privilege because they do not discuss application of law to a specific set of facts.

1. Undisputed Descriptions Of The Materials Do Not Involve A Specific Set of Facts

Seven of the eleven documents (or, at minimum, portions of those documents) provide only general overviews of relevant law with no application to any particular factual situation. The dissenting justices offered the following (undisputed) descriptions of the documents:

- The “Board of Parole Interviews” handout “is a checklist of materials to be brought to parole interviews, the factors that must be considered during the interviews and certain requirements that must be followed based upon whether an open date is granted or release is denied.” R206 (Lynch, J., concurring in part and dissenting in part) (concluding document should have been produced in its entirety); R207 (Pritzker, J., concurring in part and dissenting in part) (same).
- The “Favorable Court Decisions” and “Unfavorable Court Decisions” documents “each consist[] of a packet of published court decisions without any legal advice or confidential information.” R206 (Lynch, J., concurring in part and dissenting in part) (concluding documents should have been produced in their entirety).
- At least “certain portions” of the “BOP Interviews and Decisions” PowerPoint, the “Parole Interviews and Decision-Making” PowerPoint, the “Parole Interviews and Decision-Making Under Revised Regulations” PowerPoint, and “Parole Interviews and Decision Making” handout only “recite regulatory and statutory guidelines.” *Id.* (Lynch, J., concurring in part and dissenting in part) (concluding these portions should have been “released, subject to potential redactions”).

These are precisely the kind of generalized training materials that the overwhelming majority of courts have held are not privileged. *See supra* at 19-22; 26-28.

Two of the remaining documents contained sample language for the Department to use in its parole determinations. Justice Pritzker offered the following descriptions of these documents:

- The "Sample Decision Language Concerning Departure from COMPAS" handout "consists of three pages of information that provides template paragraphs that the Board of Parole may use in its decisions if departing from the COMPAS Risk and Needs Assessment Instrument" but does *not* "provide[] instructions or advice on how and when to implement this decisional language." R209 (Pritzker, J., concurring in part and dissenting in part) (concluding that this document was not protected by attorney-client privilege).
- Similarly, the "Hypothetical Board Decisions" document "presents template paragraphs for denying release." *Id.* (Pritzker, J., concurring in part and dissenting in part) (concluding same).

While perhaps slightly less generalized than the seven documents discussed above, these materials likewise do not "convey[] the lawyer's assessment of the client's legal position" vis-à-vis a particular factual situation. *Spectrum*, 78 N.Y.2d

at 378. Instead, the documents appear to "contain[] only generic descriptions of the law as it might apply," but do not "apply any of these generalized principles to specific factual situations nor does it indirectly disclose any inquiry by or concern of [the BOP] that would not be self evident from the nature of [the BOP's] business." *Hartford Life Ins. Co. v. Bank of Am. Corp.*, 06-CV-3805(LAK)(HBP), 2007 WL 2398824, at *6 (S.D.N.Y. Aug. 21, 2007).

Finally, both dissenting justices believed two "Minor Offenders" memoranda were privileged, but neither provided any description or analysis of those documents. R203 (Lynch, J., concurring in part and dissenting in part); R206-207 (Pritzker, J., concurring in part and dissenting in part). The majority only indicated that the documents "were created by counsel and contain legal advice to the Board regarding the state of law and how the Board should conduct interviews in accord with such law." R202-203. While Appellate Advocates has not been able to examine these documents, that description fails to establish privilege as a matter of law. As noted above, counsel's discussions of general legal principles and "generic descriptions of the law as it might apply" do not qualify as privileged. *See supra* at 19-22; 26-28. Legal advice regarding the "state of the law" and "conduct[ing] interviews in accord with such law" falls squarely within that unprotected bucket.

2. The Lower Court Rulings Impermissibly Expanded the Scope of the Privilege

The court below could only find that these documents were exempted from disclosure by adopting a nearly unlimited conception of the attorney-client privilege.

