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VIA E-SERVICE AND MAIL

July 8, 2022

Lisa LeCours
Chief Clerk and Legal Counsel to the Court
Clerk's Office
New York State Court of Appeals
20 Eagle Street
Albany, New York, 12207-1095

Re: Matter of Appellate Advocates v. NYSDOCCS
APL-2022-00063

Dear Ms. LeCours:

Petitioner-Appellant Appellate Advocates submits this letter brief pursuant to Section 500.11 of the Court of Appeals Rules of Practice and the Court's letter dated June 16, 2022.

PRELIMINARY STATEMENT

This case involves exceptionally important questions of first impression regarding the scope of disclosure under New York's Freedom of Information Law (FOIL). The first question concerns whether the attorney-client privilege shields from disclosure government training materials that set forth only general, unapplied legal principles. The second asks whether such training documents are shielded from disclosure as "intra-agency materials" that do not constitute "final agency policy" or "instructions to staff that affect the public."

These questions are of far-reaching importance to New Yorkers who wish to understand how their government operates and hold it to account. Given the importance of the issues, this case is an inappropriate candidate for the Court's alternative procedure. This Court has yet to address the questions presented, and two separate opinions dissenting on the first question of law make clear that the issues are unsettled and subject to divergent views. The Court should order full briefing and oral argument.[1]

Alternatively, the Court should reverse the decision of the Appellate Division based on this letter briefing. The Appellate Division committed legal error in finding that training materials that

[1] Should the Court not order full briefing, Appellate Advocates respectfully requests leave to file a reply under N.Y. Ct. Rules § 500.11(e).

do no more than generally describe legal standards—without applying the standards to any real-world factual scenario—constitute "legal advice" protected by the attorney-client privilege. That holding departs from settled principles of privilege law. The core purpose of the privilege is to protect client confidences, which generic overviews of the law simply do not imperil or even implicate. While this Court has never addressed privilege in the context of training materials, it is clear from the teachings of its precedents, persuasive lower court decisions, and highly analogous federal decisions that such materials are not privileged. These documents contain no application of legal standards to any real-world factual scenario and, at most, consider hypothetical facts for purely illustrative purposes. In holding such materials privileged, the Third Department worked a massive expansion in the scope of New York's privilege law, and contravened this Court's repeated admonition that the privilege must be construed narrowly. The Third Department's novel expansion of the privilege was plainly wrong, and should be reversed.

Nor does the "intra-agency materials" exemption justify withholding. That exemption does not apply to documents that are *either* "final agency policy" or "instructions to staff that affect the public." This Court should confirm that, under the plain meaning of the statute, the exemption does not apply to training materials that instruct final-decision makers of their obligations when exercising their discretion on questions that unquestionably affect the public.

STATEMENT OF THE CASE

A. Legal Background

New York's Freedom of Information Law (FOIL) was enacted nearly 50 years ago, 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. Under the law, State agencies generally must "make available for public inspection and copying all records." *Id.* § 87(2). But the law permits agencies to withhold "those records or portions thereof" under specified exemptions. *Id.* This case involves two exemptions.

First, agencies may withhold documents that "are specifically exempted from disclosure by state or federal statute." *Id.* § 87(2)(a). Two such laws are CPLR § 4503, which codifies the attorney-client privilege, and CPLR § 3101(c), which codifies the attorney work-product doctrine. This Court has explained that the attorney-client privilege attaches to materials that are (1) "confidential"; (2) "transmitted in the course of a professional [attorney-client] employment"; and (3) "convey[] the lawyer's assessment of the client's legal position." *Spectrum Sys. Int'l Corp. v. Chem. Bank*, 78 N.Y.2d 371, 378 (1991); *see Matter of Priest v. Hennessy*, 51 N.Y.2d 62, 68-69 (1980). Satisfying the three requirements is necessary but not sufficient to invoke the privilege. "[E]ven where the technical requirements of the privilege are satisfied," privilege does not apply "where strong public policy requires disclosure." *Priest*, 51 N.Y.2d at 68–69; *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. v. Countrywide Home Loans, Inc.*, 27 N.Y.3d 616, 624 (2016); *see Spectrum*, 78 N.Y.2d at 377.

