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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.

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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.

TABLE OF CONTENTS

Page

CORPORATE DISCLOSURE STATEMENT i

STATEMENT OF RELATED LITIGATION i

TABLE OF AUTHORITIES iii

PRELIMINARY STATEMENT 1

ARGUMENT 3

I. The Withheld Materials Do Not Qualify As Attorney-Client Privileged 3

A. Appellate Advocates Offers A Clear Standard For Application Of The Privilege Grounded In Precedent And The Privilege's Purpose 3

B. The Training Materials At Issue Are Not Privileged 8

C. The Court Should Reject the Department's Vague And Subjective "Purpose" Driven Inquiry 11

D. The Department's Remaining Arguments Are Meritless 13

E. Public Policy Requires Disclosure 19

II. The Withheld Materials Do Not Qualify For the Intra-Agency Exemption 21

A. The Department's Position On The Scope Of The Intra-Agency Exemption Is Overbroad And Unmoored From The Purposes Underlying The Exemption. 21

B. The Department's Arguments Regarding The Scope Of The Final Agency Policy And Instructions To Staff Exceptions Are Incorrect 24

III. Two Remaining Issues Warrant This Court's Consideration 27

CONCLUSION 29

TABLE OF AUTHORITIES

Page(s)

CASES

Matter of Abdur-Rashid v. New York City Police Department,
31 N.Y.3d 217 (2018) 6

Ambac Assurance Corp. v. Countrywide Home Loans, Inc.,
27 N.Y.3d 616 (2016) 5, 25

American Immigration Council v. United States Department of Homeland Security,
905 F. Supp. 2d 206 (D.D.C. 2012) 23

Brack v. MTA New York City Transit,
No. 18-CV-846-SJB, 2019 WL 1547258 (E.D.N.Y. Apr. 9, 2019) 28

Coastal States Gas Corp. v. Department of Energy,
617 F.2d 854 (D.C. Cir. 1980) 6, 7, 12, 14

In re Donald Sheldon & Co.,
191 B.R. 39 (Bankr. S.D.N.Y. 1996) 4

Matter of Fink v. Lefkowitz,
47 N.Y.2d 567 (1979) 16, 27

Fisher v. United States,
425 U.S. 391 (1976) 5

Friedman v. Bloomberg LP,
No. 3:15cv00443, 2019 WL 9089585 (D. Conn. Jan. 14, 2019) 17

Friedman v. Rice,
30 N.Y.3d 461 (2017) 20

Matter of Gould v. New York City Police Department,
89 N.Y.2d 267 (1996) 16, 19

Matter of Hanig v. State of New York Department of Motor Vehicles,
79 N.Y.2d 106 (1992) 16, 19

Page(s)

Hartford Life Insurance Co. v. Bank of America Corp.,
No. 06-CV-3805, 2007 WL 2398824 (S.D.N.Y. Aug. 21, 2007) 10

Matter of Kheel v. Ravitch,
62 N.Y.2d 1 (1984) 22

LoSacco v. City of Middletown,
71 F.3d 88 (2d Cir. 1995) 28

Matter of Madeiros v. New York State Education Department,
30 N.Y.3d 67 (2017) 27, 29

Maloney v. Murphy,
984 F.3d 50 (D.C. Cir. 2020) 28

Manufacturers & Traders Trust Co. v. Servotronics, Inc.,
132 A.D.2d 392 (4th Dep't 1987) 4

Martinez v. United States,
840 F. App'x 660 (2d Cir. 2021) 29

McKnight v. Honeywell Safety Products USA,
No. 16-132WES, 2019 WL 452741 (D.R.I. Feb. 5, 2019) 17

Miedema v. Miedema,
144 A.D.3d 803 (2d Dep't 2016) 28

National Council of La Raza v. Department of Justice,
411 F.3d 350 (2d Cir. 2005) 25

National Day Laborer Organizing Network v. United States Immigration & Customs Enforcement,
486 F. Supp. 3d 669 (S.D.N.Y. 2020) 12

Matter of New York 1 News v. Office of the President of Borough of Staten Island,
231 A.D.2d 524 (2d Dep't 1996) 24

Matter of New York Times Co. v. City of New York Fire Department,
4 N.Y.3d 477 (N.Y. 2005) 23

Page(s)

Matter of Priest v. Hennessey,
51 N.Y.2d 62 (1980) 8, 12, 18, 20

Ross v. Bank of America, N.A. (Currency Conversion Antitrust Litigation),
No. 05 CIV. 7116, 2010 WL 4365548 (S.D.N.Y. Nov. 3, 2010).....17

Rossi v. Blue Cross & Blue Shield of Greater New York,
73 N.Y.2d 588 (1989) 4, 5, 7

Scott v. Chipotle Mexican Grill, Inc.,
103 F. Supp. 3d 542 (S.D.N.Y. 2015) 12

Spectrum Systems International Corp. v. Chemical Bank,
78 N.Y.2d 371 (1991) .....*passim*

Matter of Stein v. New York State Department of Transportation,
25 A.D. 3d 846 (3d Dep't 2006).....24

In re Sulfuric Acid Antitrust Litigation,
432 F. Supp. 2d 794 (N.D. Ill. 2006).....18