Although neither court below was clear in the legal rule for the privilege it was applying, both holdings would expand the doctrine far beyond its historically limited role to include general statements of the law. For its part, the Supreme Court held the materials were privileged because they "contain discussion and analysis of the relevant statutes, regulations and case law to be applied during the parole determination process" and "set forth legal advice and strategies relating to the interview and decision-making procedure." R189. The Third Department similarly adopted an expansive view, noting that certain materials were privileged because they "provide counsel's summary, view and impression of recent case law to the Board" and discuss "various legal standards and regulations." R203. The upshot of these articulations seems to be that any material containing a lawyer's description of the law will qualify. That extreme construction would expand the privilege to any situation where an attorney discusses the law with a client, which is unmoored from the privilege's foundation, purpose, and historic application.

In any event, even if the Department is ultimately able to show that some of the documents here are privileged, it plainly did not meet its burden to "articulate particularized and specific justification" for withholding the requested documents.

Gould, 675 N.E.2d at 811 (N.Y. 1996) (internal quotations omitted). State officials' reliance upon "conclusory characterizations of the records sought to be withheld" are insufficient to meet an agency's burden. *Church of Scientology of New York v. State*, 46 N.Y.2d 906, 908 (N.Y. 1979); *see also Niagara Envtl. Action by Raymond v. City of Niagara Falls*, 100 A.D.2d 742, 743 (4th Dep't 1984), *aff'd*, 468 N.E.2d 694 (N.Y. 1984) ("An attorney's affidavit containing conclusory assertions does not meet the agency's burden of proof under the Public Officers Law.").

Here, the Department only provided conclusory assertions of attorney-client privilege. As a few examples, the Department provided the following basic descriptions of materials and assertions of privilege:

- "The Parole Interviews and Decision-Making handout prepared May 2016 provides legal advice regarding the statutory and regulatory factors to consider when Commissioners conduct parole interviews and reach parole decisions." R163.
- "The Hypothetical Board Decisions handout from May 2016 was prepared to provide legal advice as to how to draft parole decisions properly applying the relevant statutes and regulations." R164.
- "The Parole Interviews and Decision-Making Presentation Slides were prepared for a training session in May 2016 in order to provide legal

advice concerning the statutory and regulatory factors Commissioners consider during parole interviews and when reaching decisions." *Id.*

Those boilerplate descriptions are the very type of "conclusory characterizations" that fail to satisfy the burden an agency is required to meet to establish the application of the privilege. The decision below must be reversed for that reason alone.[4]

C. Even If The Materials Are Deemed "Legal Advice," Public Policy Independently Requires Disclosure

Finally, even assuming the privilege does apply, the public policy exception to the privilege requires disclosure of these materials given that the Department's interest in nondisclosure is minimal and the public interest in disclosure here is significant.

New York law requires disclosure in the public interest even when materials are otherwise privileged. *Priest*, 51 N.Y.2d at 68-69 ("[E]ven where the technical requirements of the privilege are satisfied, it may, nonetheless, yield in a proper case,

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[4] To be clear, this case does not implicate any separate attorney-client communications that may occur in relation to the challenged documents. For example, following a training session, if a BOP commissioner reached out to counsel to discuss the application of the training materials to a specific legal matter, such a conversation may well fall within the scope of the attorney-client privilege. But the Court need not parse the precise boundaries of the privilege in the context of that type of communication, which is not at issue here. Rather, the training materials here are completely untethered from the client's own "legal position," *Spectrum*, 78 N.Y.2d at 378, and they fail to address the application of law to a specific set of facts. Those materials are clearly not privileged under well-settled law.

where strong public policy requires disclosure.”). Notwithstanding the clearly established nature of this exception, the court below erroneously failed to consider it. *See generally Jacqueline F.*, 47 N.Y.2d at 215 (applying exception); *Superintendent of Ins. Of State v. Chase Manhattan Bank*, 43 A.D.3d 514 (3d Dep’t 2007) (same). And the circumstances here warrant application of the exception.