Second, agencies may also withhold certain documents under an "intra-agency exemption" provided that they "are inter-agency or intra-agency materials which are not . . . instructions to staff that affect the public" or "final agency policy or determinations." POL § 87(2)(g).

B. Procedural History

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 Board of Parole (BOP) make parole determinations. *Id.*

On March 19, 2018, Appellate Advocates submitted a FOIL request, which (as relevant here) 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).[2] This information was being requested to aid in "understanding the decision-making process and reviewability of BOP parole determinations." R9.

The Department initially provided 119 pages of records in response to the request, but none of the documents were training materials provided to BOP commissioners. *See, e.g.*, R11, R32-39 (documents produced addressing the frequency with which staff must take in-service training programs). The Department indicated that "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. The Department offered no information, explanation, or justification of its decision to withhold the documents beyond citing to statute, and did not offer any analysis of those statutes as applied to the materials at issue.

On June 17, 2019, Appellate Advocates administratively appealed the adequacy of the Department's response to the request, explaining that 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 that 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 and sought relief including an order declaring the

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[2] 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* R101-05 (stipulation of settlement regarding other disputed sections).

Department's response to be in violation of FOIL and directing the Department to provide Appellate Advocates with immediate access to all records responsive to the request. R9-15. In the course of proceedings, the Department produced a privilege log, specifying eleven documents that it was withholding. R158-59. The production of this privilege log, nearly two years after its FOIL request was made, marked the first time Appellate Advocates was informed of what documents were being withheld. Each entry asserted protection under the attorney-client privilege and intra-agency exemption to FOIL. *Id.*[3]

The Department answered the petition, and 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." R108-22. 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." R118-19.

On June 26, 2020, the Supreme Court denied the petition. R186-91. The court explained that 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. R188-89. 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.

On July 29, 2020, Appellate Advocates appealed. R1. On appeal, Appellate Advocates argued that 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. Appellant Br. 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 18-19 (quoting *Priest*, 51 N.Y.2d at 69). Amici Reinvent Albany, a nonpartisan New York nonprofit group that advocates for open and accountable government, and New York Coalition for Open Government, a nonpartisan nonprofit organization dedicated to government transparency, filed a brief in support of Appellate Advocates.

On March 3, 2022, in a split decision, the Appellate Division, Third Department affirmed. A three-justice majority held that all of the materials were protected by attorney-client privilege,

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[3] The Department also asserted in the privilege log—for the first time—that the attorney work-product doctrine prevented disclosure. *Id.* While the Supreme Court addressed that argument, R189-90, the Department ultimately abandoned it on appeal, conceding that it had not been raised at the agency level. Appellee Br. 11 n.3.

and thus did not reach the issue of whether the intra-agency exemption applied. Op. 3. 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 should apply.

Two justices wrote separate opinions disagreeing with the majority about the scope and application of the attorney-client privilege. Op. 3-6 (Lynch, J., concurring in part and dissenting in part); Op. 6-10 (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. Op. 5 (emphasis added). And Justice Pritzker similarly noted that "general training materials" are not privileged. Op. 9. 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. Op. 6 (Lynch, J.); Op. 7 (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. Op. 4 n.1. 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. Op. 10.[4]

On May 23, 2022, Appellate Advocates appealed to this Court. On June 16, 2022, this Court informed Appellate Advocates that "the Court, on its own motion," had decided to "examine its jurisdiction with respect to whether 'there is a dissent by at least two Justices on a question of law.'" Letter from Hon. Letitia James to Appellate Advocates (Jun. 16, 2022) (quoting CPLR § 5601(a)). The Court also indicated that it would consider whether the appeal should be designated an alternative track appeal under Section 500.11 of the Court of Appeals Rules of Practice and informed counsel that "[i]f any party objects to section 500.11 review, written reasons for that view should accompany the writing submitted with respect to the merits." *Id.*

ARGUMENT

I. THIS CASE SATISFIES THE CRITERIA FOR AN APPEAL AS OF RIGHT, AND THE COURT SHOULD ORDER FULL BRIEFING AND ARGUMENT ON THE IMPORTANT QUESTIONS OF LAW PRESENTED

This Court has jurisdiction under CPLR § 5601(a) because Justice Lynch and Justice Pritzker dissented on a question of law. Both justices disagreed with the majority's exceedingly