Tax Analysts v. IRS,
117 F.3d 607 (D.C. Cir. 1997).....22

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), *aff'd*, No. 154642/17, 2022 WL 1632229 (1st Dep't May 24, 2022).....7

United States v. Doe (In re Grand Jury Investigation),
399 F.3d 527 (2d Cir. 2005) 20

United States v. Quiroz,
22 F.3d 489 (2d Cir. 1994) 28

Valassis Communications, Inc. v. News Corp.,
No. 17-CV-7378, 2018 WL 4489285 (S.D.N.Y. Sept. 19, 2018).....17

Matter of Williams & Connolly v. Axelrod,
139 A.D.2d 806 (3d Dep't 1988).....27

Page(s)

STATE REGULATIONS

Public Officers Law
§ 84 1
§ 87(2)(g)(ii) 2, 21
§ 87(2)(g)(iii) 2, 21
§ 89(4)(c)(ii) 29

OTHER AUTHORITIES

Paul Rice, et al., *Attorney-Client Privilege in the United States* § 7:10 (Dec. 2022) 4

PRELIMINARY STATEMENT

Appellate Advocates offered a clear standard in its opening brief for when attorney-client privilege should apply in the context of New York's Freedom of Information Law ("FOIL"): To qualify for protection under the attorney-client privilege, legal advice must be based on real-world factual scenarios or circumstances the client is facing. It does not apply to generic descriptions of legal standards or a lawyer's application of legal concepts to hypothetical facts that contain no client confidences. In other words, it must include an assessment of the client's "legal *position*," not abstract legal analysis. *See Spectrum Sys. Int'l Corp. v. Chem. Bank*, 78 N.Y.2d 371, 380 (1991) (emphasis added).

That standard is rooted in this Court's precedent, the purpose of the privilege, and analogous federal law. 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. N.Y. Pub. Off. Law ("POL") § 84. This Court should not allow the Department to undercut those aims here by misusing the privilege to shield generic training materials that are untethered to any real-world facts or client confidences—especially when those materials involve matters of great public importance.

In contrast, to the extent the Department provides any guiding principle at all, it anchors its position on the subjective purpose for which an attorney created the

materials. *See* Resp. Br. 19 ("Counsel Kiley created them for the specific purpose of rendering 'legal advice and counsel' to Board Commissioners . . . ."). But that vague standard conflicts with precedent, does not align with the purpose of the privilege, and presents numerous practical problems. It would also deeply undermine FOIL by permitting the government to shield broad swaths of materials from disclosure that are within the heartland of the statute. This Court should not adopt the Department's ill-defined approach.

The Department's answer on application of the intra-agency exemption is similarly flawed and would likewise allow the government to circumvent FOIL's purposes. First, the Department adopts a virtually limitless view of what constitutes deliberative materials subject to the intra-agency exemption. That view does not align with precedent or the policy underlying FOIL. Second, the Department contends that the exceptions for the intra-agency exemption for non-deliberative, "final agency policy or determinations," POL § 87(2)(g)(iii), and for "instructions to staff that affect the public," *id.* § 87(2)(g)(ii), do not apply here because the Commissioners were not completely *bound* by the materials. Those positions find no home in the text of the statute or precedent. This Court should reject the Department's effort to impose a novel restriction on the scope of FOIL.

The Third Department's decision should be reversed.

ARGUMENT

I. THE WITHHELD MATERIALS DO NOT QUALIFY AS ATTORNEY-CLIENT PRIVILEGED

The attorney-client privilege does not apply to the materials at issue because none provide advice tailored to a specific factual scenario. Appellate Advocates offers a straightforward standard for application of the privilege grounded in precedent and the privilege's purpose. The Department fails to either undermine the applicability of that rule or propose any workable alternative standard that should be applied by this Court. At best, the Department offers a vague and highly subjective test that would ground privilege solely on the attorney's intent in creating the materials. That test has no basis in this Court's precedent, and should be firmly rejected.

A. Appellate Advocates Offers A Clear Standard For Application Of The Privilege Grounded In Precedent And The Privilege's Purpose

Appellate Advocates articulates a clear standard for application of the attorney-client privilege: the privilege covers legal advice that applies the law to a real-world set of facts that a client is facing. Under that standard, the privilege does not apply to an abstract assessment of the law, untethered from the client's own "legal position," such as the training materials at issue. Requiring a real-world situation facing the client for application of the privilege is grounded in this Court's

precedent and the purpose of the privilege, and offers a workable approach, as evidenced by this Court's and federal caselaw.

As explained in Appellate Advocates' opening brief, whether application of the privilege is appropriate hinges on whether the materials reflect an assessment of the client's legal *position*, i.e., the advice was a legal assessment in the context of a real-world situation facing the client. *See Spectrum Sys. Int'l Corp. v. Chem. Bank*, 78 N.Y.2d 371, 377-78 (1991) (legal advice addressed specific instances of employee conduct that potentially amounted to fraud and assessed "client's legal position"); *see also Rossi v. Blue Cross & Blue Shield of Greater N.Y.*, 73 N.Y.2d 588, 590-94 (1989) (memorandum involving real-world factual scenario); 1 Paul Rice, et al., *Attorney-Client Privilege in the United States* § 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.").

That approach aligns with the purpose of the privilege, which is 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.*, 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.").

