To be argued
By: Frank Brady
10 minutes requested

Supreme Court of the State of New York
Appellate Division – Third Department

In the Matter of the Application of

APPELLATE ADVOCATES,

Petitioner-Appellant,

v.

NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION,

Respondent-Respondent.

No. 531737

BRIEF FOR RESPONDENT

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Dated: June 8, 2021

Supreme Court, Albany County – Index No. 907522-19

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PRELIMINARY STATEMENT

This appeal arises from petitioner-appellant's Freedom of Information Law ("FOIL") request of respondent Department of Corrections and Community Supervision ("DOCCS") for records pertaining to the training of the Commissioners of the State Board of Parole. The records at issue in this appeal are training materials, including handouts and presentation slides prepared by counsel to the Board of Parole for use in training sessions, as well as legal memoranda covering specific legal issues related to the Board's exercise of its discretion in making parole release determinations involving minor offenders.

In response to petitioner's FOIL request for training materials, respondent initially provided 119 pages of documents and withheld other records as protected from disclosure by the attorney-client privilege and the exemption for intra-agency materials. *See* Public Officers Law ("POL") § 87(2)(a), (g); CPLR 4503(a). After petitioner commenced this C.P.L.R. article 78 proceeding, respondent produced approximately 400 additional pages of documents and identified 11 records that it was

withholding as protected by the attorney-client privilege and the exemption for intra-agency materials.

After DOCCS submitted these 11 documents to Supreme Court (Ryba, J.) for in camera inspection, the court denied petitioner's application. The court found that respondent had properly withheld these 11 records as exempt from FOIL disclosure because they constituted attorney-client communications, intra-agency materials, and attorney work product. As explained below, the judgment should be affirmed.

QUESTION PRESENTED

Whether the withheld documents are exempt from FOIL disclosure as privileged attorney-client communications and intra-agency materials.

Supreme Court answered in the affirmative.

STATEMENT OF THE CASE

A. FOIL Request

In March 2018, petitioner Appellate Advocates, a non-profit public defender organization, submitted a FOIL request to respondent DOCCS seeking documentation that it hoped would provide insight into the

decision-making process of the Board of Parole. (Record on Appeal [R] 9.) Petitioner sought 18 categories of information. (R17-21.) Due to the volume of information sought, respondent's records access officer responded to the request in five separate batches. (R.115, 166.)

As relevant here, under request category number 12, petitioner 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.) In response to this request, respondent provided petitioner with 119 pages of documents. In the transmittal letter accompanying this disclosure, respondent stated that some records had been withheld because they were protected by attorney-client privilege or consisted of inter or intra-agency materials. (R11-12, 31.) [1]

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[1]Under categories 11 and 18 of the FOIL request, petitioner also sought records relating to the compensation and performance of Board Commissioners and the Board's use of video conferencing technology. (R8-9, 19-20.) Respondent provided petitioner with some records in response to these requests but withheld other records as exempt. (R10-11, 12-13.) Petitioner's administrative appeal with respect to categories 11 and 18 was unsuccessful. (R13-14.) Petitioner brought an article 78 proceeding, and the parties stipulated to a partial settlement agreement,

(*continued on the next page*)

Petitioner administratively appealed. On July 2, 2019, respondent confirmed the determination, finding that the withheld materials were covered by the attorney-client privilege, *see* POL § 87(2)(a); CPLR 4503(a), and were exempt as inter/intra-agency materials, *see* POL § 87(2)(g). (R66.)

B. This Proceeding

Petitioner commenced this proceeding in October 2019 to challenge respondent's FOIL response to categories 11, 12 and 18. As noted above, the parties entered a settlement agreement that resolved the challenges to categories 11 and 18.

With respect to category 12, respondent disclosed approximately 400 additional documents, but continued to withhold 11 other documents as exempt from disclosure. (R102-103, 114, 158-159, 162.) Respondent provided a copy of a Privilege Log (R158-159) and submitted a copy of each of the 11 documents to Supreme Court for *in camera* inspection.[2]

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that resolved the FOIL request under categories 11 and 18. (R101-105, 114.)

[2] Respondent has provided this Court with the withheld materials for *in camera* review.

(R103, 110.) Respondent also provided affirmations from Michelle Liberty, DOCCS Assistant Counsel and FOIL Appeals Officer, and Kathleen Kiley, Counsel to the Board of Parole.

Liberty, the FOIL Appeals Officer, explained that she denied the appeal with respect to category 12 because the documents were protected by the attorney-client privilege and exempt from disclosure as intra-agency materials, citing POL § 87(2)(a), (g) and CPLR 4503(a). (R167.)

Kiley, as counsel to the Board, provides legal counsel and advice to the Board Commissioners with respect to the statutory, regulatory and case law governing the conduct of parole hearings and the decision-making process. (R161.) Kiley explained that the 11 withheld records are training materials and other memoranda that she prepared with the assistance of staff attorneys in her office. The handouts and presentation slides were created "to provide legal advice and counsel" to the Board Commissioners through these training sessions, and the memoranda were created to "provide legal advice and counsel" to Commissioners with respect to specific issues that arise in release interviews involving minor offenders. (R162.)

Kiley stated that all of these materials reflect her "professional knowledge of the statutory and regulatory law as it relates to parole matters," as well as her "interpretation and assessment of the impact that recent amendments and decisional case law will have on parole matters." (R162.) Further, Kiley, explained, Commissioners were made aware of the fact that these materials had been provided to them in the context of "our attorney-client privilege." (R162) To the best of Kiley's knowledge, none of these materials had been disseminated outside the Board of Parole. (R164.) Kiley addressed each of the documents at issue:

1. The "Board of Parole Interviews" handout, authored September 8, 2017, "was created for a training session in order to provide Commissioners with legal advice as to how to understand the requirements of the law and regulations when preparing for and conducting parole interviews, and reach decisions." (R162.)

2 and 3. The two "Minor Offenders" memoranda—dated May 21, 2018 and September 16, 2016—were authored by Kiley. They "contain legal advice to Commissioners as to how to apply the law and regulations when conducting parole interviews concerning minor offenders." (R163.)

4. The document entitled "Board of Parole Interviews and Decisions," dated July 26, 2018, are presentation slides "created as part of a training session in order to provide legal advice to Commissioners as to how to apply the statutes and regulations when conducting parole interviews and reaching decisions." (R163.)

5. The "Sample Decision Language Concerning Departure from COMPAS" handout, authored in 2018, provides advice to Commissioners "as to how to reach decisions that complied with the statutes and regulations when their decision departed" from the recommendations of an inmate's COMPAS risk assessment instrument. (R163.)

6. The document entitled "Parole Interviews and Decision-Making Under Revised Regulations," dated June 15, 2017, represents presentation slides that were "prepared for a training session for Commissioners in order to provide legal advice as to how to apply the revisions to 9 NYCRR 8002.1-8002.3 when conducting parole interviews and reaching parole decisions." (R163.)

7. The "Parole Interviews and Decision-Making" handout, which was prepared in May 2016, "provides legal advice regarding the statutory

and regulatory factors to consider when Commissioners conduct parole interviews and reach parole decisions" (R163.)

8 and 9. The two handouts entitled "Favorable Court Decisions" and "Unfavorable Court Decisions" were prepared in May 2016 to "provide legal advice and impressions on recent case law that applied to the relevant statutes and regulations to parole decisions, and advised Commissioners as to how to reach decisions in light of these recent judicial decisions." (R163.)

10. The handout entitled "Food for Thought: Hypothetical Board Decisions" was prepared in May 2016 "to provide legal advice as to how to draft parole decisions properly applying the relevant statutes and regulations. (R164.)

11. The document entitled "Parole Interviews and Decision-Making," represent presentation slides that were prepared for a May 2016 training session "in order to provide legal advice concerning the statutory and regulatory factors Commissioners consider during parole interviews and when reaching decisions." (R164.)

C. Supreme Court's Decision

After conducting an in camera review and considering Kiley's affirmation, the court found that the 11 documents were exempt from disclosure. The withheld materials had been submitted in confidence to the Board and consisted of "discussion and analysis of the relevant statutes, regulations and case law" that the Board must apply in the parole determination process, as well as "legal advice and strategies relating to the interview and decision-making procedure," citing *Matter of Gilbert v. Office of the Governor of the State of N.Y.*, 170 A.D.3d 1404, 1405-06 (3d Dep't 2019). The court found that, when viewed "in their full content and context," the materials were "clearly the unique product of an attorney's professional skills and were confidentially disseminated" to Board members "for the purpose of rendering legal advice." (R5.)

Thus, the court held that the documents were exempt from disclosure as privileged attorney-client communications and work product. Additionally, the court found that the documents were exempt as intra-agency materials because they contained counsel's recommendations and "were disseminated confidentially in furtherance of the decision-making process prior to final determinations." (R6.)

Matter of Gartner v. New York State Attorney General's Off., 160 A.D.3d 1087, 1091-92 (3d Dep't 2018). Finally, the court ruled that petitioner was not entitled to attorney's fees. (R6.) The appeal ensued. (R1.)

ARGUMENT

AFTER REVIEWING THE WITHHELD DOCUMENTS, SUPREME COURT CORRECTLY FOUND THEY ARE EXEMPT FROM FOIL DISCLOSURE AS ATTORNEY-CLIENT COMMUNICATIONS AND INTRA-AGENCY MATERIALS.

Supreme Court properly sustained respondent's nondisclosure of the 11 documents at issue on this appeal. Contrary to petitioner's argument (Br. at 10-12), respondent met its burden of demonstrating that the documents are exempt from disclosure by explaining the basis for its assertion of the applicable FOIL exemptions through an affidavit by an agency attorney with personal knowledge, and by submitting the documents themselves for *in camera* review. *Matter of Miller v. New York State Dept. of Transp.*, 58 A.D.3d 981, 492-493 (3d Dep't), *lv. denied*, 12 N.Y.3d 712 (2009). And after conducting an *in camera* review, the court correctly held that the documents were exempt from disclosure as

attorney client communications and intra-agency materials.[3] For the reasons below, this Court should affirm.

A. Attorney-Client Privilege

All government documents are presumptively open for public inspection unless specifically exempted from disclosure by the POL. *Matter of Fappiano v New York City Police Dept.,* 95 N.Y.2d 738, 746 (2001). Among other exceptions to disclosure, FOIL does not require disclosure of materials "specifically exempted from disclosure by state or federal statute." POL § 87(2)(a). The exemption thus includes privileged attorney-client communications. CPLR 4503(a); *Matter of Gilbert*, 170 A.D.3d at 1405; *Matter of Shooters Comm. On Political Educ., Inc. v. Cuomo*, 147 A.D.3d 1244, 1245 (3d Dep't 2017).