[4] A chart illustrating the dissenting justices' position as to each document at issue is appended to this letter as Addendum A.

broad interpretation of the attorney-client privilege and would have applied a narrower rule. The majority opinion below concluded that training materials which "discuss . . . legal standards and regulations," with no application to real or hypothetical facts, were privileged. Op. 3. Justices Lynch and Pritzker disagreed, and would have required at least some application to hypothetical facts. Op. 4-5, 9-10. These justices' disagreement with the majority did not turn on differing views of the facts. All justices agreed that the documents at issue are training materials concerning general legal requirements that contain, at most, some application of those principles to hypothetical facts. Instead, the disagreement turns on the correct *legal rule* that must be applied to determine whether such documents are privileged. This Court has jurisdiction based on that disagreement, and thus may consider any argument properly raised below. *Matter of Estate of Duchnowski*, 31 N.Y.2d 991, 992 (1973).

The fractured opinions below on this exceedingly important question of law also demonstrate that this appeal warrants full briefing and oral argument. As the Court has explained, the use of alternative procedures is warranted if a case involves (a) "questions of discretion, mixed questions of law and fact or . . . findings of fact, which are subject to a limited scope of review;" (b) "recent controlling precedent;" (c) narrow issues of law not of statewide important;" or (d) "unpreserved issues of law." *Matter of Luis P.,* 32 N.Y.3d 1165, 1167 n.2 (2018). Here, the scope of FOIL, and its exemptions, are unresolved questions of law subject to disagreement by reasonable minds, including the Appellate Division justices below. That the majority and each of the separate opinions cited this Court's decision in *Spectrum* in support of their position shows that more guidance from this Court is needed. *See* Op. 3; Op. 4 (opinion of Lynch, J.); Op. 9 (opinion of Pritzker, J.). That is especially true given the important implications these issues have for government transparency, which are even more acute in the parole context. *See infra* Section II.B.

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

The materials at issue in this case are not entitled to attorney-client privilege. And even if the privilege did attach in the first instance, the materials here should be disclosed under the well-established public policy exception to the privilege. Either way, the Third Department's decision to shield from disclosure the highly general training materials at issue here was plainly wrong, and should be reversed.

A. The Materials Are Not Privileged

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—are not subject to the attorney-client privilege. Such communications lack 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. The Third Department's ruling to the contrary has the effect of vastly broadening the scope of the privilege, and shielding from FOIL virtually any communication made by counsel within a government agency. That holding cannot be reconciled with this Court's precedents, the rule in other Appellate Divisions, or analogous federal law.

1. Training Materials That Do Not Assess Or Analyze A Client's Legal Position As To A Real-World Factual Situation Are Not Privileged

This Court has explained that the attorney-client privilege's "application must be consistent with the purposes underlying the immunity." *Spectrum*, 78 N.Y.2d at 377. Applying the privilege to materials that have no connection to any real-world factual situation, and do not reveal any agency confidences, is not consistent with those purposes. As this Court has explained, the privilege "constitutes an 'obstacle' to the truth-finding process." *Ambac Assur. Corp.*, 27 N.Y.3d at 624. That steep cost is justified in order "to ensure that one seeking legal advice will be able to confide fully and freely in his attorney, secure in the knowledge that his confidences will not later be exposed to public view to his embarrassment or legal detriment." *Priest*, 51 N.Y.2d at 67-68. Protecting the client's confidences warrants protection of some materials prepared by an attorney, but only to the extent those 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); *see Spectrum*, 78 N.Y.2d at 379.