The Department appears to accept as much, stating that the privilege is "intended to foster openness between counsel and client so that legal problems can be thoroughly and accurately analyzed." Resp. Br. 16 (citing *Rossi*, 73 N.Y.2d at 591-92); *see also id.* ("[P]rivilege serves the vital purpose of fostering the open dialogue between attorneys and clients 'that is deemed essential to effective representation.'" (quoting *Spectrum*, 78 N.Y.2d at 377)). Appellate Advocates' standard is sufficiently protective of that right while also ensuring that the privilege does not sweep beyond what it was intended to protect—it ensures that any legal advice rendered based on factual real-world scenarios is protected and that any advice rendered regarding hypothetical scenarios based on client confidences will likewise be covered. *See, e.g.*, *Fisher v. United States*, 425 U.S. 391, 403 (1976) (Privilege "protects only those disclosures necessary to obtain informed legal advice which might not have been made absent the privilege."). Expanding the scope of privilege to encompass materials or communications untethered to any real-world factual scenario or client communication is unnecessary because no legal jeopardy could possibly attach to generic restatements of the law or purely hypothetical scenarios. *Cf. Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, 27 N.Y.3d 616, 624 (2016) (application of the privilege "'constitutes an "obstacle" to the truth-

finding process,'" and must be applied narrowly (citation omitted)). An individual's right to candid communication with their counsel simply isn't implicated in such a situation.

Appellate Advocates' standard also comports with analogous federal precedent and avoids rendering FOIL less effective and more restrictive than its federal counterpart. *See Matter of Abdur-Rashid v. N.Y. City Police Dep't*, 31 N.Y.3d 217, 231 (2018) (This Court "ha[s] repeatedly looked to federal precedent when interpreting FOIL" because it "was modeled after" the Freedom of Information Act ("FOIA").); *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 863 (D.C. Cir. 1980) (requiring disclosure of "question and answer guidelines which might be found in an agency manual"); Opening Br. 26-28.

In an effort to distinguish *Coastal States*, the Department incorrectly suggests that New York's privilege rule is *broader* than the federal standard set forth in *Coastal States*. In the Department's telling, New York's privilege rule "extends" to any "'confidential communication between the attorney or his employee and the client in the course of professional employment'" without "requir[ing] the attorney to have first received confidential information from the client." Resp. Br. 23-24. That view cannot be squared with *Spectrum* or *Rossi*. In both of those cases, this Court did not hold the materials were privileged because an attorney was communicating with a client—indeed, both opinions would have been dramatically

shorter if that were the rule. Rather, it was the content of the communication that governed the analysis. *Spectrum*, 78 N.Y.2d at 377-78 (document containing "lawyer's assessment of the client's legal position" was privileged communication); *see also Rossi*, 73 N.Y.2d at 590-94 (memorandum involving real-world factual scenario).[1] The same is true in *Coastal States*. There, the court focused on the difference between "neutral, objective" legal analysis (which does not implicate the purposes of the privilege) and the communication of "private information" (which does, because the privilege is grounded in the need for candor). *Coastal States*, 617 F.2d at 863. When there is no private information—in the form of a real-world factual situation that the client is facing—there is no "legal advice" but rather just an "objective, neutral" legal analysis, which is outside the purpose of the privilege. The Department offers no sensible reason why New York privilege law should break from its federal counterpart.

In short, to constitute legal advice shielded by the privilege, the materials at issue must "relate[] to and integrate[]" actual facts rather than merely reference "basic legal concepts." *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), *aff'd*, No.

[1] Indeed, the Department's view of New York privilege law (that any communication from an attorney to a client is protected, regardless of content) would eviscerate the legal advice requirement. That mistaken view cannot be squared with this Court's precedent.

154642/17, 2022 WL 1632229 (1st Dep't May 24, 2022); *see also Spectrum*, 78 N.Y.2d at 377-78. Absent such a real-world application addressing a "client problem," 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."); *Matter of Priest v. Hennessey*, 51 N.Y.2d 62, 67-68 (1980). Statements or summaries of general legal principles in the abstract, untethered to any client issue, cannot qualify.

B. The Training Materials At Issue Are Not Privileged

Under the standard outlined above, it is apparent that the materials here do not qualify for application of the attorney-client privilege because they do not discuss application of law to a specific set of facts facing the client.[2] The Department makes no attempt to disagree with Appellate Advocates' descriptions of the documents (drawn from the proceedings below), nor does the Department meaningfully dispute that they would not be privileged under the proposed test. Resp. Br. 26-27.

As explained in Appellate Advocates' opening brief, 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.

[2] Appellate Advocates notes that its analysis is based on characterizations of the documents as described in the proceedings below.

Opening Br. 28-31. Respondent contends these materials "reflect counsel's summary, view and impression of recent case law," and "discuss legal standards and regulations to facilitate the Board's understanding." Resp. Br. 26. However, these are precisely the kinds of generalized training materials that the overwhelming majority of courts have held are not privileged. Opening Br. 19-22, 26-28. That reasoning also provided the basis for the two dissenting justices' conclusion that various training materials should have been produced in whole or, at a minimum, in part. *See* R204-205 (Lynch, J., concurring in part and dissenting in part) (dissenting from majority decision regarding training documents because "[a]lthough these documents were prepared by attorneys in the course of a professional relationship, the general legal principles outlined therein are not confidential"); R206-208 (Pritzker, J., concurring in part and dissenting in part) (agreeing with Lynch, J., that "Board of Parole Interviews" checklist—a checklist for how the Board of Parole should conduct itself prior to the interview—"does not contain any privileged or exempt material and therefore does not fall within the attorney-client exemption").