The Department’s interest in nondisclosure here is minimal. The information requested is basic information on the general principles that go into its parole decisions. Other agencies voluntarily disclose similar training materials. *See, e.g.*, NYPD Patrol Guide, *Civilian Complaint Rev. Bd.: NYC*, https://www1.nyc.gov/site/ccrb/investigations/nypd-patrol-guide.page (“The NYPD’s Patrol Guide contains the rules that NYC police officers must follow in carrying out their official duties.”) (last accessed Jan. 22, 2023). The Department does not have a strong interest in nondisclosure.

In contrast, the public interest in disclosure here is significant. FOIL was specifically enacted as “a legislative effort to increase the accountability of the government to its citizens by recognizing the public’s ‘right to know’ more about the operation of the government.” *Weston v. Sloan,* 84 N.Y.2d 462, 466 (1994) (quoting POL § 84). The legislature found in enacting FOIL that these interests are key to “maintain[ing] “a free society.” POL § 84. Disclosure of the records “can be a remarkably effective device in exposing waste, negligence, and abuses on the part

of the government[.]" *Fink*, 47 N.Y.2d at 571. It is in the public's best interest "to hold the governors accountable to the governed." *Id.* (citing *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978)).

It is worth noting that the interests on the side of disclosure in the FOIL context are far greater than in the context of a civil discovery dispute between private parties. While promoting "liberal discovery" is an important public interest, *Spectrum*, 78 N.Y.2d at 376, that interest is not nearly as strong as the interest in accessing materials necessary to hold government to account.

And the public interest in disclosure is heightened even further in the context of materials concerning parole determinations. This Court has recognized that "the parole system is an enlightened effort on the part of society to rehabilitate convicted criminals" and emphasized the critical importance of ensuring "such offenders [believe] in a fair and objective parole procedure." *See, e.g.*, *People ex rel. Menechino v. Warden, Green Haven State Prison*, 27 N.Y.2d 376, 385-86 (1971); *see also Morrissey v. Brewer*, 408 U.S. 471, 477 (1972) (The purpose of parole "is to help individuals reintegrate into society as constructive individuals as soon as they are able, without being confined for the full term of the sentence imposed. It also serves to alleviate the costs to society of keeping an individual in a prison.").

Parole is a significant milestone for incarcerated individuals because "[t]he liberty of a parolee enables him to do a wide range of things open to persons who

have never been convicted of any crime . . . . Subject to the conditions of his parole, he can be gainfully employed and is free to be with family and friends and to form the other enduring attachments of normal life." *Id.* at 482.

At parole hearings, the BOP decides whether an incarcerated individual should be released or remain in the custody of the New York's Department of Corrections. Despite the increased liberty interests at stake, incarcerated individuals are not given the right to counsel at initial determination hearings. *See Briguglio v. N.Y. State Bd. of Parole*, 24 N.Y.2d 21, 26 (1969).

Given the BOP's opaque policies, a parolee appearing before the BOP has little insight into how the BOP makes its decision. Similarly, a member of the public has no understanding of the BOP's considerations or rationales for granting parole. BOP commissioners decide whether to grant or deny parole by following guidelines contained in the training materials withheld from the public under the Third Department's ruling. BOP's refusal to produce critical documents that explain the factors behind a parole officer's decision to grant or deny an incarcerated person's release is antithetical to basic notions of liberty and erodes public trust in the judicial-penal system and the rule of law. It also denies the public an opportunity to hold BOP commissioners to the guidelines issued by the Department and ensure that commissioners are receiving adequate training for the unique position that they hold.

Accordingly, even if this Court concludes the privilege does apply, it should nonetheless order disclosure of the training materials in light of the weighty public policy concerns at issue here.

D. If It Is A Close Question, The Materials Must Be Disclosed

Finally, to the extent this Court believes that it is a close call on whether the materials are privileged, they must be disclosed. "To ensure maximum access to government documents, the 'exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption.'" *Gould*, 89 N.Y.2d at 275 (quoting *Matter of Hanig v. State of New York Dep't of Motor Vehicles*, 79 N.Y.2d 106, 109 (1992)). In the FOIL context, this means that information must "fall[] *squarely* within the ambit of one of these statutory exemptions" to be withheld. *Id.* (emphasis added) (quoting *Fink*, 47 N.Y.2d at 571). If the materials do not "squarely" qualify for the privilege, they must be disclosed.