The attorney-client privilege exists to foster open dialogue between attorneys and clients, and it applies to communications between attorneys and clients that are made for the purpose of obtaining or

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[3] Although the court below also found that the withheld materials to be exempt from disclosure as attorney work product (Br. at 6), respondent does not defend nondisclosure on this ground solely because, as petitioner correctly points out (Br. at 7-9), the only grounds for nondisclosure asserted at the agency level were attorney-client privilege and intra-agency materials.

rendering legal advice in the course of a professional relationship. *Spectrum Sys. Intl. Corp. v. Chemical Bank*, 78 N.Y.2d 371, 378-379 (1991); *Rossi v. Blue Cross & Blue Shield of Greater N.Y.*, 73 N.Y.2d 588, 592-593 (1989); *Matter of Gilbert*, 170 A.D.3d at 1405. In determining whether a communication is protected by the attorney-client privilege, "[t]he critical inquiry is whether, viewing the lawyer's communication in its full content and context, it was made in order to render legal advice or services to the client." *Spectrum Sys. Intl. Corp.*, 78 N.Y.2d at 379. Inasmuch as facts are the foundation of legal advice, the attorney-client privilege protects communications between an attorney and his or her client that convey facts relevant to a legal issue under consideration—even if the underlying information contained in the communication is not privileged. *Id*. at 379-380; *Matter of Gilbert*, 170 A.D.3d at 1405-06; *Roswell Park Cancer Inst. Corp. v. Sodexo Am., LLC*, 68 A.D.3d 1720, 1721-1722 (4th Dep't 2009).

Although many of the cases in this area concern communications by clients to their attorneys, the privilege also applies to the attorney's own communications to the client. *Rossi*, 73 N.Y.3d at 592. "[F]or the privilege to apply when communications are made from attorney to

client—whether or not in response to a particular request—they must be made for the purpose of facilitating the rendition of legal advice or services, in the course of a professional relationship." *Id*. at 593.

That test is met here. As explained in the affirmation of Kathleen Kiley, Counsel to the Board of Parole, the 11 withheld documents consist of training materials consisting of handouts and presentation slides and legal memoranda covering specific legal issues. These materials were created for the purpose of rendering "legal advice and counsel" to Board Commissioners on the conduct of parole release interviews for both adults and minor offenders, including the statutory and regulatory factors that must be considered to render a lawful decision, and advice on decision-making in light of recent case law developments. In addition, the materials include recommendations on evaluating inmates, scores on the COMPAS risk assessment instrument and composing written decisions. (*See in camera materials*; R162-163.) Notably, the Commissioners were notified that these materials had been provided to them under the attorney-client privilege.

Although statutory, regulatory or decisional law is not per se confidential or privileged, these legal references are covered by the

privilege because they constitute the "foundation of the legal advice" that counsel provided to the Commissioners. *Spectrum Sys. Intl. Corp.*, 78 N.Y.2d at 379. Viewing the communications in their "full content and context," it is evident that counsel's selection of statutes, regulations and case law, as well as the counsel's practical advice on conducting a parole interview and preparing a release decision, reflect counsel's professional judgment as to the applicable law and fall within the attorney-client privilege. *Id*.

This Court should reject petitioner's claim (Br. at 13-15) that the withheld materials are not privileged because they were "training materials" containing general descriptions of the law. There is no "training materials" exception to attorney-client privilege, and petitioner's reliance on *Amadei v. Nielsen*, 2019 WL 8165492 (E.D.N.Y. 2019), is misplaced. In *Amadei*, the district court, in reviewing a discovery order, found that the magistrate's finding that the attorney-client privilege did not apply to certain U.S. Customs and Border Patrol (CBP) training materials was "not clearly erroneous" where the training document at issue contained no specific legal advice and functioned as a general purpose legal manual that informed that informed CBP officials

about the laws they must enforce and the constitutional and statutory restrictions they must follow. *Id*. at *8.

The communications here, by contrast, are tailored to a specific situation: they reflect counsel's professional judgment about how to apply legal standards in the context of conducting parole release interviews and composing written decisions, essentially advising the Board on the breadth of its discretion and authority in this particular context. *See Valassis Communs., Inc. v. News Corp.*, 2018 U.S. Dist. LEXIS 160234, *8-11 (S.D.N.Y. 2018) (training materials and policy manuals from general counsel conveying legal advice to employees in a position to act on that advice are protected by the attorney-client privilege). The withheld materials do not constitute final agency policy nor are they equivalent to an agency manual. *See National Council of La Raza v. Department of Justice*, 411 F.3d 350, 360 (2d Cir. 2005) ("the attorney-client privilege may not be invoked to protect a document adopted as, or incorporated by reference into, an agency's policy.") Nor do references to publicly-available statutes, regulations and case law defeat the claim of privilege, because the "full content and context" of these communications reveals that they were made to facilitate legal advice in the course of a

professional relationship. *Spectrum Sys. Intl. Corp.*, 78 N.Y.2d at 377-79; *see also In re Grand Jury Subpoena Duces Tecum*, 731 F.2d 1032, 1037 (2d Cir. 1984); *Matter of Rye Police Assn. v. City of Rye*, 34 A.D.3d 591, 591 (2d Dep't 2006).

Petitioner's reliance (Br. at 15) on *Am. Immigration Council v. United States Dep't of Homeland Sec.*, 905 F. Supp. 2d 206, 22-223 (D.D.C. 2012), for the proposition that attorney-authored materials are not privileged unless they are based on confidential information received from the client, is misplaced. In New York, the privilege is broader than the D.C. Circuit's formulation. Under C.P.L.R. 4503(a), the privilege extends to "confidential communication between the attorney or his employee and the client in the course of professional employment." This statute does not require the attorney to have first received confidential information from the client. Indeed, such an approach would ill serve the privilege's underlying purpose, which "fosters the open dialogue between lawyer and client that is deemed essential to effective representation." *Spectrum Sys. Intl. Corp.*, 78 N.Y.2d at 377; *see also ACLU v. NSA*, 925 F.3d 576, 598 (2d Cir. 2019).

As the Court of Appeals recognized, although the privilege usually arises in the context of a client's communication to an attorney, the privilege extends as well to communications from the attorney to the client so long as that they are for the purpose of providing "'legal advice or services in the course of a professional relationship.'" *Spectrum Sys. Intl. Corp.*, 78 N.Y.2d at 377-78, quoting *Matter of Creekmore*, 1 N.Y.2d 284, 296 (1956). Here, Kiley, as counsel to the Board, plainly has an ongoing professional relationship with the Board Commissioners—*see* Executive Law § 259-c(17) (the Board's attorneys serve as its legal advisors)—and the privilege applies because, as discussed above, the communications at issue were for the purpose of rendering legal advice.

The Court should also reject petitioner's claim (Br. at 15-17) that the withheld materials are not protected because they are "not connected to a specific legal issue" but are instead "only generic descriptions of the law." In making this assertion, petitioner misconstrues this Court's holding in *Matter of Charles v. Abrams*, 199 A.D.2d 652 (3d Dep't 1993). In *Charles*, the petitioner sought policy documents from the Attorney General's Office that provided staff attorneys with final agency policy with respect to providing legal representation to public employees under

Public Officers Law § 17. The Court rejected the Attorney General's claim that the policy documents were protected by the attorney-client privilege because the Attorney General identified no existing attorney-client relationship. The policy related to litigation generally and did not facilitate the rendition of legal services to any particular client or concern a particular lawsuit. "In the absence of an attorney-client relationship, the privilege does not arise." *Id.* at 653. Contrary to petitioner's characterization of this holding, this Court did not hold that the attorney-client privilege *only* arises in the context of pending or imminent litigation. Similarly, petitioner misconstrues this Court's holdings in *Matter of Gilbert*, 170 A.D.3d 1404, and *Matter of Shooters Comm. On Political Educ., Inc.*, 147 A.D.3d 1244. To be sure, each of these cases involved the dispensing of legal advice in response to specific and existing legal problems—the termination of a sublease and a response to a FOIL request, respectively—but in neither of these cases did application of the privilege depend on whether counsel was addressing an imminent or pending legal matter.

In any event, review of the materials at issue demonstrates that Counsel's legal advice was provided to address specific legal issues

arising in the context of parole release interviews. Issues arising out of that context have been and continue to be the subject of litigation involving the Board—especially with respect to the Board's consideration of minor offenders for parole release. *See, e.g., Flores v. Stanford*, 2019 U.S. Dist. LEXIS 160992 (S.D.N.Y. 2019);[4] *Matter of Campbell v. Stanford*, 173 A.D.3d 1012 (2d Dep't 2019); *Matter of Rivera v. Stanford*, 172 A.D.3d 872 (2d Dep't 2019); *Matter of Allen v. Stanford*, 161 A.D.3d 1503 (3d Dep't 2018); *Matter of Hawkins v. New York State Dept. of Corr. & Community Supervision*, 140 A.D.3d 34 (3d Dep't 2016).

Finally, contrary to the assertions of petitioner (Br. at 17-19) and *amicus curiae* (Br. at 10-14), public policy does not dictate disclosure of the withheld documents. Although petitioner discounts the value of the attorney-client privilege as applied to government officials, the purpose of the privilege is no less relevant in the context of government agencies.

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[4] On February 12, 2021, in *Flores v. Stanford*, 18-cv-2468, Magistrate Judge Judith C. McCarthy granted a protective order with respect to the same documents at issue in this Article 78 proceeding after finding the documents were covered by the attorney-client privilege. *See* District Court Docket Entry # 176. This Court may take judicial notice of the magistrate's decision, which is set forth at pages 47 to 56 of a court transcript that respondent has attached as an addendum to this brief.

In this context, the privilege encourages attorneys and their clients to communicate fully and frankly and thereby promotes the "'broader public interests in the observance of law and administration of justice.'" *Pritchard v. County of Erie (In re County of Erie)*, 473 F.3d 413, 418 (2d Cir. 2007), quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). "The availability of sound legal advice inures to the benefit not only of the client who wishes to know his options and responsibilities in given circumstances, but also of the public which is entitled to compliance with the ever growing and increasingly complex body of public law." *In re Grand Jury Subpoena Duces Tecum*, 731 F.2d at 1036-37.

B. Intra-Agency Materials

Alternatively, the Court should affirm the judgment because 11 withheld documents are intra-agency materials exempt from disclosure under Public Officers Law § 87(2)(g). That provision exempts from disclosure "inter-agency and intra-agency materials" that are not: (i) statistical or factual tabulations or data; (ii) instructions to staff that affect the public; (iii) final agency policy or determinations; or (iv) external audits. The exemption applies to certain internal records, including "communications exchanged for discussion purposes not

constituting final policy." *Matter of Russo v. Nassau County Community Coll.*, 81 N.Y.2d 690, 699 (1993); *Matter of Bass Pro, Inc. v. Megna*, 69 A.D.3d 1040, 1041-42 (3d Dep't 2010).

