1271 Avenue of the Americas
New York, New York 10020-1401
Tel: +1.212.906.1200 Fax: +1.212.751.4864
www.lw.com

LATHAM & WATKINS LLP

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VIA E-SERVICE AND MAIL
September 9, 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,

Pursuant to subsection 500.11(e) of this Court's rules of practice, Appellate Advocates requests permission to submit a reply to Respondent the New York State Department of Correction and Community Supervision's August 22, 2022 response letter in the above-captioned appeal. The Department's response contains cites to case law that was not part of the Department's briefing to the Appellate Division that Appellate Advocates has not had an opportunity to previously address. Additionally, Appellate Advocates wishes to respond to the Department's new public policy argument regarding how disclosure would have a "chilling effect" on governmental attorney-client relationships.

As noted in the Department's letter to this Court on July 14, 2022, the Department does not oppose Appellate Advocate's motion to submit this reply.

Respectfully submitted,

LINCOLN SQUARE LEGAL SERVICES, INC.

Ron Lazebnik
Fordham University School of Law
150 West 62nd Street, 9th Floor
New York, NY 10023
(212) 636-6934
rlazebnik@lsls.fordham.edu

LATHAM & WATKINS LLP

Samir Deger-Sen
Mateo de la Torre
Molly Babad
1271 Avenue of the Americas
New York, New York 10020
(212) 906-1200

James A. Tomberlin
555 Eleventh Street, NW, Suite 1000
Washington, DC 20004
(202) 637-2200

Attorneys for Appellant-Petitioner Appellate Advocates

Cc: Hon. Letitia James
New York State Attorney General
Attn: Christopher Hummel, Esq.
The Capitol
Albany, NY 12224-0341

1271 Avenue of the Americas
New York, New York 10020-1401
Tel: +1.212.906.1200 Fax: +1.212.751.4864
www.lw.com

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

Petitioner-Appellant Appellate Advocates submits this reply under Section 500.11(e) of the Court of Appeals Rules of Practice in support of its July 8, 2022 letter brief in the above-captioned appeal.[1]

PRELIMINARY STATEMENT

The Department's response proposes a dramatic expansion in the scope of the attorney-client privilege, and explicitly advocates that New York privilege law break from its federal counterpart. *See* Dep't Br. 12. The Department concedes that the materials here do not address any real-world factual situation—and that many do not even address hypothetical facts. But the Department takes the extreme position that even generic statements of legal obligations—completely divorced from any concrete factual situation—are within the scope of the privilege. That position finds no support in this Court's precedents, is fundamentally at odds with the purpose of the privilege and contravenes this Court's repeated admonition that the privilege must be construed narrowly. Critically, the Department can offer no credible reason why the privilege should apply to the materials at issue here. It acknowledges that the purpose of the privilege is to ensure that clients feel comfortable sharing sensitive information with counsel, but it identifies no plausible way in which disclosure of materials that do not discuss, analyze, or reference real-world (or even hypothetical) facts could somehow chill open dialogue. If this Court's precedents emphasizing the narrow scope of attorney-client privilege are to be taken remotely seriously, the Department's extraordinary position must be rejected.

With respect to the intra-agency exemption, the Department argues that the documents do not constitute "final agency policy," because they do not *eliminate* BOP commissioners'

[1] Capitalized terms not defined in this brief have the meanings ascribed to them in Appellate Advocates' opening brief.

discretion by imposing a binding rule, and instead only guide that discretion. But the suggestion that this exclusion applies only where agency policy is expressed as a rule—rather than a standard—is untenable and senseless. The Department's position has no support in this Court's precedents, and other courts have resoundingly rejected it. And, in any event, the documents are also subject to disclosure for a second, independent reason: they are instructions to staff that affect the public. The Department claims that BOP commissioners are not "staff," but it has no support for that position, and adopting it here would significantly expand the scope of the inter-agency exemption, making it applicable in contexts far removed from its intended purpose.