* * *

In short, the rule adopted below by the Third Department was an extraordinary departure from traditional privilege principles. This Court's precedent has always required that counsel be rendering legal advice based on real-world factual scenarios for privilege to attach. That common-sense limitation is also reflected in federal law and provides a critical check against improper use of the privilege to shield

government processes from scrutiny. The Third Department's decision broke sharply with that precedent.

That decision is particularly wrong in the context of FOIL requests for government training materials because the materials merely contain a lawyer's assessment of the law, without application to real-world factual scenarios, and because the public has a strong interest in their contents. The decision below should be reversed.

II. THE INTRA-AGENCY EXEMPTION DOES NOT APPLY HERE

The Department also argued before the Supreme Court that the materials were properly withheld pursuant to the intra-agency agency exemption. The Supreme Court accepted that assertion. That decision was wrong, and although the Third Department majority did not address it, this Court should do so—and reverse. *See Clerk's Office Letter to Counsel*, November 29, 2022 (providing for full briefing and argument on both the questions presented); *see also Appellate Advocates' Section 500.11 Letter* at 12-14 (July 8, 2022) (discussing why intra-agency exemption does not apply)).

The intra-agency exemption does not apply here for two independent reasons. First, the materials are not subject to the exemption because they are non-deliberative, "final agency policy or determination." POL § 87(2)(g)(iii). Second, the materials are not subject to the exemption because they are "instructions to staff

that affect the public." *Id.*§ 87(2)(g)(ii). The Department has not provided any facts to show otherwise despite its burden to do so.

A. The Materials Are Not Subject To The Intra-Agency Exemption Because They Are Non-Deliberative Final Agency Policy

The materials at issue here constitute non-deliberative "final agency policy or determination[s]" that are not properly withheld under the intra-agency exemption. *Id.* § 87(2)(g)(iii). "While the term 'inter-agency materials' is not defined under the FOIL statute, New York's courts have construed this term to mean 'deliberative material,' i.e., communications exchanged for discussion purposes not constituting final policy decisions." *Russo v. Nassau Cnty. Cmty. Coll.*, 81 N.Y.2d 690, 699 (1993).

To qualify, materials must form part of a "fluid[]" "give and take" within the agency. *Kheel v. Ravitch*, 62 N.Y.2d 1, 8 (1984); *see also Tax Analysts*, 117 F.3d at 607 ("The government has the burden of showing that the materials were 'generated before the adoption of an agency policy' and 'reflect [ ] the give-and-take of the consultative process.'") (citing *Coastal States Gas Corp.*, 617 F.2d at 866). Along those lines, deliberative materials generally "reflect the personal opinions of the writer rather than the policy of the agency." *Coastal States*, 617 F2d at 866. And it is not sufficient that the materials were used in a deliberative environment; the content of the materials themselves must be deliberative. *See Russo*, 81 N.Y.2d at 699-700 ("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.").

Moreover, even where materials are deliberative, they are required to be disclosed if they "embody an agency's effective law and policy" or constitute "[t]he reasons which underlie an agency policy actually adopted, if [those reasons are] expressed within the agency." *Miracle Mile Assocs. v. Yudelson*, 68 A.D.2d 176, 182 (4th Dep't 1979) (cited in *Matter of Gould*, 89 N.Y.2d at 277) (discussing *Renegotiation Bd. v. Grumman Aircraft Eng. Corp.*, 421 U.S. 168, 184 (1975)); *see also National Labor Relations Bd. v. Sears, Roebuck & Co.*, 421 U.S. 132, 151-152 (1975). In such circumstances, the material is properly considered the "working law" of the agency and subject to disclosure. Thus, even non-final agency materials may "bec[o]me a final agency policy record when [the decision-maker] adopted it as the basis for his decision." *New York 1 News v. Off. of President of Borough of Staten Island*, 231 A.D.2d 524, 525 (2d Dep't 1996); *see also Bray v. Mar*, 106 A.D.2d 311, 314 (1st Dep't 1984) (certain records disclosable where the decision-maker adopted their findings when issuing art grants); *Nat'l Council of La Raza v. Dep't of Just.*, 411 F.3d 350, 358 (2d Cir. 2005) (holding that DOJ's Office of Legal