The majority's rule dramatically expands the privilege to include materials prepared by a lawyer that provide only general legal principles with no application to real facts. *See* Op. 3. But treating any statement that relates to law as "legal advice" is misguided. Generic descriptions of legal standards contain no confidences, and thus carry no risk of embarrassment or legal detriment to the client. And the same is true of a lawyer's application of abstract legal concepts to hypothetical facts, assuming this is done for purely illustrative purposes (and not to shed light of any real-world factual situation). In both instances—and for all generalized training materials—nothing is disclosed about the client "that would not be self evident from the nature of [its] business." *Hartford Life Ins. Co. v. Bank of Am. Corp.*, No. 06-Civ-3805, 2007 WL 2398824, at *6 (S.D.N.Y. Aug. 21, 2007). The majority's dramatic expansion of what constitutes protected legal advice is plainly irreconcilable with this Court's repeated admonition that, given the costs of applying the privilege, its scope "must be narrowly construed." *Ambac Assur. Corp.*, 27 N.Y.3d at 624; *Spectrum*, 78 N.Y.2d at 377; *see also Coastal States Gas Corp.*, 617 F.2d at 862-63. Notably, the other questions a court must answer to determine privilege—was a document being transmitted in the scope of an attorney-client relationship, and was it exposed to any third parties?—are closer to yes/no binaries that do not lend themselves to a narrowing construction. For this principle to do any work, then, this Court should narrowly construe what is meant by "legal advice."

While this Court has never before considered the scope of the attorney-client privilege in the context of government training materials, its precedents have always viewed a real-world factual situation as an essential attribute of "legal advice." In *Spectrum*, a bank was concerned about specific instances of employee conduct that potentially amounted to fraud, and the "legal advice" at issue addressed "that problem." 78 N.Y.2d at 377. The third prong of the privilege test was satisfied because the document "convey[ed] the lawyer's assessment of the client's legal position" vis-à-vis that real-world factual situation. *Id.* Similarly, in *Rossi*, the document at issue

was a memorandum "regarding a possible defamation suit" based on specific facts. 73 N.Y.2d at 591.[5]

Interpreting these precedents, lower courts have recognized that a particularized factual context is a requirement for the privilege to apply. For instance, *Matter of Charles v. Abrams* involved a FOIL request for "any documents that provide agency staff attorneys with final agency policy with regard to legal representation under Public Officers Law § 17." 199 A.D.2d 652, 653 (3d Dep't 1993). The State asserted privilege based on *Rossi*, but the court 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.*[6] *Charles* and other decisions thus stand for the proposition that the privilege does not attach to generic policy materials, because they 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; *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).

Federal precedent, which this Court "ha[s] repeatedly looked to . . . when interpreting FOIL" because it "was modeled after" the Freedom of Information Act (FOIA), only confirms that training materials fall outside the scope of the privilege. *Abdur-Rashid v. New York City Police Dep't*, 31 N.Y.3d 217, 231, 100 N.E.3d 799 (2018). Federal courts have analyzed this precise issue and overwhelmingly come down *against* training materials being entitled to privilege. Importantly, the D.C. Circuit, a significant authority in federal agency law and FOIA requests in particular, 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"). Federal courts in New York likewise do not recognize privilege as 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." *Hartford Life Ins. Co.*, 2007 WL 2398824, at *6 (materials predicting how courts "might apply [certain legal principles to a client's] industry" not privileged); *see also*

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[5] Appellate Division cases finding privilege similarly involve a particular factual situation. *See, e.g.*, *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).

[6] *Charles* also held that that no attorney-client relationship existed, but that alternative basis for denying 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.

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) ("compliance 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, 222-223 (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 *7 (E.D.N.Y. Apr. 17, 2019) (generic training materials are not privileged).

In sum, the majority's rule—that materials generally describing legal standards are privileged—is far out of step with the decisions of other courts across the country. The correct rule, which federal courts recognize, is that materials must assess or analyze a client's legal position as to a real-world situation for the privilege to attach. At a minimum, this Court should require application of the legal standards to at least *hypothetical* facts (as the dissenting justices suggested). Either way, the extreme rule adopted in the decision below should be reversed.

2. The Training Materials At Issue Are Not Privileged As A Matter Of Law

As the weight of authority makes clear, the generic training materials at issue here are not privileged as a matter of law. The Department has never claimed that the materials apply legal principles to any real-world factual scenarios. And it is the Department's burden to show that the materials are entitled to protection as attorney-client privilege. *See generally Ambac Assur. Corp.*, 27 N.Y.3d at 624; *Abdur-Rashid*, 37 N.Y.S.3d at 66 (agency resisting disclosure must submit a detailed affidavit showing that the information logically falls within the claimed exemptions).