At a minimum, the sheer breadth of the Department's arguments underscores that the decision below cannot be affirmed without full consideration, including oral argument. This is not simply a case about whether the specific documents at issue are privileged, but a fundamental disagreement about the appropriate legal standard. And this Court's clarification of that legal standard is needed, regardless of its ultimate disposition as to the documents themselves. Tellingly, the Department does not dispute that this case presents questions of first impression that are of far-reaching importance to New Yorkers and the development of New York law. Indeed, the Department acknowledges the novelty of the issues presented, and explicitly asks this Court to declare a break between New York and federal principles of privilege. This Court should not chart that new course. But, whatever else is true, a case of this importance is plainly unsuited for alternative track resolution—full consideration is warranted.

ARGUMENT

The Department argues that the court below correctly withheld the materials at issue under the attorney-client privilege. It also argues, in the alternative, that this Court should find that the intra-agency exemption applies. The Department is wrong on both counts.

I. The Attorney-Client Privilege Does Not Justify Withholding These Materials

The Court should reject the Department's expansive interpretation of the attorney-client privilege and hold that the privilege does not apply because the materials (as they are described by the Department and the courts below) do not analyze any real or even hypothetical facts. Alternatively, the Court should find that the well-established public policy exception to the privilege applies to the FOIL-requested parole materials at issue in this appeal.

A. The Department Fails To Explain Why Generic Training Materials Should Be Protected By Attorney-Client Privilege

As Appellate Advocates explained in its opening brief, the attorney-client privilege does not apply to the training materials at issue because they do not constitute "legal advice"—in that they do not "'convey[] the lawyer's assessment of the client's legal position.'" Opening Br. 6-8 (quoting *Spectrum Sys. Int'l Corp. v. Chem. Bank*, 78 N.Y.2d 371, 378 (1991)). Under this Court's precedents, the term "legal advice" must be construed narrowly. Opening Br. 7. Properly understood, the privilege applies only to materials that "assess or analyze a client's legal position as to a real-world situation"—or, at minimum, "appl[y] . . . the legal standards to at least hypothetical facts." Opening Br. 9. The Department mischaracterizes Appellate

Advocates' position, claiming that the rule proposed is that the "application of the privilege is limited to advice concerning an imminent or pending legal matter." Dep't Br. 13. But Appellate Advocates has never suggested that the matter be "imminent" or "pending," only that it relate to some kind of real-world (or at least hypothetical) factual scenario. That modest limitation is vitally important to ensuring the privilege does not sweep beyond its intended scope to protect materials of public importance that the government might *prefer* to keep secret, but do not implicate the core purposes of the privilege. The privilege exists to ensure that clients who are or may be subject to litigation feel comfortable sharing sensitive information with counsel. If a communication contains no real (or even imagined) facts, then no client confidences are imperiled by disclosing it and there is no real risk of chilling effects on attorney-client dialogue. Shielding that sort of communication would be a wholly unwarranted "'obstacle' to the truth-finding process." *Ambac Assur. Corp. v. Countrywide Home Loans, Inc.*, 27 N.Y.3d 616, 624 (2016).

While the Department does not specify the exact contours of its contrary rule, it is clear that the Department would reject even that modest requirement. The Department acknowledges that "[i]n determining whether a communication is protected by attorney-client privilege, '[t]he critical inquiry is whether . . . it was made in order to render legal advice or services to the client." Dep't Br. 10 (quoting *Spectrum*, 78 N.Y.2d at 379). While the Department never defines precisely what it means by the term "legal advice," it is clear that the Department's interpretation is expansive. Under the Department's test, "counsel's selection of" or "references to" "statutory, regulatory or decisional law" in a communication render it privileged. Dep't Br. 11. Under that rationale, it seems, the mere mention of some legal authority is dispositive: an email from counsel with a single case attached, with no analysis or commentary, is protected legal advice.

That rule is extreme and wrong. It is unsupported by precedent; fundamentally at odds with the policies behind the attorney-client privilege and FOIL; and would represent a sharp departure from federal law, as the Department concedes.