Counsel memorandum was disclosable where DOJ relied on its analysis and conclusions in its final decision).[5]

The materials at issue here are not subject to the intra-agency exemption because they are non-deliberative and underlie final agency policy. Training materials are created to "guid[e]" staff. *Coastal States Gas Corp.*, 617 F.2d at 863. The Department has never asserted (or submitted evidence showing) the materials were part of any "give and take." Indeed, based on the available descriptions, it seems none of these materials disclose consultations, discussions, or personal opinions by any individual writer. Instead, Counsel to the BOP stated she "prepared [the materials] with the assistance of [her] staff attorneys within Counsel's Office to the Board of Parole," and "[a]ll of the materials contain [her], *and counsel's office['s]*, professional knowledge of the statutory and regulatory law." R162 (emphasis added). It does not appear anyone else reviewed or edited the documents before they were used to train staff.

In a highly analogous case, the District Court for the District of Columbia explained "training slides are neither predecisional nor deliberative. *Am. Immigr.*

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[5] *See, e.g.*, *Tuck-It-Away Assocs., L.P. v. Empire State Dev. Corp.*, 54 A.D.3d 154, 162 (1st Dep't 2008), *aff'd*, 13 N.Y.3d 882 (2009) (explaining that because "[m]any of the provisions of FOIL, including the [intra-agency] exemption . . . were patterned after the federal analogue (the Freedom of Information Act)," "the Court of Appeals has noted [that] federal case law on the scope of this exemption is therefore instructive" (citing *Fink*, 47 N.Y.2d at 572)).

Council, 905 F. Supp. 2d at 218. That is because "training is not a step in making a decision; it is a way to disseminate a decision already made. Indeed, by teaching [agency] employees to go forth and apply the information in the slides, [the agency] entrenched its policies. The deliberative-process privilege thus cannot protect [such] slides from disclosure." *Id.* The training materials here are likewise not the kind of "predecisional, nonfinal discussion[s]" that receive protection under the intra-agency exemption. *Stein v. New York State Dep't of Transp.*, 25 A.D. 3d 846, 847-48 (3d Dep't 2006).[6]

Finding the materials here subject to the intra-agency exemption would not only break with federal law, but also vastly expand the exemption's historically limited application. For example, Justice Pritzker asserted documents containing language to be inserted into agency decisions are deliberative. R210. But those documents are not part of a "give-and-take" within the agency, and the agency has

[6] At a minimum, the documents at issue here which are "samples" designed for direct incorporation into agency decision must constitute "final agency policy" materials because they were not subject to further deliberation and were intended to be directly inserted into external agency decisions. Two of the withheld documents here contained sample language for the BOP commissioners to insert into written parole determinations. The Department has never suggested—much less presented evidence showing—that it does not use the materials to shape final determinations by the commissioners, as would be required to satisfy its burden to show the exemption applies. *See generally Ambac Assur. Corp.*, 27 N.Y.3d at 624. To the extent the withheld materials were incorporated into final agency actions decisions, they are not intra-agency materials.

made no effort to show that they are. If such documents qualify as deliberative, it is hard to imagine what internal agency documents would *not* qualify for the intra-agency exemption. That broad conception of the intra-agency exemption cannot be squared with the general purpose of FOIL, which is designed to permit public access to communications within agencies, and should be rejected. *See* N.Y. Stat. Law § 152 (McKinney) ("A construction of a statute which tends to sacrifice or prejudice the public interests will be avoided.").