While the term "intra-agency materials" is not defined under the FOIL statute, New York's courts have construed this term to mean "deliberative material," *i.e.*, communications exchanged for discussion purposes not constituting final policy decisions. *Matter of Xerox Corp. v. Town of Webster*, 65 N.Y.2d 131, 132 (1985); *Matter of Shooters Comm. On Political Educ., Inc.*, 147 A.D.3d at 1246. This exemption applies to "predecisional, nonfinal discussion and recommendations by employees within and among agencies to assist decision makers in formulating a policy or determination." *Stein v. New York State Dep't of Transp.*, 25 A.D.3d 846, 847-48 (3d Dep't 2006).

The purpose of this exemption is to "'permit people within an agency to exchange opinions, advice and criticism freely and frankly, without the chilling prospect of public disclosure.'" *Matter of Miller,* 58 A.D.3d at 984 (3d Dep't 2009) (quoting *Matter of New York Times Co. v. City of N.Y. Fire Dep't*, 4 N.Y.3d 477, 488 (2005)); *Matter of Sea Crest Constr. Corp. v Stubing*, 82 A.D.2d 546, 549 (2d Dep't 1981) (exemption

protects "the deliberative process of the government by ensuring that persons in an advisory role" are able to communicate opinions freely with "agency decision makers"). The exemption thus protects "internal conversations about the agency's work" that are not "factual statements." *Matter of New York Times Co.*, 4 N.Y.3d at 487-88.

Here, the documents were properly withheld as intra-agency materials because they discuss how Commissioners making parole release decisions should conduct the interviews, consider the required factors that must govern their deliberations, and craft written decisions. (*See in camera materials*; R162-163.) As such, the materials plainly constitute "predecisional, nonfinal discussion and recommendations" from agency counsel to Board of Parole Commissioners for the purpose of assisting these decision makers in making release determinations. *See Matter of Xerox Corp.*, 65 N.Y.2d at 132 ("FOIL protects against disclosure of predecisional memoranda or other nonfinal recommendations, whether or not action is taken."); *Stein*, 25 A.D.3d at 847-48.

The Court should reject petitioners' claim (Br. at 21-24) that the materials are "instructions to staff that affect the public." As established

by the Kiley affirmation, all of the withheld materials were created to advise the Commissioners about their legal obligations as decision-makers. By definition, the Commissioners are not agency "staff" with respect to parole decision-making. Rather, the Commissioners are appointed officials whose powers and duties include making parole release determinations. *See* Executive Law § 259-c. Furthermore, contrary to petitioner's characterizations (Br. at 22), counsel has not "propagated agency law" that requires the Commissioners "to do as they were instructed" in these training materials. The materials do not command a single course of action. Rather, they contain advice, recommendations, and suggestions for how the Commissioners should exercise their authority in conformance with the law.

For similar reasons, as this Court can discern from its own *in camera review*, the withheld materials are not "final agency policy" (Br. at 25-27). The materials do not establish agency policy that the Commissioners *must* follow when making their individual or collective decisions, but leave considerable discretion to the Commissioners. And contrary to petitioner's assertion (Br. at 26), the document entitled "Sample Decision Language Concerning Departure from COMPAS" does

not require Commissioners to incorporate verbatim any particular language or phrasing into final agency decisions. It only contains samples of language to advise the Commissioners on how to construct a written decision that explains how COMPAS risk assessment instrument scores impacted their determination. In sum, the documents do not establish any "final agency policy" to which the Commissioners must adhere during the decision-making process.

CONCLUSION

The judgment should be affirmed.

Dated: Albany, New York
June 8, 2021

Respectfully submitted,

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PRINTING SPECIFICATIONS STATEMENT

Pursuant to the Uniform Practice Rules of the Appellate Division (22 N.Y.C.R.R.) § 1250.8(j), the foregoing brief was prepared on a computer (on a word processor). A proportionally spaced, serif typeface was used, as follows:

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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CARLOS FLORES, et al.,

Plaintiffs,

Case No. 18-cv-02468

-vs-

TINA M. STANFORD, et al.,

Defendants.

----------x

United States Courthouse
White Plains, New York

February 12, 2021

** VIA TELECONFERENCE **

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Proceedings recorded via digital recording device

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THE DEPUTY CLERK: In the matter of Carlos Flores versus Tina M. Stanford. Counsel, please state your appearances for the record.

MR. RYAN: Antony Ryan, Cravath, Swaine & Moore representing plaintiffs.

MS. HERNANDEZ: Damaris Hernandez, Cravath, Swaine & Moore on behalf of plaintiffs. Good afternoon, Your Honor.

MS. KOHLER-HAUSMANN: Issa Kohler-Hausmann, also for plaintiffs.

THE COURT: Mr. Wong, are you going to state an appearance?

MR. WONG: Marco Wong from Cravath, Swaine & Moore for the plaintiffs.

THE COURT: Defendants?

MS. COLLINS: Thank you. Deanna Collins from the Office of the New York State Attorney General on behalf of the defendants. Good afternoon, Your Honor.

THE COURT: Good afternoon, Ms. Collins.

MR. MATTHEWS: Good afternoon, Your Honor. This is Matt Matthews with McDowell Hetherington for third-party Northpointe.

THE COURT: Good afternoon, counsel. So we are going to do multiple things this afternoon and will require everybody's patience, and I will talk to you about the order in which I would like to do everything.

We have before me today a motion to compel made by plaintiffs against non-party subpoena issued to Northpointe. That's Docket 81. Northpointe has responded to that, which is Docket 86. I want to hear argument on that today and see if I can resolve that. If not, I will resolve it at a later time.

The second thing is, this is my regular status conference on the Flores matter, so I want an update from counsel on how everything is going.

And then the third thing is, there is an outstanding motion for discovery for a protective order, and that was made by defendants in this case, which is Docket Number 176, and I'm prepared to rule on that today.

Since Mr. Matthews is here for only one of those three things, and Ms. Collins will be here for the other two, I am going to deal with the issue as it relates to Northpointe first. Then I am going to say Mr. Matthews can leave at that point, and I then will go to a status update on how things are going with discovery in this matter, and then I will issue a bench ruling on the motion for protective order by defendants. Okay.

So in order to go to the issue that I have before me with Northpointe, which is Docket 81 and Docket 186, I'm going to ask plaintiff to briefly tell me why they need -- I read both letters. I've looked at the case law surrounding this. I understand generally the general legal issue involved, but I think what I don't really have a good sense of is why you

actually need the information that you are trying to get from Northpointe. You've gotten a lot of information so far, and it's unclear to me from your letter what this information -- why this information is necessary, given everything else you've got.

So I don't know who wants to speak to this from plaintiffs' counsel, but I turn to plaintiffs' counsel.

MR. RYAN: Thank you, Your Honor. This is Antony Ryan. Ms. Hernandez, who has been dealing with this largely, lost her voice, so I will be speaking today for the plaintiffs.

We are seeking here, Your Honor, two discrete sets of materials about a software tool called COMPAS, and COMPAS is one of the most important issues in this case from our perspective. That is, how the defendants in this case, the Commissioners and the Board of Parole rely upon COMPAS and the effect that that reliance upon COMPAS has on their parole release decisions as they relate to juvenile offenders; and the two sets of materials that we seek here today are essential for us to be able to test and legally prove the allegations that we've made in the complaint.

So I was intending anyway before Your Honor posed the question to begin with, just a brief background as to what COMPAS is and why it's important; why it's so important to our claims in this case.

COMPAS is a risk assessment instrument, so it's a web-based software tool, and defendants use COMPAS. They rely

upon COMPAS in evaluating parole applicants. So before an inmate comes up for his or her parole hearing, a COMPAS report is generated, and the way that's done is that Corrections counselors complete an electronic questionnaire. They input a variety of information about the inmate, and that includes information such as age; it includes offenses; it includes the answers to a variety of questions like, is the person job ready? or does this person have notable disciplinary issues?

So all those answers are then entered into the COMPAS tool, which then converts the answers into numbers, you know, like 1 for yes; 0 for no, and then applies a formula to those inputs. The formula is the result of regression models, which are one of the pieces of information that we are seeking here on motion. So the formula is applied, and that then results in a sort of composite score on each of about a dozen particular measures, which is something called scales. So there is about a dozen of these risk scales. An example of these scales would be arrest risk, that is, a recidivism risk. Another risk scale is risk of felony violence. So how all these dozens of numerical inputs are combined, are weighted, to result in this composite score, that's the result of a regression model, which COMPAS has developed. So then COMPAS uses what it calls the Norm Group Data Set and --

THE COURT: The Norm Group what? I didn't hear you.

MR. RYAN: The Norm Group Data Set.

THE COURT: Thank you.

MR. RYAN: So it's a whole set of data that Northpointe, the developer of the COMPAS tool, collected this data. It's for -- as I understand it, for about 7,000 people from a variety of correctional settings, prisons, jails in various states; and that's, in effect, the raw -- the raw data, and as I understand it, Northpointe has used the Norm Group Data Set for two reasons: First, to derive these regression models that I spoke about before, and then also to convert the scores for what we can make into data files. So that the way the information is presented then to the Commissioners of the Board of Paroles is, you know, on, for instance, risk of felony violence, the inmate then is said to be in one of Deciles 1 through 10, and so that's how the information is presented on the report that defendants receive prior to the hearing, and that Decile Score translation is done using the Norm Group Data Set.

So it's important, Your Honor, to understand that the use of COMPAS is mandatory according to Board of Parole regulations.

THE COURT: So the use of it's mandatory, but it's one -- correct me if I am wrong here -- the way I am reading it, from my understanding of what you are saying, it's one data point they must consider when making their determination; it is not controlling on them, and it's just another data point for

them to consider; is that correct?

MR. RYAN: No, Your Honor. Our reading of the regulation is that the use of COMPAS in the New York parole system is unlike, for example, the use of COMPAS in criminal sentencing in Wisconsin in the *Loomis* case that Northpointe cited in its letter. It's a much higher presumption given to the use of COMPAS, and I would refer the Court to Title IX, Section 8002.2 of the New York --

THE COURT: Did you give this to me?

MR. RYAN: I'm sorry?

THE COURT: Is this in your papers? because I didn't see it. Title IX?

MR. RYAN: It's in our complaint, Your Honor.

THE COURT: But it wasn't submitted in support of this argument, right? Because -- unless I missed it -- I am looking at these other letters right before I got on. But --

MR. RYAN: I apologize then, Your Honor, if it's --

THE COURT: It might be there. I might have missed it. Title IX 8.2?