First, the Department's legal rule finds no home in this Court's precedents. In its opening brief, Appellate Advocates pointed out that this Court's "precedents have always viewed a real-world factual situation as an essential attribute of 'legal advice.'" Opening Br. 7. The Department cites nothing to the contrary. While it discusses this Court's decisions in *Spectrum* and *Rossi v. Blue Cross & Blue Shield of Greater N.Y.*, 73 N.Y.2d 588, 593 (1989), Dep't Br. 10-12, it does not dispute those cases involved real-world factual situations, Opening Br. 7-8. And the Department's interpretation of the privilege is fundamentally at odds with this Court's repeated admonitions that the privilege must be narrowly construed. Opening Br. 7. The Department gives a perfunctory nod to that principle, Dep't Br. 10-11, only to cast aside it and advocate the broadest rule possible. Even "statutory, regulatory or decisional law"—which the Department purports to concede "is not per se confidential or privileged"—becomes privileged in the Department's view whenever counsel "select[s]" it to include in a communication or "references" it in a communication. Dep't Br. 11. That rule is contrary to a narrow construction of the privilege. Indeed, it is hard to imagine many communications from counsel that would *not* be entitled to privilege under the Department's rule.

As Appellate Advocates explained in its opening brief, persuasive lower court decisions read this Court's precedent to require a particularized factual context for the privilege to apply. Opening Br. 8. The Department again has no real response. The Department simply ignores one case. *See 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) (cited at Opening Br. 8). And the Department claims that *Matter of Charles v. Abrams* stands only for the proposition "that '[i]n the absence of an attorney-client relationship, the privilege does not arise." Dep't Br. 13 (quoting 199 A.D.2d 652, 653 (3d Dep't 1993)). While that was an alternative basis for the court's holding, Opening Br. 8, the Department ignores the fact that the court expressly distinguished *Rossi* on the basis that "the documents [at issue] contain the agency's final policy, which is to be applied to all litigation in general" rather than "*a[ny] particular lawsuit*." 199 A.D.2d at 653 (emphasis added). That language is flatly inconsistent with the Department's proffered approach, which would apply the privilege to guidance regarding "statutory dut[ies]" applicable to all "parole release decisions" in general, rather than any particular decision. Dep't Br. 13-14. The fact that this was not the only basis for the decision reached is irrelevant. *See generally Phillips v. Smith*, 717 F.2d 44, 49 (2d Cir. 1983) ("'an alternate holding has the same force as a single holding; it is binding precedent'" (citation omitted)); *Malloy v. Trombley*, 50 N.Y.2d 46, 52, 405 N.E.2d 213, 216 (1980).

Significantly, the lower court decisions that the Department cites stand only for the proposition that "the attorney-client privilege protects communications between an attorney and his or her client *that convey facts* relevant to a legal issue under consideration." *Gilbert v. Off. of the Governor*, 170 A.D.3d 1404, 1405-06 (3d Dep't 2019) (emphasis added); *see id.* (involving "communications between counsel in the Governor's Office and [Department of Transportation] employees that contain or reference factual information relevant to counsel providing legal advice"); *Roswell Park Cancer Inst. Corp. v. Sodexo Am., LLC*, 68 A.D.3d 1720, 1722 (4th Dep't 2009) (involving materials "created as part of in-house counsel's fact-gathering process and investigation that formed the basis for in-house counsel's legal advice and legal services" in action involving breach of contract for design and construction services). Those cases would have come out the same way under Appellate Advocates' rule. Indeed, if anything, they *support* the proposition that the privilege exists to protect the disclosure of facts—not highly generalized analysis of abstract legal principles.

Second, the Department's argument that its rule is supported by the purpose of the attorney-client privilege fails. The Department suggests its rule is needed to promote "the privilege's underlying purpose of facilitating open dialogue" and claims that Appellate Advocates' contrary rule fails to "address the value of the attorney-client privilege in protecting the communications of government lawyers with their clients." Dep't Br. 12, 15. It is wrong on both counts.

The privilege should apply where disclosure would put client confidences at risk. But disclosing generalized training materials that do not analyze real—or even hypothetical—facts simply does not run that risk. The Department returns to the theme of needing "open dialogue between attorneys and clients" throughout its brief. Dep't Br. 10, 12, 15. But it never provides a credible explanation for why declining to apply the privilege in the context of generic training materials would undermine that dialogue. The idea that attorney-client relations will suffer, and

clients will not feel comfortable sharing sensitive information, all based on the risk of disclosure of generic statements of the law—entirely divorced from any real or even hypothetical facts—is rank speculation. And this claim is all the more implausible given that other agencies voluntarily disclose similar training materials, Opening Br. 11—a point the Department does not dispute. It is hard to imagine any chilling effect that would result from subjecting to FOIL materials which "disclose[] [nothing] about the client 'that would not be self evident from the nature of [its] business.'" Opening Br. 7 (quoting *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)). For instance, the Department explains that the materials at issue related to the Board's "duty to make discretionary parole decisions." Dep't Br. 13-14. But, as the Department confirms, that duty is "statutory," *id.*—and thus public.