Together, the two dissenting justices below found error in the majority's application of the attorney-client privilege to *nine* of the eleven documents at issue. Although Appellate Advocates still have not been able to independently examine these materials, the undisputed characterizations of those documents make clear that they (and the remaining two documents) fall outside the scope of the privilege.

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." Op. 6 (Lynch, J., concluding document should have been produced in its entirety); Op. 7 (Pritzker, J., concluding 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." *Id.* (Lynch, J., 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., 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 8-9.

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." Op. 9 (Pritzker, J., 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., 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. Critically, these documents do not "disclose any inquiry by or concern of [the Department] that would not be self evident from the nature of [the Department's] business." *Hartford Life Ins. Co*., 2007 WL 2398824, at *6. The fact that the Department sometimes denies release and sometimes departs from COMPAS is hardly surprising, and the clear intention for these documents to become part of final parole determinations only further undermines the Department's purported interest in nondisclosure.

Finally, both dissenting justices believed two "Minor Offenders" memoranda were privileged, but neither provided any description or analysis of those documents. 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." Op. 2-3. While Appellate Advocates has not been able to examine these documents, that description fails to establish privilege as a matter of law.

B. Even If the Materials Were Privileged, Public Policy Would Require Disclosure

"[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." *Priest*, 51 N.Y.2d at 68-69; *see Rossi*, 73 N.Y.2d at 588. The majority opinion below erred in failing to consider whether to apply this well-recognized exception. *See generally Matter of Jacqueline F.*, 47 N.Y.2d 215 (1979) (applying exception); *Superintendent of Ins. of State v. Chase Manhattan Bank*, 43 A.D.3d 514 (3d Dep't 2007) (same). The weak government interest in nondisclosure here, and the strong public interest in government transparency as to parole determinations, suggest that the privilege should not apply here in the first place. Even assuming it does apply, these considerations counsel in favor of applying a public policy exception to the privilege.

Requiring the Department to disclose basic information on the general principles that go into its parole decisions is an exceedingly modest request. Indeed, 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."). The Department does not have a strong interest in nondisclosure.

By contrast, the public has an important interest in disclosure. This issue arises in the context of a FOIL request. As this Court has explained, "[i]t is settled that FOIL is based on the overriding policy consideration that 'the public is vested with an inherent right to know and that official secrecy is anathematic to our form of government.'" *Cap. Newspapers, Div. of Hearst Corp. v. Whalen*, 69 N.Y.2d 246, 252 (1987) (citation omitted). 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). The legislature specifically found in enacting FOIL that these interests are key to "maintain[ing] "a free society." POL § 84. It bears 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 surely 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.

These concerns are even more salient 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). What goes into a parole board's monumental decision to grant, or deny, someone freedom should not be shrouded in mystery—from the parolee or from the public. Because the important public interest in disclosure far outweighs the minimal government interest in nondisclosure, it was error not to apply the public policy exception.

III. THE INTRA-AGENCY EXEMPTION DOES NOT APPLY

The exemption to FOIL's general disclosure mandate for certain "intra-agency materials" is also inapplicable here. POL § 87(2)(g). The majority did not address this exemption. The statute specifically excludes materials that are "final agency policy or determination," or "instructions to staff that affect the public." POL § 87(2)(g)(ii)-(iii). The materials at issue are both.

A. The Materials Are Final Agency Policy

The intra-agency exemption does not extend to "final agency policy or determinations." POL § 87(2)(g)(iii). The materials at issue are final agency policy as that term is understood as a matter of New York law, and under settled federal law. *See, e.g.*, *Tuck-It-Away Assocs., L.P. v. Empire State Dev. Corp.*, 54 A.D.3d 154, 162, (3d 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 v. Lefkowitz*, 47 N.Y.2d 567, 572 (1979))). That conclusion follows for two reasons.