MR. RYAN: Title IX, Section 8002.2 of the New York Code of Rules and Regulations. This is a Board of Parole regulation.

THE COURT: I'm going to ask Ms. -- I don't mean to interrupt you, but if it's going to help me understand if what you are saying is accurate or not.

Ms. Collins, is this mandatory in the sense that it controls what their decision is or is it one data point that they are supposed to consider? Ms. Collins, you may be on mute.

MS. COLLINS: I'm sorry, Your Honor. Can you hear me?

THE COURT: I can now.

MS. COLLINS: Thank you. It is true that the COMPAS scores are something that the Board is required to consider. However, under the regulation, the Board may choose to depart from the COMPAS scores if they so choose. They just have to say why. That's my understanding of the regulation.

THE COURT: It's the same as the sentencing guidelines in federal court, it sounds like, where you have to consider them, but you don't -- you don't have to -- you're not bound by them. You can depart from them; you just need to state your reasoning for departing.

MS. COLLINS: That's my understanding as well, although I'm not familiar with the sentencing guidelines.

MR. RYAN: Um --

THE COURT: So, Mr. Ryan, they have to consider that, but they are not bound to follow them. They can not follow them, but if they don't follow them, they have to state the reason. Is that inaccurate? Is that accurate?

MR. RYAN: That's accurate insofar as it goes. I do believe, Your Honor, I'm -- I've got the exact wording here, and I would like to refer the Court to the wording. I do believe

this is stronger --

(Cross-talk)

THE COURT: I would like to see it. I'm trying to pull it up myself. Unfortunately, you did not attach it. You attached cases, but you did not attach this, so I'm kind of surprised.

MR. RYAN: I apologize for that, Your Honor.

So the regulation reads, "In making a release determination, the Board shall be guided by risk and needs principles, including the inmate's risk and needs scores as generated by a periodically validated risk assessment instrument," and that, as the commentary explains that the periodically validated risk assessment instrument is the COMPAS tool.

THE COURT: So that's no different than what I just said or what Ms. Collins just said. "Shall be guided by." That means they are guided by it; doesn't mean they are controlling them. It doesn't mean that they can't depart from them. It's they are guided by them. It's something they look at. The same way we have sentencing guidelines in federal court on criminal cases that we look at that guide us, but don't have to -- don't control the decision we are making. The decision is still within the discretion of the judge, in this case the parole officer, and it's their understanding that if you don't go by what is guided by these risks tools, then you have to explain

it; but they do not control the decision-making. They are one piece, an important piece, that guides the parole officers. Or yes, the Parole Commissioners.

MR. RYAN: Yes, Your Honor. They are not controlling. They do, however, establish a presumption, and any departure must be justified. So it is --

THE COURT: Okay.

MR. RYAN: -- not as though they are one of a list of factors that can be considered or weighed in any way that defendants choose. They are something that --

THE COURT: They are important.

MR. RYAN: -- presumptively -- right.

THE COURT: They are important. I understand that. So --

MR. RYAN: Okay.

THE COURT: But this case -- this case is about how the Commissioners are making their decisions, the information that is going to them to make their decisions, and COMPAS is one of them. So you've gotten information about how COMPAS runs, what these risk factors are; why do you need any more than you've got? I still don't have -- I'm struggling to understand how -- why -- I mean, there isn't an allegation here -- and I could be wrong here -- there isn't an allegation here that there is some known problem with COMPAS, and the tool that they should have been -- that they should know better than to be using it.

MR. RYAN: There is, Your Honor.

THE COURT: That this tool is particularly bad, so that is one of your arguments?

MR. RYAN: Yes.

THE COURT: That the tool is bad; not the risk assessment tool, but the COMPAS in particular, and that there is a better one out there?

MR. RYAN: I'm not sure we have -- I'm not sure --

(Cross-talk)

THE COURT: Nor is it that you think --

MR. RYAN: I would -- sorry, Your Honor.

THE COURT: Nor is it that using a risk enhancement tool is a problem?

MR. RYAN: Our allegation is that there is a specific problem with this COMPAS risk assessment tool. It is not a claim about the use of any possible risk assessment tool. It is a claim about the way in which this particular tool weights the input, in particular, age; and so this is set forth, for example, in paragraphs 209 to 211 of the operative complaint, which is ECF 110.

(Cross-talk)

THE COURT: 109, and that complaint is -- the one I'm looking at is Docket 1, right? There is not another one I should be looking at or is there an amended complaint?

MR. RYAN: There is an operative complaint, which is

the Second Amended Complaint, which is ECF --

THE COURT: And which docket is that?

MR. RYAN: Number 110.

THE COURT: Okay. Give me a second. I will get there. And what paragraph am I looking at?

MR. RYAN: 209 to 211, and it says this in our letter.

THE COURT: Okay. I got it. Thank you.

MR. RYAN: Okay. And we explain there that on information and belief, COMPAS treats youth as an aggravating factor. What we mean by that is that as we -- as we believe looking at inmates' particular COMPAS scores, we have tried our best to guesstimate at reverse engineering and looking at it, it looks as though, looks to us, as though the way COMPAS works is that if somebody was young at the time that he or she committed the offense, and therefore after having served a particular period of time in prison, and is still relatively young, say somebody is 40 years old, and the person comes up for a parole hearing, and this is a person who's been in prison now for 24 years, having committed an offense at age 16, that's sort of an example, which is pretty typical of our class; this person is going to be considered relatively youthful, and we will get a much higher score in terms of a risk of felony violence re-offending than somebody who was 30 years old at the time that he or she committed the underlying offense and is coming up for parole at age 54, the same period of time later.

So this, in our view, is contrary to the constitutional mandate --

(Cross-talk)

THE COURT: And any information you have gotten so far from COMPAS supports this belief?

MR. RYAN: To a small extent, yes. We've gotten information from COMPAS which shows what the inputs are that are considered in the risk scale -- risk scale that we are eliciting, and so we have been able to see what they have given us so far that age is considered in some way in arriving at this ultimate score; and therefore, of course, placing the inmate in the various deciles that defendants see when they prepare for the parole review.

What we can't evaluate, what we are unable to evaluate, and what we need this logistics regression model and the Norm Group Data Set in order even to evaluate is how important is age? How important is it if you are 25 years old, if you are 30 years old, if you are 40 years old? How much weight is actually given to this? Would it make a big difference if all other things are equal or does it make a small difference? We are unable to tell that because all we can see is a formula.

THE COURT: Got it. All you can see is the data that's entered. You just don't know the weight given to that data or how it's -- you know, if age is -- if the age -- if

there is a certain age where it changes. For instance, it could give a more serious response if it starts at like 22, and that they treat the juvenile differently; that would be a different issue, and you can't see that from the data that you have?

MR. RYAN: That's right, Your Honor. And so that's why we are seeking this information that will help us show --

THE COURT: All right.

MR. RYAN: -- whether the allegations in our complaint are true or not and how much a difference this actually makes.

We believe that this is making a big difference, and is a big reason why juvenile offenders in the states are being held in prison for 1onger than they should be for those of them who would otherwise -- obviously not everybody -- but for those of them who otherwise would be good candidates for release. You're a Commissioner, and you see this person in Decile Rank 9 or 10, and that's now strongly weighing you to say, this person should not be released, and it might be -- our view is that they will be based largely upon age, and that in our view would be unconstitutional. It would be a clear legal violation under the Supreme Court case.

THE COURT: Okay. I understand your argument. Thank you, Mr. Ryan. I appreciate it. And thank you for responding to my questions and giving me the place to where I can look.

Okay. Mr. Matthews?

MR. MATTHEWS: Yes, Your Honor. Thank you very much.

I think your question as you have framed the issues for counsel really is spot on as: Why do they need this based on everything that we have already given them? And I think just to quickly set a baseline of some things I don't think are in dispute: The COMPAS software is a trade secret. It's the most proprietary information that my client has. It's their formula for Coca-Cola or their secret sauce. It's the most valuable and important proprietary information they have, but I don't think that's in dispute.

So the question for the Court under Rule 45 is, you have to weigh the burden on my client against the value to the requesting party, and the need for the documents is a key to that. So, you know, arguably, this information is relevant to the case, but is it a key issue in the case? Absolutely not. Mr. Ryan framed the issue as he began as this case being about two things: How the Board relies on COMPAS, and how that reliance impacts their decisions. You don't need to know anything about how COMPAS works to get at those issues. It's the -- this case is about what the Board does with information that comes from the COMPAS software.

So but putting that aside, we gave them a lot of information about how the software works.

(Cross-talk)

THE COURT: I appreciate what you are saying, and that's why I was tough on Mr. Ryan because the Board has

discretion, and the Board can use the data that it gets, and the Board is required to use those guidelines. I see it very similarly to district judges' role in sentencing guidelines in federal court. It's something that they must under the law consider, but they can depart from it.

So the question is: If one of the data points that they must consider is this -- the data that's being put into the algorithm or the formula, if that data is improperly calculating based on the law, you know, based on their argument what the law is, improperly calculating a piece of information, isn't that relevant for the plaintiffs to know in order to say, hey, you know, it's not, per se -- the Commissioners are not per se making any mistakes. They are relying on data that was calculated the wrong way. And, therefore, this -- you know, DOCCS has to use a different data, or COMPAS has to alter the way they do a status if they are going to continue to work with DOCCS, providing information on the juveniles. I'm sure you provide information on more than just the juveniles.

So why wouldn't that information be something that is more than just relevant? It's essential to know whether the information that they are getting before them and the way they are deciding the cases is not -- doesn't have a bent to it before it even starts.

MR. MATTHEWS: Right. It's a good question, and I think in some cases there might be a need for it. There's just

not in this one. As alleged in this case, the plaintiffs' allegation cite -- as stated in the complaint, goes far more towards alleging that the Board improperly does not consider low COMPAS risk scores. So the eight plaintiffs, the eight named plaintiffs in this case with respect to five of them, the plaintiffs alleged that they had low COMPAS scores, the most favorable scores that you could have.

With respect to the three others, they say that Mr. Bennett, only three were not low. Mr. Delima, only one was not low, and Mr. Lebron, only two were not low. Now, there are 41 risk scales that go into the COMPAS software. We've provided them with a 43-page document that lists out the scale items that go into each one of those scale scores. They know how that works, and with -- so of the 328 scale scores the named plaintiffs had, 322 of them were low.

If you read the complaint in that way, the allegation is that the Board should be considering the low scores, and for some reason they don't.

Now with respect to the ones that were not low, for Mr. Bennett, the three that are listed are: One, prison misconduct; two, reentry substance abuse; and three, reentry financial. The documents that we've already provided them show that in the scale items that go into those scores, risk -- age is not a factor. It's not considered at all.