The Department tries to justify its rule by pointing out that the privilege can protect "nonprivileged information" if it is included in "otherwise privileged communication." Dep't Br. 10. That is true, but irrelevant. As the Department acknowledges, the basis for protecting nonprivileged information is that "facts are . . . the foundation of legal advice." Dep't Br. 10. As this Court has explained, there are "inordinate practical difficulties in making surgical separations" between privileged and nonprivileged facts. *Spectrum*, 78 N.Y.2d at 379. While the difficulty in separating privileged from nonprivileged facts may warrant some degree of breathing room in cases involving facts, the Department stretches this principle far past its breaking point in suggesting it warrants protecting the generic training materials at issue here. For instance, the Department does not dispute Justice Lynch's characterization of one "document entitled 'Board of Parole Interviews'" as "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; *see id.* (Lynch, J., concluding that this document should not have been withheld); *id.* at 7 (Pritzker, J., same). Based on that description, there are no relevant facts—privileged or otherwise—contained in the document. So there is no basis to apply the privilege under this sort of breathing-room rationale.

The Department reasons further that case law, statutes, and regulations should be protected by the privilege because—like facts—these may be a "'foundation of legal advice.'" Dep't Br. 11 (quoting *Spectrum*, 78 N.Y.2d at 379). But protecting from disclosure all attorney communications that could be a "foundation" for future legal advice would be broad enough to encompass virtually all of a lawyer's passing thoughts. Applying that nebulous standard to cover an attorney email attaching a case or statute, with no original analysis or comment, would be directly contrary to this Court's instruction that the privilege "must be narrowly construed." *Ambac Assur. Corp.*, 27 N.Y.3d at 624; Opening Br. 7.

Third, the Court should reject the Department's invitation to categorically depart from federal law on this issue. The Department effectively concedes that the materials at issue would be subject to disclosure under the D.C. Circuit's decision in *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980). *See* Dep't Br. 12 (arguing only that "[i]n New York, the privilege is broader than the D.C. Circuit's formulation"). That is a significant concession. This Court has historically followed federal courts, and the D.C. Circuit in particular, in construing FOIL. *See, e.g.*, *Abdur-Rashid v. New York City Police Dep't*, 31

N.Y.3d 217, 228-31, 236 (2018) (relying on and extensively discussing three D.C. Circuit cases in interpreting FOIL and its exemptions); *Madeiros v. New York State Educ. Dep't*, 30 N.Y.3d 67, 76, 78 (2017) (similar). Breaking with that court on this issue would be a radical departure.

The Department suggests that this departure has already been made, because in New York, the privilege applies "to the attorney's own communications to the client." Dep't Br. 12. But "the federal courts [also] extend the privilege . . . to an attorney's written communications to a client," *Coastal States*, 617 F.2d at 862—so the Department's suggestion that New York is categorically broader is erroneous. The Department's cavalier attitude toward expanding New York's privilege rules far beyond the rules applied by federal courts is contrary to this Court's consistent reliance on federal-law principles in interpreting the scope of disclosure required by FOIL. And it cannot be squared with the Court's repeated admonition that the privilege be narrowly construed. The core holding in *Coastal States* is that it would not serve "any purpose" to "apply[] the attorney-client privilege" to communications that are "neutral, objective analyses of agency regulations" that "resemble . . . question and answer guidelines which might be found in an agency manual." 617 F.2d at 862-63. The Department does not cite any case holding to the contrary under New York law. And the Department provides no reason to broaden New York privilege far beyond its federal counterpart. *See generally Ambac Assur. Corp.*, 27 N.Y.3d at 624 (attorney-client privilege "must be narrowly construed"); *Matter of Jacqueline F.*, 47 N.Y.2d 215, 219 (1979) (cautioning that "invocation of [the privilege] should be cautiously observed to ensure that its application is consistent with its purpose").