Two of the remaining documents contained sample language for the Department to use in its parole determinations. While perhaps slightly less generalized than the seven documents discussed above, these materials 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." *See Hartford Life Ins. Co. v. Bank of Am. Corp.*, No. 06-CV-3805, 2007 WL 2398824, at *6. The Department provides no additional support to counter that position.

Regarding the two "Minor Offenders" memoranda, both dissenting justices believed they were privileged, but neither provided any description or analysis of those documents. *See* 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. And, rather than provide any argument to bolster that analysis, the Department simply restates the Third Department's conclusion that these materials constitute legal advice. Resp. Br. 26. However, that description fails to establish privilege as a matter of law. As with the other nine documents, counsel's discussions of general legal principles and "generic descriptions of the law as it might apply" do not qualify as privileged. *Hartford Life Ins. Co*., 2007 WL 2398824, at *6. Legal advice regarding the "state of the law" and

"conduct[ing] interviews in accord with such law" falls squarely outside the scope of the privilege. R202-203.

Because none of the eleven documents at issue provides legal advice tailored to a particularized factual scenario, the materials are not shielded by attorney-client privilege and should be disclosed under FOIL. The Department has failed to satisfy its burden of proof to demonstrate otherwise.

C. The Court Should Reject the Department's Vague And Subjective "Purpose" Driven Inquiry

The Department argues that all eleven of these documents are protected in their entirety by the attorney client privilege. But notably absent from the Department's brief is any clear articulation of the standard that should be applied. To the extent that the Department advances a test at all, it appears to ground application of the privilege merely in the subjective position for which an attorney created the materials. *See* Resp. Br. 19 ("Counsel Kiley created them for the specific purpose of rendering 'legal advice and counsel' to Board Commissioners . . . ."). That standard cannot be squared with precedent or the purpose of the privilege and is unworkable in practice.

First, courts have repeatedly made clear that the label affixed to material by the author or others is not determinative of whether the material is attorney-client privileged. *See, e.g.*, *Spectrum*, 78 N.Y.2d at 379-80 ("[A] court is not bound by the conclusory characterizations of client or counsel that the retention was for the

purpose of rendering legal advice . . . ."); *Scott v. Chipotle Mexican Grill, Inc.*, 103 F. Supp. 3d 542, 545-46 (S.D.N.Y. 2015) (a lawyer's "ipse dixit does not convert non-privileged communication into privileged communication"); *Nat'l Day Laborer Org. Network v. U.S. Immigr. & Customs Enf't*, 486 F. Supp. 3d 669, 692-93 (S.D.N.Y. 2020).

Second, that test does not comport with the purpose of the privilege. The privilege is intended to safeguard the right of an individual to confer with counsel. Absent its application, individuals may be reluctant to share inculpatory information with their counsel. *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*, 617 F.2d at 862.

The purpose is not furthered, however, by applying the privilege to materials any time an attorney asserts a subjective purpose of providing legal advice, even absent a real-world factual scenario. In such circumstances, application of the privilege does not further communications between client and counsel, but instead turns the privilege into an amorphous shield. For example, if an attorney purported that a client's fee arrangement was privileged, that would not make it so because "[a] communication concerning the fee to be paid has no direct relevance to the legal advice to be given." *Priest*, 51 N.Y.2d at 70 ("[F]ee arrangements between attorney

and client do not ordinarily constitute a confidential communication and, thus, are not privileged in the usual case.").

The standard laid out in Appellate Advocates' opening brief is sufficiently protective of confidential communications, while also ensuring broad public access as promised by FOIL. By contrast, the Department's proffered subjective intent test is infinitely malleable, and could be used to shield from disclosure *any* attorney-client communication that a governmental agency would prefer not to disclose. This Court should reject the Department's invitation to create a roving attorney-client exception to FOIL.[3]

D. The Department's Remaining Arguments Are Meritless

The Department offers several supposed concerns with the test proposed by Appellate Advocates. None have merit.

First, the Department argues that Appellate Advocates misapplies precedent by requiring that there be an immediate risk of litigation for the privilege to apply. Resp. Br. 21 ("First, this Court has squarely rejected the notion that the privilege only applies in the context of assessing 'some real-world set of facts' that implicates

[3] The Department's subjective purpose-driven test would undoubtedly tip the scales in favor of the party claiming the privilege, impermissibly shifting (and reducing) its burden to demonstrate that the privilege applies. Such a test would require parties and a court to apply an amorphous standard, while Appellate Advocates' real-world facts test provides the parties with a straightforward, content-driven test that will lead to the need for less intervention, including *in camera* review.

the risk of litigation."); *see also id.* at 22 ("Contrary to petitioner's characterization, *Matter of Charles* [*v. Abrams*, 199 A.D.2d 652 (3d Dep't 1993)]did not hold that the privilege only arises in the context of pending or imminent litigation—a formulation that ignores the myriad other situations in which lawyers provide legal advice."). That is simply incorrect. Appellate Advocates nowhere stated that litigation had to be "pending or imminent" for the privilege to apply. Rather, Appellate Advocates' standard imposes only the modest requirement that there be at least some real-world factual scenario that is being addressed—regardless of whether litigation is imminent, likely, or even possible.