First, the materials constitute the working law of the agency and are not deliberative. As a leading Appellate Division case that this Court has cited approvingly explains, just as "[t]here is no exemption for final opinions which embody an agency's effective law and policy," so too there is no exemption for "[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, 417 N.Y.S.2d 142 (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)); *National Labor Relations Bd. v. Sears, Roebuck & Co.*, 421 U.S. 132, 151-152 (1975). The latter category of documents are known as "the working law of the agency," *Sears, Roebuck & Co.*, 421 U.S. at 151-52, which is distinct from materials that are "deliberative."[7] Whereas working law constitutes "guiding" materials, deliberative materials form part of a "fluid" "give-and-take" within the agency. *Kheel v. Ravitch*, 62 N.Y.2d 1, 4 (1984) (memoranda drafted for purpose of negotiations were deliberative); *see Tax Analysts v. I.R.S.*, 117 F.3d 607 (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."). Deliberative materials generally "reflect the personal opinions of the writer rather than the policy of the agency." *Coastal States*, 617 F2d at 866.

By definition, training materials are created to "guid[e]" staff. *Kheel*, 62 N.Y.2d at 4. The Department has never asserted (or submitted evidence showing) that the materials were part of any "give-and-take," reciprocal feedback cycle between the BOP commissioners and the staff

[7] In a sense, the term "working" law might suggest that these determinations are not "final" within the meaning of the statute. But courts have long recognized that interpreting "final" "using the ordinary dictionary definition" "would produce an unreasonable result by denying access to all opinions, orders and determinations except those made by the highest agency." *Miracle Mile*, 68 A.D.2d at 182.

attorneys. Based on the available descriptions, it seems that none of these materials disclose consultations, discussions, or personal opinions by any individual writer. Indeed, the author of the materials, Counsel to the Board of Parole, stated in an affirmation that 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 that anyone else reviewed or edited the documents before they were used to train staff. Thus, the materials are 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).

Second, the materials are adopted (explicitly or implicitly) into final decisions to grant or deny parole. Courts have held that 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 Bray v. Mar*, 106 A.D.2d 311, 314 (1st Dep't 1984) (certain records from New York State Council on the Arts are 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) (finding that the DOJ's Office of Legal Counsel memorandum was disclosable where the DOJ relied on its analysis and conclusions in its final decision).

That is clearly the intended use of at least some of the materials at issue. For example, two of the withheld documents consisted of sample language for BOP commissioners to insert into written parole determinations. To the extent the materials were incorporated into final agency decisions[8] they are not exempted intra-agency materials.

B. The Intra-Agency Exception Does Not Cover Instructions To Staff That Affect The Public

The intra-agency exemption also does not extend to "instructions to staff that affect the public." POL § 87(2)(g)(ii). The materials at issue here are precisely that.

Training materials fit easily within the plain meaning of "instruction." *See* "Instruction," Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/instructions (1a: "an outline or manual of technical procedure"). The materials here provide an overview of general legal obligations in conducting parole hearings. And the target audience is Department staff. *See, e.g.*, R162 (author of the materials explaining that the materials were intended for "BOP Commissioners").[9]

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[8] The Department has never suggested—much less presented evidence showing—that it does not use the materials to shape final determinations by the parole commissioners, as it would need to in order to satisfy its burden to show the exemption applies. *See generally Ambac Assur. Corp.*, 27 N.Y.3d at 624.

[9] Below, the Department cited NY EXEC § 259-c—which lists the BOP's functions, powers, and duties—to claim that "rather than "staff," BOP employees are "appointed officials whose powers

The parole determinations at issue also unquestionably "affect the public." *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"). Indeed, as discussed above, the public has a strong interest in the Department's parole determinations.

IV. THE WORK-PRODUCT DOCTRINE DOES NOT APPLY

The Department asserted during the Article 78 proceeding—for the first time—that the attorney work-product doctrine prevented disclosure. While the Supreme Court addressed that argument, R189-90, the Department ultimately abandoned it on appeal, conceding that it had not been raised at the agency level. Appellee Br. 11 n.3. The majority did not consider the work-product doctrine in its opinion, but this Court should instruct it to reverse the error committed by the Supreme Court for considering the work product doctrine. *See, e.g.*, *Matter of Madeiros v. N.Y. State Educ. Dep't*, 30 N.Y.3d 67, 74-75 (2017) (rejecting an agency's reliance on a FOIL exemption not raised at agency level).

V. APPELLANT IS ENTITLED TO ATTORNEYS' FEES

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

CONCLUSION

For the foregoing reasons, this Court should reverse the decision below and order the Department to disclose the materials at issue, or remand for further proceedings.

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and duties include making parole determinations." Appellee Br. 8. But nowhere does NY EXEC § 259-c state that 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 purpose of the statute.