The Department also ignores the five other federal cases Appellate Advocates cited in its opening brief that, like *Coastal States*, refused to apply the privilege to generic training materials. Opening Br. 8-9. The Department cites a few federal cases for the proposition that "training materials are not categorically outside the protection of the attorney-client privilege." Dep't Br. 13. But Appellate Advocates is not arguing that training materials are categorically nonprivileged—only that generic training materials that do not apply the law to real or hypothetical facts fall outside the privilege's scope. Regardless, the cases the Department cites do not undermine the general federal-law consensus on this issue. At best, the Department cites one or two outlier cases that are inconsistent with the weight of federal authority on this issue, including the influential D.C. Circuit.[2] The Department's silence regarding the cases cited by

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[2] Nor do the cases support the Department's extreme rule. *Valassis Commc'ns, Inc. v. News Corp.* did not analyze this issue because "[b]oth parties agree[d] that training materials and policy documents can amount to legal advice protected by the attorney-client privilege." No. 17-CV-7378 (PKC), 2018 WL 4489285, at *3 (S.D.N.Y. Sept. 19, 2018). And *Currency Conversion Antitrust Litig. v. Bank of Am., N.A.* appears to have involved at least hypothetical facts, in that the advice there concerned "how to respond to [potential] customer inquiries" regarding an arbitration provision. No. 05 CIV. 7116 WHP THK, 2010 WL 4365548, at *6 (S.D.N.Y. Nov. 3, 2010). Notably, the same court, in a more directly on point case, held that materials predicting how courts "might apply [certain legal principles to a client's] industry" are not privileged. *See Hartford Life Ins. Co.*, 2007 WL 2398824, at *6.

Appellate Advocates further reveals that there is no compelling reason for New York to depart from the more established precedent.

Finally, the Department tries to evade the consequences of its rule by arguing that the documents here were provided "in tandem with practical advice on conducting a parole interview and preparing a release decision." Dep't Br. 11-12. But even if the overall "training experience" involved confidential facts, the Department cites no authority supporting the idea that an otherwise nonprivileged communication can somehow become privileged based on a conversation counsel intends to have with a client once the client has reviewed it. Appellate Advocates has never sought disclosure of the conversations surrounding these documents—just the documents themselves. And simply asserting that the documents are enmeshed in an "experience" that involved potentially privileged communication cannot possibly render the documents themselves privileged.

In sum, the Department's rule is contrary to the Court's precedents and federal law, and irreconcilable with the fundamental principle that the privilege must be construed narrowly. Indeed, the Department asks this Court to construe the privilege as broadly as possible—and improperly obstruct the core transparency and truth-finding functions of FOIL in the process. The Court should not chart that novel course. Instead, it should re-affirm its precedents and align New York law with federal principles of privilege. The Appellate Division's decision should be reversed.[3]

B. Public Policy Requires Disclosure In Any Event

Moreover, as Appellate Advocates' opening brief explained, even if the privilege did apply, public policy would require disclosure. Opening Br. 11. The Department does not dispute that other agencies voluntarily disclose similar training materials, which only undermines the weak government interest in nondisclosure here. *Id.* And the Department fails to grapple with the critical public interest in accessing the parole materials at issue. *Id.*

The Department generically invokes "the public interest in effective government." Dep't Br. 15. But that vague "interest" would support virtually any restriction on disclosure of government documents, and would be plainly contrary to the purposes of FOIL. In any event, the Department fails to offer any credible explanation of how disclosing the materials at issue would discourage agency personnel from seeking legal advice—much less hinder the government's ability to function effectively. The Department also suggests Appellate Advocates offer an "artificially narrowing application of the attorney-client privilege as applied to government attorneys." Dep't Br. 15. But the public policy exception is well established. Opening Br. 11. This Court has recognized for over 40 years that "official secrecy is