B. The Intra-Agency Exemption Does Not Apply Because The Withheld Materials Constitute Instructions To Staff That Affect The Public

Even if this Court considers the materials deliberative and not final agency policy, the materials were also not properly withheld under the intra-agency exemption independently because they constitute instructions to BOP staff that affect the public. The intra-agency exemption does not extend to "instructions to staff that affect the public." POL § 87(2)(g)(ii). "Instructions" include training materials, like those at issue here. *See* N.Y. Stat. Law § 232 (McKinney) ("Words of ordinary import used in a statute are to be given their usual and commonly understood meaning."); "Instruction," Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/instructions ("an outline or manual of technical procedure") (last visited January 22, 2023). The materials here provide an overview of general legal obligations in conducting parole hearings. The target

audience is Department staff. *See, e.g.*, R162 (author of the materials explaining that the materials were intended for "BOP Commissioners"). And parole determinations unquestionably "affect the public." Indeed, as discussed above, the public has a strong interest in the Department's parole determinations and the standards that BOP staff are applying in parole hearings. *See supra* at 34-38. *Cf. Williams & Connolly v. Axelrod*, 139 A.D.2d 806, 808 (3d Dep't 1988) (finding that an internal public health memorandum by the Department of Health was "'instructions to staff that affect the public' since [it] deal[t] with a public health matter"). The materials thus qualify under a straightforward reading of this exception to the intra-agency exemption.

Indeed, this Court's decision in *Fink* makes clear that instructions to staff that affect the public encompasses "[r]ecords drafted by the body charged with enforcement of a statute which merely clarify procedural or substantive law." 47 N.Y.2d at 572; *see also Capruso v. New York State Police*, 300 A.D.2d 27, 28 (1st Dep't 2002) (relying on *Fink* to find "manuals [containing] primarily technical specifications, operational instructions and legal advice on how best to ensure successful prosecution of speeders" had to be disclosed); *cf. Stokes v. Brennan*, 476 F.2d 699, 701 (5th Cir. 1973) ("[T]he disclosure of information clarifying an agency's substantive or procedural law serves the very goals of enforcement by encouraging knowledgeable and voluntary compliance with the law."). Here,

because the materials merely clarify the procedural or substantive law that applies, they are, as in *Fink*, subject to disclosure.[7]

C. The Department Did Not Meet Its Burden To Show The Intra-Agency Exemption Applies

Finally, even if this Court determines the materials qualify for the intra-agency exemption, it should reverse because the Department did not meet its burden here to show the intra-agency exemption applied. Agencies have the burden to show withheld documents fall within an exemption. *Matter of Gartner v. N.Y. State Att'y Gen.'s Off.*, 160 A.D.3d 1087, 1090 (3d Dep't 2018). As discussed *supra* at 32-33, "the agency must articulate particularized and specific justification for not disclosing requested document" to meet its withholding burden. *Gould*, 675 N.E.2d at 811 (N.Y. 1996) (internal quotation marks and citation omitted). "[C]onclusory characterizations of the records sought to be withheld" are insufficient to meet an agency's burden. *Church of Scientology of New York*, 46 N.Y.2d at 908; *see also*

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[7] To the extent the Department argues BOP employees are not "staff," that argument does not hold water. Below, the Department cited NY EXEC § 259 c, which lists the BOP's functions, powers, and duties, to claim BOP employees are "appointed officials whose powers and duties include making parole determinations." Resp't 3d Dep't Br. at 8. But nowhere does NY EXEC § 259-c state BOP "appointed officials" are not staff. The Court should reject this cramped reading of FOIL, which lacks any statutory basis and runs contrary to the statute's purpose. *See* N.Y. Stat. Law § 114 (McKinney) ("If there is nothing to indicate a contrary intent on the part of the lawmakers, terms of general import in a statute ordinarily are to receive their full significance.").

Niagara Envtl. Action, 100 A.D.2d at 743 ("An attorney's affidavit containing conclusory assertions does not meet the agency's burden of proof under the Public Officers Law.").