With respect to Mr. Delima, they say his score was

high for risk of felony violence. Candidly, I'm not sure which scale score they are talking about. That's not -- that's not one of the 41 scales, but if it's talking about the scale that goes to current violence, the age is not considered.

With respect to Mr. Lebron, there again, the two scores that were not low are prison misconduct and reentry substance, and age is not a factor in them.

So if there was some case where there was, you know, an allegation that scale scores had been high with respect to scale items that do take age into account -- that's not the case here -- then it could potentially be relevant and something that they would need to prove their claims, but it's just not the case.

The other part is that, you know, this case -- those are the only plaintiffs in the case right now. So it's a point that we made just in a footnote, but a class has not been certified; and the question of whether the COMPAS software is fair or not fair to juvenile offenders is going to be a common question. There's no need to produce this information, I would think at all. This is very, very similar to the *Loomis* case in which the same kind of due process arguments were made. And I think this Court should reach the same conclusion that the Court did there; that it was not a due process violation to find that those trade secrets did not need to be produced.

But to the extent that the Court disagrees with that

at all, there is certainly no need to produce it yet.

THE COURT: So here is my question, Mr. Matthews: Is there a way -- I mean, is there a way to give them the information just about how age is used and calculated? And have you given that rather than having to give your whole algorithm out? Because you are right, there are certain things in the algorithm that's not even relevant to this case that may, you know, give a defendant or a juvenile or an inmate a certain kind of score that has nothing to do with age.

MR. MATTHEWS: Uh-huh.

THE COURT: So is there a way to carve out just what they are looking for or is it not possible?

MR. MATTHEWS: I mean, frankly, that's what we thought the information that we had provided did give them, and I'm happy to submit that information to the Court for its own consideration to see the level of detail in this Practitioner's Handbook and the Code Book and the Validity Handbook. It's fairly detailed in explaining out the factors that are considered in each one of those scales, how the scoring works, and how those inputs go into generating an overall recidivism score.

So I think to go a step further and to provide the algorithm itself is one, again, I think unnecessary, but --

THE COURT: Now what about the --

MR. MATTHEWS: -- the only thing that --

(Cross-talk)

THE COURT: The Norm Group Data Set?

MR. MATTHEWS: That's sort of a -- it's not something different. It's something that was an input to kind of set baselines for the algorithm, as I understand it.

THE COURT: Okay.

Mr. Antony -- let me get back to you, Mr. Ryan. Sorry. I apologize. Mr. Ryan, did you want to respond to what Mr. Matthews said?

MR. RYAN: I do, Your Honor. And, Mr. Matthews, with all respect, does not understand our claim in this case. He is obviously representing a nonparty, but we absolutely are claiming, Your Honor, that one of the ways in which a number of our named plaintiffs, and many members of this class, have been harmed and continue to be harmed, is that they have high COMPAS scores reported for recidivism risk, for felony violence risk, which is -- which is one of the COMPAS scales that has age as an input. And so --

MR. MATTHEWS: May I? I don't mean to interrupt, but just to clarify, can you tell me which one of the scales you are talking about?

MR. RYAN: So our understanding -- and we have gone over this in the meet-and-confer sessions with you -- our understanding is that New York State reports 12 of these scores to its Commissioners in the prehearing memos, and that they

sometimes give different names to these scores than COMPAS gives itself. So it also receives information from the State. We will get to that in the later part of this hearing. So as I understand it, the State is doing now to gather some State-related COMPAS documents, but this core issue about how the risk scales have been validated, the scores -- these scales, excuse me -- have been validated by their creator, which is Northpointe, and so when they give these high scores to our plaintiffs, a Commissioner sitting there thinks, okay, this is somebody who's likely to reoffend, and doesn't realize perhaps as he or she is sitting there in the moment, doesn't realize how much of this is driven by age, and therefore thinks, well, I can just rely on this COMPAS issue. I don't need to look behind it. I'm not seeing a reason to actually depart from it when we believe, Your Honor, that there is a reason for every one of these juvenile offenders, there is an overwhelmingly strong reason to depart; and we are suing the defendants in the Section 19 action not just for the individual discretion that they exercise when they are one of a three-Commissioner panel that sits in a particular hearing, but also for the systemic decisions that they make for their choice that they will use COMPAS for their choice. Even though we have complained about this, that they continue to use a risk assessment instrument that is penalizing youthful offenders as opposed to doing what the Supreme Court tells them that they need to be doing, which

is looking to evidence of demonstrated maturity and rehabilitation and affirmatively taking into account the fact that they were youthful at the time of their offense. So it's absolutely perverse the way that this COMPAS instrument puts, you know -- has a huge influence on these individual release decisions.

THE COURT: I appreciate your argument. I do appreciate the argument you are making right now, but I also don't know how any additional information is going to give you any more ability to make any more nuance to the argument. So that's -- don't respond to that because, you know, I have listened to what you say. I really -- you can respond to it in a second.

I want to hear from Ms. Collins because, you know, I want to know if she has any position on this or Ms. Collins can shed any light on any factual statements being made by anybody or maybe not an accurate representation on how this tool is being used by the Commissioners, or what this case is -- what you understand the case as being about.

MS. COLLINS: Thank you, Your Honor. I would add, not just as a footnote, but a main argument that defendants have in this case is that the age of the offender at the time of the offense, as well as their progress throughout their incarceration is mandated by the same regulations that Mr. Ryan noted earlier. The Board is required to consider the

youthfulness of the offender at the time that the offense was committed, as well as their quote-unquote growth and maturity since the time of that offense. That's separate and apart from anything that is included in COMPAS. It's a separate factor that for these -- this group of individuals the Board must consider.

That being said, concerns over how an individual's youthfulness at the time that they are coming to the Board for an interview is considered. I mean, to the extent that plaintiffs argue that that factor is not being considered adequately, so to speak, by the Board, I mean, that's what we believe this plaintiff's allegations are about. And to the extent that they now argue that COMPAS has a role in that, you know, again, I would just say that that -- that concern is alleviated already by the specific regulations that are governing the Board's decision-making.

In addition, to the extent that Mr. Ryan indicated that the State does have some sort of COMPAS-related materials particular to the State, that is true. I have not had the opportunity yet to review a large majority of them. They are still in the hands of Parole Board's counsel's office. They are reviewing them. So the factual materials, whatever that set of documents entails, I'm not in a position to comment on.

THE COURT: Thank you.

Okay. Mr. Ryan, you can respond.

MR. RYAN: Thank you, Your Honor.

So how does this information help us is a question the Court asked. The way the information would help us, and I don't expect that the information would be something that, you know, I or any of the lawyers in this case would be able to interpret unaided, this logistics regression model, it would allow us to have an expert witness analyze this and say, yes, the result of this is that people who are -- who are youthful offenders, when they are coming up for parole in their 30s, the recidivism risk scale is indeed almost entirely driven by age or perhaps the expert says, no.

THE COURT: Do you have an expert that's reviewed the data so far?

MR. RYAN: Yes, Your Honor. And we --

THE COURT: And has the expert told you that they cannot do a -- they cannot complete their analysis without more information?

MR. RYAN: Yes. Yes, she has.

THE COURT: Okay.

MR. RYAN: Yes. Absolutely. And there's -- I mean, I -- all of the information produced to us so far is information that's in readily intelligible text documents I can understand or all of them don't require great expertise. I have read all 2 or 300 pages that Northpointe's produced to us. It is clear to me that the answer is not there. We have given those materials

to our expert. She has confirmed to us that the answer is not there. We tailored what we are seeking based on what our expert tells us she needs, right? So we are being targeted and discrete here.

So and I just -- the other thing I would note, and just refer the Court in terms of our claims in this case to paragraph 233 of the Second Amended Complaint, which again is ECF 110, where we referred to the regulation Section 8002.2 and even when a Commissioner departs --

THE COURT: The argument here -- sorry, Mr. Ryan. I did not hear the paragraph number. You broke up.

MR. RYAN: I apologize, Your Honor. Paragraph 233.

THE COURT: I don't think it's you. I think it's the phone system, so no need to apologize. 233? Okay. Thank you.

MR. RYAN: Yes, Your Honor. Starts at the bottom of page 62 and goes up to --

THE COURT: Yes, I have it now.

MR. RYAN: So at the top of page 63 we explain that it required the Commissioners to provide reasons for departure from the conclusions of a validated risk assessment instrument, but only when that departure is denying release. So we have plaintiffs here who are coming up for parole, who appear on the face of this COMPAS instrument to be a recidivism risk, and we allege that they are being denied parole in those cases, obviously, where the three-Commissioner panel doesn't choose in

its discretion to depart from that. Ordinarily, they are not required. It's clear to us having reviewed many, many hearing transcripts where there are lots of COMPAS references, that these COMPAS scores in practice are very important, and so generally speaking, there will not be a departure, and if the Commissioners don't realize that, in fact, this supposed -- supposed risk of recidivism is being driven by age or being driven by other appropriated age-related factors that are part of this COMPAS instrument, then that's leading them to deny parole to our plaintiffs and our proposed class repeatedly, and that's going in the opposite direction of what the *Miller* and *Montgomery* cases direct.

THE COURT: Okay. Thank you. Let me -- because I have a lot to take care of in this conference, let me ask Mr. Matthews to address whatever he might want to address relating to what you said; but also, Mr. Matthews, I want to hear about the burden.

MR. MATTHEWS: Sure. Yes, Your Honor. I will try to move quickly through the response. I think, you know, with all due respect, I do note -- I don't know all the ins and outs of the case, and it's been going on for a while. There are a lot of things that have been filed, but I've read the operative complaint, and I do know what was pleaded with respect to these plaintiffs, and the allegations about high scorers are extremely limited, and with respect to the scales that are alleged to have

been reported high, none of them take age into account. So -- for good or ill -- and so I think with respect to these plaintiffs, there is no need for them, and we have -- the documents that we've turned over explain that how the scales were -- in terms of what goes into them, I've gone into that.

The allegation that age is improperly considered is pure speculation by the plaintiffs. You asked if they could point to anything in the documents that we have produced that would indicate that is improperly considered, and they are not able to, and that's why an expert can't say it's properly or improperly considered at this point.

But to back out again the allegation in -- the core issue in the case is the same as in the *Loomis* case, which is: Does the Board properly consider the information that it's required to consider or not? Not, is the COMPAS software fair or not fair?

And just as in *Loomis* where Mr. Loomis's due process rights were not deprived by the fact that he didn't understand the formulas, knowing that these scores were considered was as far as the Court thought they needed to go.