This standard aligns with that laid out in *Spectrum*. There, while there was no imminent prospect of litigation, there *were* real-world facts facing the client when the law firm was "specially retained as outside counsel for the purpose of conducting an internal investigation into possible fraud" and "rendering legal advice about that problem, including counseling about litigation options." *Spectrum*, 78 N.Y.2d at 378. Accordingly, the legal advice provided an assessment of the client's "legal position" with respect to the facts adduced in the investigation. *Id.* Nowhere in *Spectrum* did the Court suggest that the privilege would apply to a counsel's "objective, neutral" legal assessment, *Coastal States*, 617 F.2d at 863, divorced from the concrete circumstances facing the client.

Second, the Department asserts that the Court "should also reject petitioner's argument . . . that training materials are categorically outside the attorney-client privilege" because "[t]he law does not support such a bright-line rule." Resp. Br. 24-25. That blatantly misconstrues Appellate Advocates' proposed test. Appellate Advocates did not suggest that this Court should create a "bright-line rule" that the privilege "categorically" does not apply to training materials. Some training materials—especially ones that are responsive to specific questions asked by clients—might well be entitled to privilege. But, as explained in its opening brief, such materials are not privileged where, as here, they contain "'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." Opening Br. at 27 (alterations in original) (citation omitted); *id.* (collecting cases).

And while the Department cites a number of cases (none of which are binding on this Court) to support its assertion that the Court should find the materials here privileged, Resp. Br. 25-26, none are persuasive.[4] The Department first relies on

[4] All of these cases arise outside of the FOIL (or FOIA) context, which do not implicate the same interests in disclosure that government materials sought under FOIL do. *Compare* Resp. Br. 25-26 (citing cases involving private actors where there is no background presumption in favor of broad disclosure), *with* Opening Br.

Flores v. Stanford, No. 18-CV-2468 (S.D.N.Y.) ("*Flores*")—in which the Magistrate Judge determined the training materials at issue in this case qualified as privileged. Resp. Br. 23, 27. But the Magistrate Judge appeared to rely, at least in part, on the decision below in this case. *Flores* Tr. 52, Dkt. No. 233. It would be circular reasoning to now affirm the court below because another court relied on its contested findings. *Id.* In any event, the court's reasoning in *Flores* is deficient because the court implicitly shifted the burden, away from requiring the defendant to prove the documents were privileged, to requiring the plaintiffs to prove that they are not. *Id.* at 54:6-10, 55:5-8. In doing so, the court improperly reconciled the perceived lack of indicia of privilege in the defendant's favor. That is plainly the wrong standard—the Department should be required to shoulder its full burden to prove the attorney-client privilege applies in this case.[5]

26-27 (citing several cases where training materials prepared within agencies did not qualify for the privilege in the context of FOIA).

As this Court has held, FOIL puts a thumb on the scale in favor disclosure. "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.'" *Matter of Gould v. N.Y. City Police Dep't*, 89 N.Y.2d 267, 275 (1996) (quoting *Matter of Hanig v. State of N.Y. 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)).

[5] In *Flores*, it appears the court gave considerable weight to evidence asserting that counsel was *solicited* by the "BOP Chairwoman" to prepare the documents in

The remaining cases the Department relies on (1) confirm that the Department bears the burden of proving that the materials at issue provide a legal assessment of a particularized factual situation—a bar the Department has not cleared here[6]; or (2) do not involve the purely objective analysis of the law, and so are much further afield than the facts here.[7]

As a last-ditch effort, the Department appears to suggest that the materials at issue here might satisfy Appellate Advocates' standard because they relate to topics

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question. *Flores* Tr. 54:6-8. Neither Michelle Liberty nor Kathleen Kiley made such an assertion here. *See* R161-167.

[6] For example, in *Valassis Communications, Inc. v. News Corp.*, the court shielded from disclosure only exhibits that contained confidential legal advice concerning marketing tactics, confidential communications regarding that advice, and communications containing legal advice to employees—i.e., material that addressed concrete factual situations. No. 17-CV-7378, 2018 WL 4489285, at *2-3 (S.D.N.Y. Sept. 19, 2018). Communications regarding non-legal matters that did not "disclose[] the nature of the privileged legal advice" were not privileged. *Id.* at *4.

[7] To the extent these decisions describe the materials at issue, it is clear the materials went beyond a purely neutral, objective analysis of the law. In *McKnight v. Honeywell Safety Products USA*, the court stated "[i]n the corporate setting, the privilege protects any communication where a corporate employee sought or acted upon legal advice concerning the duties of his or her employment." No. 16-132WES, 2019 WL 452741, at *1-2 (D.R.I. Feb. 5, 2019). Similarly, in *Ross v. Bank of America, N.A. (Currency Conversion Antitrust Litigation)*, the materials at issue appear to have involved at least hypothetical facts communicated by the client, in that the advice concerned "how to respond to [potential] customer inquiries" regarding an arbitration provision, and defendant submitted various declarations regarding the purpose of the training. No. 05 CIV. 7116, 2010 WL 4365548, at *6 (S.D.N.Y. Nov. 3, 2010). To the extent *Friedman v. Bloomberg LP*, No. 3:15cv00443, 2019 WL 9089585 (D. Conn. Jan. 14, 2019), conflicts with this Court's precedent and federal law and relies on the "predominant purpose" of the trainings to invoke privilege, this Court should decline to follow it.