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[3] The Department also renews the argument it made in the Appellate Division based on *Flores v. Stanford*, 18-CV-2468 (S.D.N.Y.). Dep't Br. 14. Appellate Advocates responded at length to that argument in its reply brief in that court, Reply Br. 6, and the Department offers no response to those points in its brief in this Court. Rather than reproducing those points here, Appellate Advocates simply refers the Court to its earlier brief.

anathematic to our form of government." *Madeiros v. New York State Educ. Dep't*, 30 N.Y.3d 67, 73 (2017) (quoting *Matter of Fink v. Lefkowitz*, 47 N.Y.2d 567, 571 (1979)). If this Court concludes that the attorney-client privilege would normally apply to documents like the ones here, it should nonetheless recognize that the public policy behind FOIL outweighs the need for privilege here where there would be no chilling effect on future conversations with counsel based on revealing these documents.

II. The Intra-Agency Exemption Does Not Warrant Non-Disclosure Here

The Department also asks the Court to affirm on an "alternative ground" that "the Third Department did not address" and hold that the materials are "exempt from FOIL disclosure as intra-agency materials" under Public Officers Law § 87(2)(g). Appellate Advocates explained in its opening brief why the materials fall within two statutory exclusions from the exemption—they are "final agency policy or determination" and "instructions to staff that affect the public." *See* Opening Br. 12-14.[4] The Department's arguments to the contrary fall flat.

First, the Department claims that the materials cannot be considered "final agency policy" because they "do not establish any agency policy that Commissioners *must* follow when making" parole decisions and instead "leave[] intact the considerable discretion that is vested in the Commissioners." Dep't Br. 17 (emphasis added). That argument is inconsistent with the Department's own description of the materials as pertaining to "how" commissioners "should . . . consider the *required* factors that *must* govern their deliberations." Dep't Br. 16 (emphasis added). In any event, the idea that to be "final" a policy must eliminate, rather than guide, discretion is untenable—the implication of the Department's argument is that an agency policy that is phrased as a standard, rather than a rule, can never be "final." This position has no support in law or logic. Indeed, courts have long rejected the argument that materials cannot be "final" unless they are "absolutely binding" as "miss[ing] the point." *Coastal States*, 617 F.2d at 869; *Tax Analysts v. I.R.S.*, 117 F.3d 607, 617 (D.C. Cir. 1997) ("The fact that [advice memoranda] are nominally non-binding is no reason for treating them as something other than considered statements of the agency's legal position."). This exclusion applies to require disclosure of materials "intended to guide," "direct," or "have effect upon actions of others in the agency"—particularly where materials "[a]re routinely used by agency staff as guidance in conducting their" duties. *Coastal States*, 617 F.2d at 867-69; *see Tax Analysts*, 117 F.3d at 617 (advice memoranda that a "national office" issued in an "attempt[] to develop a body of coherent, consistent interpretations of the federal tax laws nationwide" are final agency policy despite the fact that "field offices" have discretion to "make the initial decisions with respect to individual taxpayers" and "may not necessarily agree with the conclusions contained in" the memoranda).

The Department also tries to suggest the materials are not "final agency policy" because they remain "deliberative." Dep't Br. 17. This argument too is unavailing. The Department does not dispute that the materials were unilaterally communicated to BOP commissioners with no expectation that the commissioners would ever respond to counsel's guidance (nor does it

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[4] These exclusions are separate and independent—to justify withholding under the intra-agency exemption, the Department must show neither exclusion applies. *See* POL § 87(2)(g)(ii)-(iii).

appear that the commissioners had any opportunity to do so). Instead, the Department claims that "it is enough that the recommendations be conveyed once." Dep't Br. 17. The Department offers no support for this implausible interpretation of "deliberative" as involving solely one-sided communication. This Court has made clear that to be "deliberative," materials must form part of a "fluid[]" "give and take" within the agency. *Kheel v. Ravitch*, 62 N.Y.2d 1, 8 (1984); *see also Tax Analysts*, 117 F.3d at 616 ("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." (citation omitted)); *Coastal States*, 617 F.2d at 866 (materials are "deliberative" if they are "subject to continuing debate within the agency," "reflect[] the give-and-take of the consultative process," and "weigh[] the pros and cons of agency adoption of one viewpoint or another").[5] Because the materials were not part of any such give and take, and instead represented the final word on the matters they addressed, they are not deliberative.