With respect to the burden, we've -- you know, we are a non-party. It's a subpoena. When I received it in January of 2020, I immediately picked up the phone and said, these requests -- we had very cordial phone calls, a couple in January 28th, February 17th. You know, I tried to explain some of the

software to target the requests a little bit more. Help me understand what it is that you are looking for because these requests are extremely broad. We had a couple of good meet-and-confers about that. We served our responses to the document requests, just the responses themselves in late February, then to address this production of documents. I drafted a supplement to the stipulation because it didn't encompass third-party documents. So we got that in place in April, and then we made a document production in May of 2020 that included these things that I've been talking about: The Handbook, the Practitioner's Guide, the Code Book, which includes equations about things that go into the general recidivism risk score. It's very detailed information about not just the inputs, but about how they are -- which ones go into certain recidivism equations.

The plaintiffs followed up in a meet-and-confer letter. We had many more rounds of meet-and-confer phone calls and letters and really just produced everything that we could short of the code, and this norm core -- I am messing up the name, the data set, the normative data set.

So it's missing in the letter the amount of time that this has required of my client and their people hours and the legal fees that they have already incurred; and I think Mr. Ryan's comments about what would be required if more is produced really highlights the additional burden that would go

with that. He said the lawyers aren't going to be able to understand it. Experts will have to get involved, and inevitably, there is going to be depositions of people who work for my client. And again, I don't think that it goes to the need of any plaintiff in this case based on the allegations that their risk scores were actually low, and that the Board should have considered those low scores.

And, you know, unless and until a class is certified or there's some kind of information, some kind of data, something that they can point to that says age is properly considered, other than just alleging it on information and belief, then I think the burden to require more production from my client, which it would require just a specialized group within the company to pull all of this; and they're -- I mean, I know everyone is busy -- but when I called them and asked them if they can do this, they say we're swamped, and we can't do it, and it's going to be months before we can get to it, and it will require dozens and dozens of hours to produce it.

THE COURT: I think you had written in your letter maybe 186, 185 hours, as well as more than 25,000 in external attorneys' fees to date, and that's what you have done to date --

MR. MATTHEWS: To date.

THE COURT: -- and that it would require even more than that. Okay.

I'm going to ask my --

MR. RYAN: Your Honor -- Your Honor --

THE COURT: Yes. Briefly because we've already spent close to an hour on this argument.

MR. RYAN: Understood. I have three sentences. First, paragraph 52 of our complaint has the specific allegation about the named plaintiff who had a high risk felony violence score, and we alleged that was because of his age.

Secondly, in terms of the --

THE COURT: Again, what's the paragraph? And for some reason when you start off with the paragraph, either my hearing is going, even though I do have headphones on right now, or it's a bad connection. What was the paragraph?

MR. RYAN: Paragraph 52.

THE COURT: 52. Thank you.

MR. RYAN: Five-two to Mr. Delima.

THE COURT: I heard 54, so thank you.

MR. RYAN: Secondly, Northpointe has produced 316 pages, a total of ten documents. So we really have bent over backwards not to burden them.

And third, what we've gotten from them so far confirms our suspicion that we had pleaded on information and belief that age is one of the inputs into this recidivism scale. So that has actually proved out, but we have no way evaluating right now how important a factor age is. That's what we need this

information for, for our expert to evaluate.

THE COURT: Okay.

MR. MATTHEWS: Your Honor?

THE COURT: Thank you. Yes.

MR. MATTHEWS: If it would be helpful to the Court, just not to rebut that. As you said, we have gone back and forth, but I have the paragraphs for each one of the plaintiffs that mention the COMPAS scores if you would like to have those.

THE COURT: Okay. No. I have -- he has given me one example, and that's fine. I'm going to take it on face value that on many of the others as well.

MR. MATTHEWS: Fair enough.

THE COURT: Ms. Collins, because you have been quiet I'm going to give you one last chance to say whatever you want, and then I'm going to ask my courtroom deputy to put me and my staff in a breakout room who has been asked to work on this with me because I want their input.

So, Ms. Collins?

MS. COLLINS: Your Honor, I have nothing more to add to the discussion. Thank you.

THE COURT: Okay. And do you take any formal position on it?

MS. COLLINS: No, Your Honor. Defendants take no position with respect to the plaintiffs' motion to compel.

THE COURT: Okay. Thank you.

So, Jess, if you could put me the staff in a breakout room for a moment? I will be right back.

(Pause)

THE COURT: Okay. So I appreciate everyone's arguments on this case. You know, one of my dilemmas and one of my debates was, do I have sufficient information? And I think I do, and I think I do on this because I -- you know, you supplemented your letters with arguments. You directed me to certain aspects of the complaint.

I appreciate this is a nonparty subpoena, and I'm highly sensitive to Northpointe's arguments to trade secret and burdensomeness, and -- but I am also highly sensitive to the needs of plaintiffs and what they are trying to argue.

The case law is that burden alone does not -- is not grounds to, you know, quash a Rule 45 subpoena. So although I will consider that argument and do consider that argument, that is not the sole thing I consider. I think the argument from Mr. Matthews, you know, one of the things you are focusing on, and one of the things I focused on was relevance and need because really, if it's not relevant, then the burden argument becomes much stronger. If it is relevant, then I have to look at the burden argument and kind of weigh it.

These are trade secrets. I do believe they are trade secrets, and I don't think there has been an argument, really, from anybody that they are not. The only argument that's been

made is plaintiffs aren't competitors, so it shouldn't matter. It always, in my opinion, matters whether something is a trade secret, whether to a competitor or not; but the case law has also made it clear that trade secrets can be protected by -- if the documents are relevant and need to be produced, they can be protected by a protective order.

So being a trade secret alone is not something that I can have as the determinative factor on whether I quash the subpoena as it relates to this aspect of the request, but it is something I have and do consider.

The *Loomis* case, which Mr. Matthews points to, is an interesting case. I'll be honest with you, I agree with the decision in this case, but I don't think it applies to this case; and the reason why is because in that case, it's not a discovery case. It's not a case -- it's a case in which individual defendants, I believe, were challenging -- wanted to have this information when they were challenging their risk assessments that were considered by the Commissioners, and they felt that they should have this, be allowed to have this information, and not having this information violates their due process; and I agree that not having the algorithm calculations for the COMPAS does not violate an individual parolee's due process rights in being able to challenge the decision that was made on their parole in state court.

But what was here challenging -- if I'm fully

understanding everything, I believe I am -- what was challenging is really the Department of Corrections' policy and practice as it relates to making decisions on juveniles, and whether they are considering the age as a component; and COMPAS is one tool, and it's only one tool, even though it's a very important tool, it's one tool that the Parole Commissioners are considering, and what goes into that tool has been provided, as far as I understand; but how the algorithm and how kind of, you know, all of the numbers and all the data that's put in is weighed and calculated is currently not known to the plaintiffs. So they can't evaluate whether a COMPAS score is unfairly considering or improperly considering one's age; and, in fact, the Commissioners don't really know that, either, so they could be using data, and they could be doing everything right, but if the data and the information they are getting is skewed based on how that information is calculated in their final number, then they don't even -- they are not even fully aware of that. So I am finding today that this is relevant, and that it needs to be produced.

Now, I understand that it is -- it takes time. We are in the midst of discovery, and I think you have time, Mr. Matthews, for your client to produce this information so we can lessen the burden. I would have to confer and ask counsel what their belief is on the appropriate timeframe, but I think we can lessen the burden on the timing and the urgency because I

believe -- and that's what I will find out after this when we do a status -- but we are still in the midst of paper discovery because there is a tremendous amount of paper discovery being produced in this case.

I do want these produced under a protective order. I do believe that this should be attorneys' eyes only, and the expert that's going to be evaluating it, and nobody else. I want these to be handled with as few people catching this as possible. I prefer to have you basically have just a handful of the attorneys because I know when large firms like Cravath, Swaine & Moore on this, you can sometimes have rotating attorneys coming in and doing assignments, I really would prefer that this document not be kind of in the common world of all attorneys on this case; just the attorneys who really need to understand this, and just the expert, and that's it.

And the expert also has to understand that any information they get on this can only be used in this case. They cannot use it on any other case. They cannot advertise themselves as now having this information, and therefore, be an expert somewhere else. This can only be used on this case. And it's going to be a very tight -- it's going to be a very tight protective order and a very narrowly tailored protective order for only the people who truly need it. Not every attorney working on this case needs it, and I don't want to hear that, you know, subsequent to this that ten attorneys got to see this

document. It should be a couple at most. So I am ruling --

MR. MATTHEWS: Your Honor --

THE COURT: Yes, Mr. Matthews?

MR. MATTHEWS: I'm sorry. I was going to ask if along those lines, would you like the parties -- or not the parties, I'm not a party -- would you like me and counsel for the plaintiffs to submit some sort of kind of letter proposal or agreement or something along those lines to the Court? I don't think our protective order goes into that level of detail.

THE COURT: I would like you to have a protective order that covers these directly. So I would like -- rather than a letter agreement, I would like that protective order for these specific documents that I will find because it will be so ordered by the Court, which means that anybody who violates will be violating a court order, and will have my wrath, which is never good.

MR. MATTHEWS: Thank you, Your Honor.

MR. RYAN: This is Antony Ryan. We are happy to enter into an order like that, Your Honor. Thank you.

MR. MATTHEWS: Thank you, Your Honor.

One other question, and I think you've made your decision on this part of it, but if you will allow me ten seconds to charge up the hill a little bit, you know, timing-wise, again, I think because this just goes to a merits issue, not a class issue, I would ask if the Court would consider, you

know, deferring production unless and until the class is certified because the how, I don't think goes into any sort of Rule 23 consideration. Whether COMPAS is considered, again, what -- if it's good, bad or otherwise uniformly is what the issue will be. Is it a common question?

THE COURT: I am going to allow Mr. Ryan a moment to -- and I appreciate, Mr. Matthews, your charge up the hill. I'm not offended by it.

MR. MATTHEWS: Thank you.

THE COURT: Mr. Ryan -- and you did it very respectfully, so I will consider it.

Mr. Ryan, do you want to respond briefly to that?

MR. RYAN: Thank you, Your Honor. Our concern with that would be that it would substantially delay the case. As the Court will hear in a few minutes, I believe that the State is very much approaching the end -- the end in sight on the document discovery. We are hoping to begin fact depositions in April, and we are going to propose a stipulated fact deposition cutoff, Your Honor, of July 8th. We do intend to make a class certification motion. When we discussed class certification with Judge Briccetti sometime ago, he indicated that he expected us to have some discovery that would go to the commonality of some of the issues, so we are then intending to stage our depositions in that way so that we can then make a class certification motion. If we delayed it, it would result in

probably a six-month additional delay in the schedule because then we would have to file and brief a class certification motion, and then to have sort of a second stage of discovery, both document discovery and depositions later, it could lead to duplicative discovery as well because we would like to have access to this information to be able to ask questions of those people who made the procurement decisions and who decided to use COMPAS. So for all of those reasons, to have it staged that way would, I believe, substantially delay our case.