that have been "the subject of litigation." Resp. Br. 23. But the mere fact that materials might involve subjects that were previously litigated is insufficient to render them privileged. Indeed, that would likely render any communication from counsel to client privileged, since virtually anything can be the "subject" of litigation. Instead, as this Court has recognized, an attorney's analysis of generalized information comes within the ambit of the privilege only when it "convey[s] the lawyer's *assessment* of the *client's legal position*." *Spectrum*, 78 N.Y.2d at 378 (emphasis added). The training materials at issue provide general instructions regarding BOP policy for probation cases broadly—these instructions are untethered to any specific facts or client confidences and are not privileged. *See Priest*, 51 N.Y.2d at 67-68; *In re Sulfuric Acid Antitrust Litig.*, 432 F. Supp. 2d 794, 796-97 (N.D. Ill. 2006) (holding that hypotheticals and related materials posed in antitrust compliance manuals were "instructional devices, not responses to requests for legal advice" and therefore not protected by attorney-client privilege).

In short, because these materials are not tied to a real-world factual situation and no client confidences are at risk, these materials are not protected by attorney-client privilege. And, to the extent the Court agrees that certain documents at issue partially address specific factual situations arising in the aftermath of the probation cases, that narrow category of materials should be redacted or produced in part, as suggested by Justice Lynch. *See* R203-206 (Lynch, J., concurring in part and

dissenting in part) (concluding documents should be disclosed, "subject to potential redactions for any confidential communications, fact-specific discussions or statements conveying ideas or advice exchanged as part of the consultative or deliberative process of decision-making"). The Department has failed to meet its burden to show that the privilege applies, and the materials should be disclosed under FOIL.[8]

E. Public Policy Requires Disclosure

The Department largely disregards the public policy implications at play in this case. First, the Department fails to acknowledge that FOIL puts a thumb on the scale in favor of disclosure. "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.'" *Matter of Gould v. N.Y. City Police Dep't*, 89 N.Y.2d 267, 275 (1996) (quoting *Matter of Hanig v. State of New York Dep't of Motor Vehicles*, 79 N.Y.2d 106, 109 (1992)). And materials must "fall[] *squarely* within the ambit of one of these statutory

[8] Notably, the Department claims to have met its burden based on the affirmations from Ms. Liberty and Ms. Kiley and by submitting the materials to the Court for *in camera* review. As previously discussed, the affidavits alone are insufficient to meet the Department's burden. By relying on *in camera* review instead of providing sufficient supporting descriptions and affidavits, the Department impermissibly asked the lower courts and this Court to shoulder its burden to establish privilege and placed Appellate Advocates at serious disadvantage throughout this litigation by not providing adequate detail.

exemptions" to be withheld. *Id.* (emphasis added). Permitting subjective attorney "purpose" to shield government documents from disclosure runs headlong into precedent that, under New York law, the public is entitled to "broad access . . . under [FOIL]." *Friedman v. Rice*, 30 N.Y.3d 461, 477 (2017); *see also* Opening Br. 35-37. The Department has no response, and fails to engage with FOIL's policy aims in any meaningful way.

Second, the Department fails to meaningfully grapple with the public policy exception to privilege. *See Priest*, 51 N.Y.2d at 69 ("[E]ven where the technical requirements of the privilege are satisfied, it may, nonetheless, yield in a proper case, where strong public policy requires disclosure."). As Appellate Advocates discussed at length in its opening brief, the public policy interests in favor of disclosure here are strong both because this case arises in the FOIL context and the materials concern parole hearings, where BOP decides whether an incarcerated individual should be released or remain in custody. Opening Br. 34-38. By contrast, the Department's interest in maintaining the secrecy of training materials is minimal, particularly given that other agencies routinely disclosure such information. *Id.* at 35. Accordingly, even if the materials at issue are privileged, public policy requires disclosure. The Department ignores this argument—merely asserting that "the privilege applies with special force in the government context." Resp. Br. 29-30 (quoting *United States v. Doe (In re Grand Jury Investigation)*, 399 F.3d 527, 534

(2d Cir. 2005)). Such a vague assertion is insufficient to override the significant, specific public interest in transparency regarding parole hearings.

II. THE WITHHELD MATERIALS DO NOT QUALIFY FOR THE INTRA-AGENCY EXEMPTION

The materials at issue in this case do not qualify for the intra-agency exemption to disclosure under FOIL both because they are non-deliberative and represent final agency policy and constitute instructions to staff. POL § 87(2)(g)(ii)-(iii). The Department's arguments to the contrary rely on an overly expansive view of the intra-agency exemption's scope and an overly restrictive view of the exceptions to the intra-agency exemption for final agency policy and instructions to staff.

A. The Department's Position On The Scope Of The Intra-Agency Exemption Is Overbroad And Unmoored From The Purposes Underlying The Exemption

The Department simply disregards the settled requirement that a communication must be "deliberative" to qualify for the intra-agency exemption.