Here, the Department made no effort to show the materials at issue were deliberative as required for them to fall within the intra-agency exemption. Nor did the Department put forward any "particularized and specific justification" for why the materials did not constitute final agency policy or why the materials were not instructions to staff. And the Supreme Court entirely failed to address the final agency policy and instructions to staff exceptions, despite Appellate Advocates' arguments regarding the agency's failure to show the materials were subject to disclosure under those exceptions. At a minimum, the Department has failed to meet its burden on this front, and the decisions below should be reversed on that basis.

III. THIS COURT SHOULD RESOLVE TWO REMAINING ISSUES TO CLARIFY THE SCOPE OF THIS CASE ON REMAND

In addition, this Court should resolve two remaining issues in order to provide needed clarity on remand. First, the Court should make clear the attorney work product doctrine does not apply here. Second, it should hold Appellate Advocates is entitled to attorneys' fees if it prevails.

A. The Work Product Doctrine Does Not Apply Here, And The Department Cannot Now Assert That It Does

One exception to the duty to disclose under FOIL is CPLR 3101(c), which codifies the attorney work product doctrine. That exception does not apply here because the Department failed to assert it at the agency level.

As this Court has recognized, an agency cannot rely on a FOIL exemption not raised at the agency level. *See, e.g.*, *Matter of Madeiros v. N.Y. State Educ. Dep't*, 30 N.Y.3d 67, 74-75 (2017) (rejecting agency's reliance on a FOIL exemption not raised at agency level); *see also Kelly v. Safir*, 96 N.Y.2d 32, 39 (2001) ("The review of an administrative determination is limited to the facts and record adduced before the agency.").

Here, the agency abandoned the attorney work product exemption argument on appeal, conceding it had not been raised at the agency level. Resp.'s Br. At 11 ("Although the court below also found the withheld materials to be exempt from disclosure as attorney work product, respondent does not defend nondisclosure on this ground solely because, as petitioner correctly points out, the only grounds for nondisclosure asserted at the agency level were attorney-client privilege and intra-agency materials."); *see also U.S. Bank N.A. v. DLJ Mortg. Cap., Inc.*, 33 N.Y.3d 84, 89 (2019) ("To preserve an argument for review by [the Court of Appeals], a party must raise the specific argument in Supreme Court and ask the court to conduct that analysis in the first instance.").

Although the majority in the Appellate Division did not consider the work product doctrine, the Supreme Court did consider it despite the agency's failure to raise the exemption at the agency level. That was error, and this Court should make clear that that part of the Supreme Court's decision cannot stand if the Appellate Division's decision is vacated.

B. Appellate Advocates Is Entitled to Attorneys' Fees

In a FOIL proceeding, a court shall award attorneys' fees to a litigant where (1) a party has "substantially prevailed" and (2) the agency had "no reasonable basis for denying access" to the records in dispute. POL § 89 (4)(c); *see also Dioso Faustino Freedom of Info. L. Request v. New York City*, 142 N.Y.S.3d 502, 504 (1st Dep't 2021).

An award of attorneys' fees is proper here. The Department lacked a reasonable basis in the law for withholding the records at issue. As demonstrated, this Court has long applied the attorney-client privilege to materials discussing specific factual scenarios, and courts have long held that training materials do not qualify for withholding under the attorney-client privilege or pursuant to the intra-agency exemption. *See supra* at 16-46. And the Department's own shifting rationales and assertions when it withheld documents drives this point home. Initially, the Department asserted attorney-client privilege over all withheld documents but did not identify how many documents it was withholding. R31. It

then subsequently disclosed approximately 400 pages of training materials it had previously withheld. When pressed on the assertion of privilege, the Government then switched course, adding the intra-agency exemption as a backstop. R66. Those shifts in position reinforce that the Department had no reasonable basis for withholding.

CONCLUSION

The Third Department's decision and order should be reversed, and the case should be remanded for further proceedings.

Respectfully Submitted,

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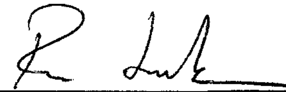

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