THE COURT: So here, Mr. Matthews, let me just tell you that the arguments you just made and your final charge up the hill was one I considered before you made it; was one of the reasons I took a break --

MR. MATTHEWS: Thank you.

THE COURT: -- because what I was weighing was whether to deny this without prejudice at this time, and whether this would be an appropriate time and really whether class certification needs to be made first.

So I did consider that prior because -- and quite frankly, I seriously considered that and leaned toward that, and I will tell you my leaning at first went back to making a decision now. One, as a judge who's trying to keep an efficient docket, that it's better to not kick the can down in a -- down the hill -- down the road so to speak in a matter when you know you are going to see it again if you have all the information

that you really probably need now, even though it's always nice to leave no stone unturned, and you know, after briefing where I would have gotten the experts, et cetera, but I will tell you what persuaded me, and it's the complaint.

Although this is a putative class action, and although there are only a handful of named plaintiffs, one of which has -- at least one of which has the higher score upon information and belief based on age, it also is trying to -- it is also asking the Court to declare that defendants' reliance on a risk assessment tool that's discriminate. So they are actually, you know, they are challenging the reliance on the tool that Northpointe produces, and because of that aspect of it in saying that the reliance on a tool that, you know, inherently -- they don't use the word "inherently," that's what I think they mean -- discriminate, and these are just allegations against those who were juveniles violates the Eighth Amendment.

So because of that is why I am going to deny the -- your request to put it off because I do believe that that will come in to and needed to actually make their claim for the putative class action when they -- that this information actually may be quite relevant to that.

So I appreciate your desire to have it pushed off. Unfortunately, I don't think that that's going to give you a -- I don't -- I don't think that's going to change the argument in

the end-run or my decision. So that's why I've denied it.

Now, of course, Judge Briccetti is the district judge on this case. You are always welcome to appeal my decision to Judge Briccetti. Okay?

MR. MATTHEWS: Thanks, Your Honor. I appreciate it, and if my client elects to, I hope you don't hold it against me personally, but just they are very sensitive about it, but I thank you very much for your time and your patience. I --

THE COURT: I am --

(Cross-talk)

MR. MATTHEWS: If you don't mind --

THE COURT: I won't hold it against your client, either. I only hold it against the client if I lose.

MR. MATTHEWS: Fair enough.

THE COURT: Then I get a little bitter, but if I'm upheld, then go right ahead.

MR. MATTHEWS: Thank you very much. You know, I think -- I'm based in Houston, but I've had a number of matters in your courthouse, and two in front of you, and they both have been trade secret disputes, and I'm 0 for 2 now, but I thank you for your -- its quite all right.

THE COURT: Can you remind me the other one?

MR. MATTHEWS: It was --

(Cross-talk)

MR. MATTHEWS: It's a totally different type of case.

It was an energy class action.

THE COURT: I remember that case very well. Hamlin.

MR. MATTHEWS: With my friend Mr. Blankenship. Yes.

THE COURT: Yes. I remember that case very well. That was a very interesting case, and everybody did a phenomenal job arguing that case. I have a feeling that case was before Judge Briccetti, too.

MR. MATTHEWS: It was. It was.

THE COURT: Yeah.

MR. MATTHEWS: I apologize. I actually have another hearing at 2:00.

THE COURT: You can go. Your job is now done. I will go on to deal with the others, but Mr. Matthews, a pleasure to have you before me again.

MR. MATTHEWS: Thank you very much.

THE COURT: And I wish you a nice weekend and continued good health.

MR. MATTHEWS: Thank you, Judge. You as well, and one last question on timing. Is it okay if Mr. Ryan and I try to work out the timing of this, and if we are unable to, we will come back to the Court or would you like to set a deadline? I'm happy to --

THE COURT: I'm going to ask you to work -- the timing of production, you guys are going to do that on your own. The issue of the protective order I'm going to give you until next

Friday to get it to me. Okay?

MR. MATTHEWS: Thank you. Thank you, Your Honor.

THE COURT: So today is the 11th. That's the 19th. I want the protective order. Okay?

MR. MATTHEWS: Understood.

THE COURT: All right. Have a good day.

MR. MATTHEWS: You too. Bye-bye.

THE COURT: Bye.

(Mr. Matthews left the hearing)

THE COURT: Okay. So I think we can move on to the next issue, which is giving me an update on the status, and then I am prepared to rule on the issue of confidentiality.

MR. RYAN: Can Ms. Collins begin?

THE COURT: Excuse me?

MR. RYAN: I am just inviting Ms. Collins to begin. We conferred before this conference, but having her give an update might be a good starting point.

MS. COLLINS: Thank you, Mr. Ryan, and Your Honor.

Briefly, the defendants have produced to date over, I believe, 17,000 pages. Our last production was about two weeks ago. We anticipate another production to go out either today or shortly thereafter.

We have finished reviewing on a first-review basis all of the emails that we were provided, the approximately 100,000 emails. We have remaining only about approximately 10,000 left

for a second-level review. We have been informed from DOCCS counsel's office that the remaining segment of emails that they were having difficulty uploading, it appears to have been resolved, and they are producing it or have produced it to our office. That only entails about 900 emails, so we don't anticipate that to be a significant burden going forward.

As I mentioned earlier, Parole Board counsel also have hard copy documents relating to COMPAS specifically that they are -- that they have obtained through various sources within DOCCS and that they are currently reviewing. They anticipate providing that to our office within the next couple of weeks, so that we can, in turn, review and turn around and produce.

We also, I think as I mentioned at the last status conference, there are a few boxes of hard copy documents that are remaining in our office that still need to be scanned. My understanding is that the majority of these documents are actually just copies of documents that were either produced or are, in any event, contained within the productions that we have either produced or will be producing. We are trying to secure a vendor just to help us scan that information. We have had a bit of a delay on that aspect due to a personal matter that my colleague, Jeb Harben, has recently undergone, but nonetheless, we are pursuing that.

Given all of that, our best-guess estimate to complete paper and ESI discovery is approximately two months. Mr. Ryan

and I spoke a few days ago about some of these outstanding matters and have agreed to propose an extension, if Your Honor would so order it, of the remaining deadlines in this case; but we can see the light at the end of the tunnel that is not a moving train in terms of the production at this point, and so I'm happy to report at least that we have overcome that hurdle.

THE COURT: That's good news. And it sounds like plaintiffs would agree with you that things have been moving along, and they too see a light.

Is that true, Mr. Ryan?

MR. RYAN: Yes, Your Honor. It is. And so we would propose then that we would be able to begin fact depositions in this case in April, and the case management order that was entered by Judge Briccetti before these document production issues arose, that was ECF 157, and Ms. Collins and I had discussed extending those dates by five months.

THE COURT: Okay. What I am going to ask you to do because I think that will be the easiest is for you to send in a third -- send to me -- confer, and send me a third revised case discovery plan scheduling order for my signature. The other two were signed by Judge Briccetti, and I believe you might have -- do you have a case management conference before Judge Briccetti or is he just -- he usually puts one on because he -- has he left this open or not?

MR. RYAN: I think he left it open unless anyone else

on the call is aware of something that slipped my mind?

MS. COLLINS: This is Ms. Collins. I also believe that he left it open, but I'm happy to double-check. If there is a date that he did have us return to, we will obviously alert his chambers as that should be extended as well.

THE COURT: I appreciate that. I hate having you guys go up in the middle of discovery, and it's not a good use of the district judge's time to do that. So if you could, and I will give you until next Friday also, so we have everything on the same date, which is 2/19 for the third revised schedule; and I will sign it as you submit it because I appreciate what this case -- what you have gone through in this case, and I appreciate -- and Ms. Collins, this is really a direction -- or I extend it to you and to Mr. Harben. I really appreciate the fact that, you know, you have done what you have done and you've gotten the staff you need to get to kind of move this along in a faster pace than originally anticipated. You know, I put pressure on you and your office to do that, and you know, I'm sure my name was muttered under people's breath afterwards, but I really do appreciate. I know how difficult it is. I have done these kind of cases when I was litigating for the government many -- at this point many, many years ago. So I do know what's entailed in it, and I don't make those directions lightly because I know how hard it is to do it, but you guys did what needed to be done to get it done, to move this faster

along. So I know that this isn't as fast as the plaintiffs wanted to go, but I hope the plaintiffs are satisfied that the pace quickened, and that production has been made, and that we do see the light at the end of the tunnel.

So thank you, Ms. Collins, and thank your -- Mr. Harben and your office for getting the extra manpower so that we could get to this point.

MS. COLLINS: Your Honor, that's appreciated, and I will share Your Honor's kind words with Mr. Harben.

THE COURT: Okay. Is there anything else we need to do before I deal with the motion, which is for protective order for certain documents that were submitted for *in camera* review, which is Document 176.1?

MS. COLLINS: Nothing for defendants, Your Honor.

MR. RYAN: Nothing else from us, either, Your Honor.

THE COURT: Okay. So now I'm going to read the bench order that I have prepared as it relates to this motion.

So presently before the Court is a motion, hereinafter "Motion," by defendants, the New York State Board of Parole, hereinafter "BOP," and individual BOP Commissioners, hereinafter "Commissioners," collectively defendants for a protective order concerning BOP training materials that defendants contend are protected by the attorney-client privilege and work product doctrine. Docket Number 176.

The instant action concerns the BOP's policies

regarding the treatment of persons sentenced as juveniles to life imprisonment with the possibility of parole, hereinafter "Juvenile Offenders." See Docket Number 100. Plaintiffs allege that the BOP's policies contravene the Sixth, Eighth and Fourteenth Amendments. Docket Number 100, paragraphs 2, 3, 8, and 9. Specifically, plaintiffs argue that the BOP's policies for evaluating whether a juvenile offender is eligible for parole are arbitrary and fail to provide a meaningful opportunity for release, and that the present parole scheme authorizes the BOP Commissioners to make unconstitutional findings of fact concerning sentencing enhancements. Docket Number 100, paragraphs 1 to 3.

The documents at issue in the instant motion are 224 pages of *inter alia* memoranda, handouts and PowerPoint decks, hereinafter "Documents," prepared by the BOP's counsel to guide the Commissioners on compliance with statutory, regulatory, and decisional law when conducting parole interviews and making release eligibility determinations. Docket Number 176-7, paragraphs 5 through 17, hereinafter, "The Kiley Affidavit."