Moreover, the Department has no real response to the argument that, even if they did not start out that way, certain materials at issue have *become* final agency policy by virtue of their adoption into final parole decisions by the Board. Opening Br. 13. The Department claims it is not enough that "some documents contain samples of language or phrasing that Commissioners may use in formulating final decisions." Dep't Br. at 17. But the Department simply ignores Appellate Advocates' cited precedent to the contrary. Opening Br. 13. Some of the materials consist of sample language for BOP commissioners to insert into written parole determinations, and the Department has never suggested that these materials are not used for their intended purpose. Opening Br. 13 & n.8.

Second, the Department argues the materials are not "instructions to staff that affect the public." Dep't Br. 17-18. The Department reiterates its position that the materials "are pre-deliberative and do not represent a final instruction, decision, or policy." *Id.* But the Department ignores the plain meaning of "instruction," which is "an outline or manual of technical procedure." *Instruction*, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/instructions. The materials at issue are precisely that. The Court should reject the Department's invitation to diverge from the plain meaning of the statutory term.

The Department also claims that BOP commissioners are not "staff" because they are political appointees. Dep't Br. 17. But "staff" is a broad term that is consistent with the legislature's apparent purpose: to ensure access to guidance documents that "affect the public." The Department's artificially narrow interpretation of that term lacks any statutory basis and runs counter to the purpose of FOIL. Nowhere does NY EXEC §259-c state that BOP "appointed officials" fall outside of the broader category of staff. Nor does POL § 87(2)(g)(iii) define staff to mean all employees except for political appointees. Critically, the Department offers no reason why the legislature would have intended to exclude BOP commissioners from the scope of this exclusion. Once again, the Department takes an extreme and unprecedented view of the

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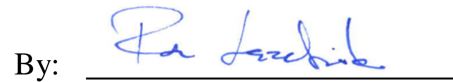
[5] The Department's cited precedent is not to the contrary. In *Xerox Corp. v. Town of Webster*, for instance, this Court held that it "c[ould not] determine" "on this record" "whether the documents in fact fall wholly within the scope of FOIL's exemption for 'intra-agency materials.'" 65 N.Y.2d 131, 133 (1985).

law and asks this Court to dramatically expand its ability to shroud from view vitally important materials that the public needs in order to understand a core government process and, if necessary, hold the government to account. The Court should decline to do so.

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. Additionally, given that this is a novel and complex issue, the Court should remove this case from the alternative track. A conversation with the Court through oral arguments would help illuminate the proper contours of privilege and the FOIL exemptions presented in this case.

Respectfully submitted,

By: 

LINCOLN SQUARE LEGAL SERVICES, INC.

Ron Lazebnik
Fordham University School of Law
150 West 62nd Street, 9th Floor
New York, NY 10023
(212) 636-6934
rlazebnik@lsls.fordham.edu

LATHAM & WATKINS LLP

Samir Deger-Sen
Mateo de la Torre
Molly Babad
1271 Avenue of the Americas
New York, New York 10020
(212) 906-1200

James A. Tomberlin
555 Eleventh Street, NW, Suite 1000
Washington, DC 20004
(202) 637-2200

Attorneys for Appellant-Petitioner Appellate Advocates

Cc: Hon. Letitia James
New York State Attorney General
Attn: Christopher Hummel, Esq.
The Capitol
Albany, NY 12224-0341

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 4,867 words, according to the word processing program with which I prepared the letter, and thus complies with the Rules of this Court.

DATE: September 9, 2022

Ron Lazebnik
Fordham University School of Law
150 West 62nd Street, 9th Floor
New York, NY 10023
(212) 636-6934
rlazebnik@lsls.fordham.edu

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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 9th day of September 2022, I served 3 true copy of the within

REPLY FOR PETITIONER-APPELLANT

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

Contact	Firm	Address + Email Address	Delivery Method
Christopher Hummel	New York State Attorney General's Office *Attorneys for Respondent-Respondent*	The Capitol Albany, New York 12224 (518) 776-2000 christopher.hummel@ag.ny.gov	FedEx Next Business Day

Sworn to me this:
September 9, 2022

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

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