In this case, the Department has never asserted (or submitted evidence showing) that the materials were part of any deliberative give-and-take within the agency.[9] But it has long been settled that to qualify for the exemption, materials

[9] To the contrary, counsel to the BOP stated that she "prepared [the materials] with the assistance of [her] staff attorneys," and "[a]ll of the materials contain [her], and counsel's office['s], professional knowledge of the statutory and regulatory law." R162. And the Department makes no contrary contention in its brief.

must form part of a "fluid[]" "give and take" within the agency. *Matter of Kheel v. Ravitch*, 62 N.Y.2d 1, 8 (1984); *see also Tax Analysts v. IRS*, 117 F.3d 607, 616 (D.C. Cir. 1997) ("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." (alteration in original) (citation omitted)).

Rather than acknowledge that longstanding limitation, the Department claims that materials need not "be part of a 'give and take' conversation" to be exempt from disclosure. Resp. Br. 33. Tellingly, the Department cites no case law to support this limited view, and ignores the settled case law Appellate Advocates cited holding otherwise. *See, e.g., Kheel*, 62 N.Y.2d at 8; *Tax Analysts*, 117 F.3d at 616.

Under the Department's approach, which removes the "deliberativeness" threshold entirely, virtually any inter-agency communication becomes subject to the exemption. That approach is far afield from the purposes of the inter-agency exemption, which protects only materials reflecting the give-and-take of the consultative process, not just any non-factual internal conversation. Expanding the exemption in this manner would cause it to swallow the rule requiring disclosure, particularly as to training materials, and require this Court to abandon FOIL's strong purpose and presumption of transparency. *See supra* at I.E.

Indeed, long-standing precedent recognizes training materials are not deliberative because "training is not a step in making a decision; it is a way to

disseminate a decision already made." *Am. Immigr. Council v. U.S. Dep't of Homeland Sec.*, 905 F. Supp. 2d 206, 218 (D.D.C. 2012). "[B]y 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.*

In addition to the Department's expansive (and incorrect) view of what constitutes deliberative material protected by the intra-agency exemption, the Department misreads *Matter of New York Times Co. v. City of New York Fire Department*, 4 N.Y.3d 477, 487 (N.Y. 2005), to mistakenly assert that the intra-agency exemption allows it to withhold all "'internal conversations about the agency's work' that are not 'factual statements.'" Resp. Br. 32 (citation omitted). The language the Department cites from *Matter of New York Times* was taken out of context from discussion of a *separate* exception to the exemption for "statistical or factual tabulations or data." *Id.* at 31-32. The scope of a separate exemption, which mandates the disclosure of factual data, says *nothing* about whether other, unrelated exemptions sweep more broadly.

Based on the available descriptions, none of these materials disclose a writer's consultations, discussions, or personal opinions that are the hallmarks of nonfinal deliberative material. Because the training materials here do not comprise the kind of "predecisional, nonfinal discussion[s]" that receive protection under the intra-

agency exemption, the exemption does not apply. *Matter of Stein v. N.Y. State Dep't of Transp.*, 25 A.D. 3d 846, 847-48 (3d Dep't 2006).

B. The Department's Arguments Regarding The Scope Of The Final Agency Policy And Instructions To Staff Exceptions Are Incorrect

In addition to its mistaken view that a communication need not be "deliberative" in order to qualify for the intra-agency exemption, the Department incorrectly asserts that the exceptions to the intra-agency exemption—for materials constituting final agency policy and instructions to staff—do not apply here because the materials at issue are not binding in all circumstances. But the Department identifies no precedent that imposes such limitations.

First, the Department argues that the materials do not fall within the exception for final agency policy because the Commissioners retain "considerable discretion" and the documents do not set policy. Resp. Br. 33. That argument runs counter to precedent. The materials here represent policy by virtue of the fact that they provide general guidance applicable to all cases, even if the Commissioners are free to exercise discretion within the bounds of that guidance. As Appellate Advocates explained, 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." *Matter of New York 1 News v. Off. of the President of Borough of Staten Island*, 231 A.D.2d 524, 524-25 (2d Dep't 1996). This is not a novel position. For decades, courts have held that materials may constitute final agency policy when their guidance is capable

of adoption. For example, in *National Council of La Raza v. Department of Justice*, the Second Circuit held that a Department of Justice Office of Legal Counsel memorandum was disclosable where the Department relied on its analysis and conclusions in reaching its final decision. 411 F.3d 350, 358 (2d Cir. 2005). Accordingly, it is of no consequence that Commissioners may retain discretion regarding how they choose to incorporate the policy into their decision-making where they ultimately chose to incorporate the materials (or at least a subset of them) into their decisions.

The Department has never suggested—much less presented evidence showing—that it does not use the materials, including checklists and sample decision language (which is designed to be incorporated and applied), to shape final determinations by the Commissioners, as it would need to in order to satisfy its burden to show the exemption applies. *See generally Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, 27 N.Y.3d 616 (2016). To the extent the withheld materials were incorporated into final agency actions decisions (which the Department has not denied), they are not intra-agency materials exempt from disclosure.

Second, the Department argues in conclusory fashion that the records are not "'instructions to staff that affect the public'" because the Commissions were "not required 'to do as they were instructed'" in the disputed records. Resp. Br. 35

(citation omitted). Notably, the Department has provided no caselaw or other authority that suggests instructions must be binding *in all circumstances* for the exception to apply. And this Court has never held that instructions must be binding to qualify for the exception.