On October 4th, 2020, defendants produced a privilege log to plaintiffs withholding the documents on the grounds that they are protected by the attorney-client privilege, work product doctrine, and the deliberative process/intra-agency doctrine. Docket Number 176-1. Plaintiffs wrote to defendants

on October 27, 2020, and November 25th, 2020, seeking disclosure of the documents and arguing that the claimed protections do not apply. Docket Number 176-2. Defendants responded by letter on December 8, 2020, reiterating its arguments that the documents are protected by the attorney-client and work product protections, and withdrawing its deliberative process/intra-agency objection. Docket Number 176-5. The parties unsuccessfully attempted to resolve the dispute, precipitating the instant motion. Docket Number 176. Plaintiffs opposed the motion, Docket Number 179, and the Court heard oral argument on January 11, 2021. Plaintiffs and defendants submitted supplemental letters on January 15, 2021, and January 23, 2021, respectively. Docket Numbers 180 and 184. Plaintiffs replied to defendants' supplemental letter on January 25, 2021. Docket Number 185.

To invoke the attorney-client privilege, hereinafter, "Privilege," the party seeking protection must show that the communications were made: One, between a client and their attorney; two, were intended to be and were, in fact, kept confidential; three, and were made for the purpose of providing or obtaining legal advice. *Brennan Center for Justice at New York University School of Law versus U.S. Department of Justice*, 687 F.3d 184 at 207, Second Circuit 2012. The privilege is not absolute and must be balanced against "the search for truth so essential to the effective operation of any system of justice."

Id.

The Second Circuit has recognized the public benefit of shielding from disclosure legal advice rendered to government bodies, reasoning that "access to legal advice by officials responsible for formulating, implementing and monitoring governmental policy is fundamental to promoting broader public interests in the observance of law and administration of justice," especially where "legal advice is sought by officials responsible for law enforcement and corrections policies." *In re: County of Erie*, 473 F.3d 413 at 419, and at 422, Second Circuit 2007, quoting *Upjohn versus United* States, 449 U.S. 383, at 389, 1989, *accord ACLU versus National Security Administration*, 925 F.3d 576 at 489, Second Circuit 2019, hereinafter *"ACLU."* *ACLU* found that "the privilege furthers a culture in which the consultation with government lawyers is accepted as a normal, desirable, and even an indispensable part of conducting the public business. Abrogating the privilege undermines that culture and thereby impairs the public interest." Consequently, training materials prepared by a government agency's counsel may be privileged if the legal advice therein is disclosed only to employees who are "in a position to act or rely on legal advice." See *Valassis Communications versus News Corp.*, 17-cv-7378 (PKC), 2018 Westlaw 4489285 at star 3, Southern District of New York, September 19, 2018.

Nonetheless, the "American people have a right to know the laws and policies that bind our government and its agencies." *ACLU*, 925 F.3d at 583. Thus, the privilege "may not be invoked to protect a document adopted as, or incorporated by reference into an agency's policy." *National Council of La Raza versus DOJ*, 411 F.3d 350 at 360, Second Circuit 2005, hereinafter *"La Raza."* Where legal advice becomes an agency's working law, ie., its "effective law and policy," a "strong presumption of public access attaches." *ACLU* 925 F.3d at 583.

To "distinguish between advice, which may be kept secret and law and policy," which is typically subject to disclosure, courts ask whether officials regarded the documents -- whether officials regarded the documents as binding. *Id.* See also *La Raza* 411 F.3d at 360, which held that legal opinions that are "recognized as authoritative interpretations within the agency" may be subject to disclosure.

Defendants contend that the documents are privileged as they convey legal advice to the Commissioners, who are in a position to act on that advice, and are not made public or disseminated outside of the BOP. Docket Number 176 at 2; Kyle Affidavit, paragraph 18. Defendants further allege that the documents are not binding agency policy, and that they are intended to provide legal advice and analysis regarding existing BOP policy to aid Commissioners in making parole determinations. Docket Numbers 176-5 and 184. Defendants aver that it is

"ultimately up to each commissioner to utilize the guidance as they see fit." Docket Number 184 at 2.

In support of its motion, defendants offer a Supreme Court County of Albany decision from June 2020, which determined that the similar BOP training materials are protected by the attorney-client privilege, work product doctrine, and intra-agency doctrine since they are "submitted in confidence to the Board of Parole Commissioners, contain discussions 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." *Appellate Advocates versus NYS DOCCS*, 907522-2019, Supreme Court Albany County, June 26th, 2020, Docket Number 176-3. Defendants also provide the Affirmation of Kathleen Kiley, counsel to the BOP, which specifically states why each of the withheld documents is subject to protection. See Kiley Affirmation.

Plaintiffs argue that the documents are not subject to the attorney-client privilege. Docket Numbers 179, 180. Specifically, plaintiffs contend that documents were adopted as BOP policy in the wake of the New York State Supreme Court decision in *Hawkins versus DOCCS* regarding juvenile offenders and form the BOP's "working law" concerning parole decisions. Docket Number 179 at 1 to 2. Plaintiffs further aver that the documents are not privileged because they do not reveal

confidential facts communicated by a client. Plaintiffs distinguish the *Appellate Advocates* decision on the grounds that it applied state privilege law and is pending appeal.

The Court finds that the documents are subject to the attorney-client privilege. They contain legal advice rendered to persons in a position to rely and act on that advice and were intended to be kept confidential, and have, in fact, been kept confidential. See *Valassis*, 2018 Westlaw 4489285 at star 3, Kiley Affirmation, paragraph 18.

Furthermore, the so-called "confidential facts" limitation raised by plaintiffs does not defeat the privilege. Relying on *ACLU versus Department of Defense*, 15-cv-3917 (AKH), 2017 Westlaw 4326524, Southern District of New York, September 27, 2017, hereinafter *Department of Defense,* plaintiffs argue that the documents are not privileged because they do not reflect confidential facts provided to counsel. Docket 179 at 2. Defendants respond that the documents were prepared based on information confidentially provided by the BOP or its agents to counsel, and are thus based on confidential facts. Docket Number 184 at 2, footnote 2. Defendants further argue that regardless, the existence of such limitation on the privilege is not settled within the Second Circuit. Docket Number 176-5 at 1 to 2.

The Court agrees with defendants. It is "somewhat unsettled" in this Circuit whether the privilege only attaches

if the communications at issue "reveals confidential facts communicated by the client." *Natural Resources Defense Council versus U.S. Environmental Protection Agency*, 17-cv-5928 (JMF), 2019 Westlaw 4142725 at star 15, footnote 12, Southern District of New York, 2019. However, that issue need not be resolved here. Since the BOP Chairwoman solicited BOP counsel to prepare the documents, the Court cannot conclude that the advice therein is divorced from confidential facts. *CF Department of Defense* 2017 Westlaw 4326524 at star 4. There is no indication that such advice was provided in a "factual vacuum." See *Id.* at star 4, footnote 3.

In any event, the Court's decision under *Department of Defense*, which states *in dicta* that "legal advice divorced from confidential facts supplied by a client probably is not protected by the attorney-client privilege," is itself equivocal as to the propriety of a bright-line confidential facts limitation. See 2017 Westlaw 4326524 at star 4. The *Department of Defense* court notes that it did not find case law to support the foregoing proposition, which it concludes is "likely because lawyers seldom provide legal advice in a factual vacuum." *Id.* at star 4, footnote 3. Furthermore, the present dispute is more analogous to that raised in *In re: County of Erie* in which the Second Circuit found that the "attorney-client privilege protects communications that pass between a government lawyer and a public official, where those communications assess the

legality of a policy and propose alternative policies," without reference to the confidential facts limitation. See 473 F.3d at 417. Accordingly, the Court finds the confidential facts limitation does not defeat of documents' privilege.

Moreover, the documents do not constitute BOP policy or "working law." There is no evidence before the Court that the documents formed the basis of, or were incorporated by reference into, BOP policy. See *ACLU*, 925 F.3d at 583. Plaintiffs offer only speculation based on the timing of the *Hawkins* decision to support their argument that the documents were adopted as part of the BOP's 2017 policy change. See Docket Number 179 at 2. After reviewing the documents *in camera*, the Court finds that they were prepared to assist the Commissioners in rendering provident parole decisions. The documents are not binding on the Commissioners nor are they recognized as authoritative interpretations within the agency. *Cf. La Raza*, 411 F.3d at 360. See Docket Number 184 at 2. Further, unlike the memorandum at issue in *La Raza*, which formed the basis of the subsequently enacted agency policy, there is no evidence that the BOP has repeatedly referenced the documents in public discussions of its policy. *Cf. Id.* at 352 and 361, which held that "we cannot allow the department to make public use of the memorandum when it serves the department's ends but claim the attorney-client privilege when it does not."

Defendants additionally argue that the documents are

protected by the work product doctrine since they were primarily created to prevent or mitigate future litigation. Docket Number 184 at 2. Defendants contend that the potential of "litigation flowing from adverse parole decisions is not speculative, it is highly likely," in light of the frequency of Article 78 proceedings challenging parole denials. Docket Number 176-5 at 2. Plaintiffs aver that the documents contain generalized compliance advice that does not assist with preparation for a specific litigation and that the documents were created in the ordinary course of business. Docket Number 179 at 2.

Since the Court finds that the documents are protected by the attorney-client privilege, the Court need not reach defendants' work product argument.

For the foregoing reasons, defendants' motion is granted. The clerk is respectfully requested to terminate the pending motion Docket Number 176.

Okay. Counsel, we have been at this now for close to two hours. I think the only remaining business to do is to schedule another conference. Given the new schedule on the production, we have been doing these conferences generally monthly. Do you think we need to meet again next month? I'm happy to do so, or would you like to put that meeting off to say sometime in April?

MR. RYAN: I think it might be helpful, Your Honor, to have a brief conference, hopefully much shorter than two hours,

next month just to be sure that we are on track and ready to begin fact depositions in April.

THE COURT: Ms. Collins, you have no objection?

MS. COLLINS: No objections, Your Honor.

THE COURT: Okay. Ms. Hummel, looking at my calendar, a month from now is March 12th. It's four weeks from now. That I can do 11:00 on March 12th.

MS. COLLINS: That works.

THE DEPUTY CLERK: That's correct, Judge.

THE COURT: Okay. Does that work for all counsel?

MR. RYAN: Yes, Your Honor.

THE COURT: Okay. So it will be March 12th at 11:00 a.m.

Ms. Collins, please tell Mr. Harben I wish him well for me. His absence was noticed today, and I hope that whatever he is dealing with, that it resolves itself in a positive manner.

MS. COLLINS: I appreciate that, Your Honor, and I will let him know. Thank you.

THE COURT: Thank you. Okay, everyone. Have a good weekend. Thank you all today and I wish everybody continued good health.

MS. COLLINS: Thank you, Your Honor.

MR. RYAN: Thank you, Your Honor.