Respectfully submitted,

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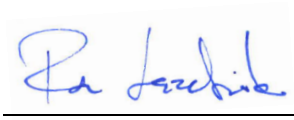
WORD COUNT AFFIRMATION

I, Ron Lazebnik, an attorney duly admitted to practice before the courts of this state, affirm under penalty of perjury that the body of this letter contains 6,837 words, according to the word processing program with which I prepared the letter, and thus complies with the Rules of this Court.

DATE: July 8, 2022



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ADDENDUM A

DOCUMENT	Lynch, J.		Pritzker, J.	
	Covered by Attorney-Client Privilege	**Covered by Intra-Agency Exemption**	**Covered by Attorney-Client Privilege**	**Covered by Intra-Agency Exemption**
Board of Parole Interviews Handout (Dated Sept. 8, 2017)	No. *See* Op. 6.	No. *See* Op. 6.	No. *See* Op. 6.	No. *See* Op. 7.
Minor Offenders Memorandum (Dated May 21, 2018)	Yes. *See* Op. 3.	Not addressed.	Yes. *See* Op. 6.	Not addressed.
Minor Offenders Memorandum (Dated Sept. 16, 2016)	Yes. *See* Op. 3.	Not addressed.	Yes. *See* Op. 6.	Not addressed.
BOP Interviews and Decisions Presentation Slides (Dated Jul 26, 2018)	No. *See* Op. 6. Redact confidential communications, fact-specific discussions, or statements conveying ideas or advice.	No. Op. 6.	Yes. *See* Op. 6.	Not addressed.
Sample Decision Language Concerning Departure from COMPAS Handout (Dated 2018)	Yes. *See* Op. 3.	Not addressed.	No. *See* Op. 6–7.	Yes. *See* Op. 7.
Parole Interviews and Decision-Making Under Revised Regulations Presentation Slides (Dated June 15, 2017)	No. *See* Op. 6. Redact confidential communications, fact-specific discussions, or statements conveying ideas or advice.	No. *See* Op. 6.	Yes. *See* Op. 6.	Not addressed.

DOCUMENT	Lynch, J.		Pritzker, J.	
	Covered by Attorney-Client Privilege	**Covered by Intra-Agency Exemption**	**Covered by Attorney-Client Privilege**	**Covered by Intra-Agency Exemption**
Parole Interviews and Decision-Making Handout (Dated May 2016)	No. *See* Op. 6. Redact confidential communications, fact-specific discussions, or statements conveying ideas or advice.	No. *See* Op. 6.	Yes. *See* Op. 6.	Not addressed.
Favorable Court Decisions Handout (Dated May 2016)	No. *See* Op. 6.	No. *See* Op. 6.	Yes. *See* Op. 6.	Not addressed.
Hypothetical Board Decisions Handout (Dated May 2016)	Yes. *See* Op. 3.	Not addressed.	No. *See* Op. 7.	Yes. *See* Op. 7.
Parole Interviews and Decision-Making Presentation Slides (Dated May 2016)	No. *See* Op. 6. Redact confidential communications, fact-specific discussions, or statements conveying ideas or advice.	No. *See* Op. 6.	Yes. *See* Op. 6.	Not addressed.
Unfavorable Court Decisions Handout (Dated May 2016)	No. *See* Op. 6.	No. *See* Op. 6.	Yes. *See* Op. 6.	Not addressed.

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[91470]

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS: **AFFIDAVIT OF SERVICE**

Giovanni Feliciano, being duly sworn, deposes and says: I am not a party to the action, and I am over 18 years of age.

On the 8th day of July 2022, I served 1 true copy of the within

LETTER BRIEF, DATED JULY 8, 2022

upon the attorneys at the addresses indicated below, by the following method(s):

Contact	Firm	Address + Email Address	Delivery Method
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Sworn to me this:
July 8, 2022

Nadia R. Oswald-Hamid
Notary Public, State of New York
No. 01OS6101366
Qualified in Kings
Commission Expires November 10, 2023

Giovanni Feliciano

Case Name: Appellate Advocates v. NYS Department of Corrections and Community Supervision
Index Number: APL-2022-00063
Docket No: 531737