Nor is the Department's attempt to exclude Commissioners from the term "staff" compelling. Although Appellate Advocates addressed the issue in its brief, *see* Opening Br. 46 n.7, the Department merely cites NY EXEC § 259-c to claim (without elaboration) that "[b]y definition," the Commissioners are not "staff" with respect to parole decision-making, but rather "appointed officials whose powers and duties include making parole release determinations," Resp. Br. 35. But NY EXEC § 259-c—which explains the functions, powers, and duties of the Board—contains no definition of "staff." Indeed, NY EXEC § 259-c does not use either the word "Commissioner" or "staff" *at all.* On the contrary, it refers collectively to "members, officers and employees" of the Board without making any distinction among them. The Department's claim is merely an unavailing attempt to construct an exclusionary definition of "staff" where one does not exist.[10]

[10] Similarly, the Department's argument that "[c]ounsel is appointed by the Board and cannot direct the Board to make final policy," Resp. Br. 35 n.5, misses the mark. The Department has made no argument and offered no evidence to suggest the Board has not adopted or does not comply with policy covered in the trainings.

Finally, Parole determinations unquestionably affect the public—which has a strong interest in the Department's parole determinations and in the standards that BOP staff apply in parole hearings. *See* Opening Br. 34-38; *Matter of Fink v. Lefkowitz*, 47 N.Y.2d 567, 572 (1979) ("Records drafted by the body charged with enforcement of a statute which merely clarify procedural or substantive law must be disclosed."); *Matter of Williams & Connolly v. Axelrod*, 139 A.D.2d 806, 808 (3d Dep't 1988). Accordingly, these materials (or at least a subset of them) fit squarely within a straightforward reading of this exception to the intra-agency exemption.

III. TWO REMAINING ISSUES WARRANT THIS COURT'S CONSIDERATION

Finally, this Court should resolve two remaining issues on appeal. *First*, the Court should make clear that the Supreme Court erred when it considered *sua sponte* the application of the work product exemption to this matter. As this Court has recognized, an agency cannot rely on a FOIL exemption not raised at the agency level. *See Matter of Madeiros v. N.Y. State Educ. Dep't*, 30 N.Y.3d 67, 74-75 (2017). The Department conceded that it did not argue at the agency level that the work product exemption should apply, effectively abandoning any argument about the exemption. *See* Resp't Br. 11, *Appellate Advocates v. New York State Dep't of Corr. & Cmty. Supervision*, No. 531737 (3d Dep't Mar. 16, 2021).

And the Department makes no argument regarding the work product doctrine before this Court. Accordingly, the Department has forfeited this argument and this

Court should hold that that part of the Supreme Court's decision cannot stand if the Appellate Division's decision is vacated. *See, e.g.*, *Miedema v. Miedema*, 144 A.D.3d 803, 803-04 (2d Dep't 2016) ("Since the father's brief fails to set forth any argument with respect to the order dated October 21, 2014, the appeal from that order must be dismissed as abandoned." (citation omitted)); *LoSacco v. City of Middletown*, 71 F.3d 88, 92 (2d Cir. 1995) ("[Party] did not raise this issue in his appellate brief. Consequently, he has abandoned it."); *United States v. Quiroz*, 22 F.3d 489, 490 (2d Cir. 1994) ("It is well established that 'an argument not raised on appeal is deemed abandoned.'" (citation omitted)).

Second, Appellate Advocates is entitled to attorneys' fees. The Department has no real answer to Appellate Advocates' request for attorneys' fees. Indeed, the Department merely asserts that the agency "had a reasonable basis for relying on the exemptions asserted... as is evident from the holdings of the courts below." Resp. Br. 36 (citation omitted). But that passing remark fails to adequately rebut Appellate Advocates' arguments regarding the propriety of awarding attorneys' fees here. *See, e.g.*, *Maloney v. Murphy*, 984 F.3d 50, 68 (D.C. Cir. 2020) ("[M]entioning an argument 'in the most skeletal way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on its bones is tantamount to failing to raise it.'" (citation omitted)); *Brack v. MTA N.Y. City Transit*, No. 18-CV-846-SJB, 2019 WL 1547258, at *4 (E.D.N.Y. Apr. 9, 2019) ("Judges are not expected to be

mindreaders. Consequently, a litigant has an obligation to spell out its arguments squarely and distinctly." (citation omitted)); *Martinez v. United States*, 840 F. App'x 660, 661 (2d Cir. 2021) ("Issues not sufficiently argued in the briefs are considered waived and normally will not be addressed on appeal." (citation omitted)).

In any event, prevailing below does not insulate a party from a request for attorneys' fees. *Madeiros*, 30 N.Y.3d at 78-79. Consequently, if this Court rules in Petitioner's favor, Appellate Advocates is entitled to attorneys' fees because it has "substantially prevailed" and the Department had "no reasonable basis for denying access" to the records in dispute. POL § 89(4)(c)(ii); *see also Madeiros*, 30 N.Y.3d at 78-79.

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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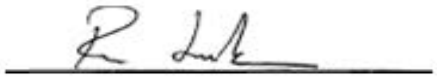

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