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August 22, 2022

Hon. Lisa A. LeCours
Clerk of the Court
Court of Appeals
Court of Appeals Hall
20 Eagle Street
Albany, New York 12207

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

Dear Ms. LeCours:

Respondent New York State Department of Corrections and Community Supervision ("DOCCS") does not object to the Court's selection of this appeal for expedited merits consideration under Rule 500.11, and submits this letter to assist the Court in the event it decides to retain this appeal on the summary calendar.

This appeal arises from appellant's Freedom of Information Law ("FOIL") request of respondent DOCCS for records pertaining to the training of the Commissioners of the State Board of Parole. At issue are 11 undisclosed records, which are materials prepared or collected by Board of Parole Counsel Kathleen Kiley for use in the training of Board Commissioners concerning the legal principles that govern their parole interviews and release determinations. The records include handouts and presentation slides prepared by counsel for use in training sessions, as well as legal memoranda covering specific legal issues related to the above acts. As established below, this Court should affirm the decision of

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the Appellate Division finding that the Board properly withheld these records from FOIL disclosure.[1]

STATEMENT OF THE CASE

A. Petitioner's FOIL Request

In March 2018, petitioner, a nonprofit public defender organization, submitted a FOIL request to respondent DOCCS seeking documentation concerning 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 letters. (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 request category number 12, respondent provided petitioner with 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); C.P.L.R. 4503(a). (R11-12, 31.)

Petitioner administratively appealed. On July 2, 2019, respondent confirmed the determination, finding that the withheld materials under category 12 were covered by the attorney-client privilege, *see* POL § 87(2)(a); C.P.L.R. 4503(a), and were exempt as intra-agency materials, *see* POL § 87(2)(g). (R66.)

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[1] Respondent has provided this Court with a copy of the 11 withheld documents for *in camera* review.

B. Supreme Court Proceedings

In October 2019, petitioner commenced this proceeding in Supreme Court, Albany County, to obtain judicial review of respondent's FOIL response to category 12, as well as to categories 11 and 18 of the request.[2] The parties subsequently stipulated to a partial settlement agreement that resolved the FOIL request under categories 11 and 18. (R101-105, 114). 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 listing each of the 11 documents (R158-159) and submitted a copy of the documents to Supreme Court for *in camera* inspection. (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 explained that she denied petitioner's administrative appeal with respect to category 12—finding that the records were protected by the attorney-client privilege and the exemption for intra-agency materials—because "the materials provided Counsel's advice as to how to best conform parole interviews and decisions with the governing statutes and regulations, as well as provide Counsel's interpretation of recent decisional case law and amendments that would impact the Board's interviews and decision-making." (R167.)

Kiley, as Board Counsel, provides legal counsel and advice to the Board Commissioners with respect to the statutory, regulatory, and case law governing the conduct of parole interviews and the decision-making process. (R161.) Kiley explained that the 11 withheld records are Board training materials that she prepared with the assistance of staff attorneys in her office. These materials include handouts and

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[2] Under categories 11 and 18 of the FOIL request, petitioner sought records relating to the compensation and performance of Board Commissioners and the Board's use of video conferencing technology. (R8-9, 19-20.)

presentation slides that were used in conjunction with Board training sessions, as well as memoranda covering specific legal issues. (R162.)

Kiley averred that she "created the handouts and presentation slides to provide legal advice and counsel to [Board] Commissioners in the course of the training sessions," and that she "created the memoranda to provide legal advice and counsel to [Board] Commissioners concerning the specific issues presented when handling parole interviews involving minor offenders." (R162.)

Kiley further affirmed that all of the training materials contain her and her office's "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.) Kiley explained that the Board Commissioners had been "made aware of the fact that these materials were provided to them" within the context of "our attorney-client privilege" (R162), and to the best of her knowledge, none of the materials had been disseminated outside the Board of Parole. (R164.)

Kiley addressed each of the 11 documents:

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 both authored by Kiley. These documents "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, consists of 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 incarcerated individual's COMPAS risk assessment instrument, which is an assessment tool used to evaluate and assess parole candidates.[3] (R163.)

6. The document entitled "Parole Interviews and Decision-Making Under Revised Regulations," dated June 15, 2017, consists of 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. The handout entitled "Favorable Court Decisions" was prepared in May 2016 to "provide legal advice and impressions on recent case law that applied to the relevant

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[3] The COMPAS Risk and Needs Assessment Instrument is used by the Board "to measure the rehabilitation of persons appearing before the board, the likelihood of success of such persons upon release, and assist members of the state board of parole in determining which incarcerated individuals may be released to parole supervision." Executive Law § 259-c(4); *see also* 9 NYCRR § 8002.2(a).

statutes and regulations to parole decisions, and advised Commissioners as to how to reach decisions in light of these recent judicial decisions." (R163.)

9. 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.)

10. The document entitled "Parole Interviews and Decision-Making," represents 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.)

11. The handout entitled "Unfavorable Court Decisions" was 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.)

Supreme Court sustained respondent's FOIL determination. First, the court held that the 11 documents were exempt from disclosure as privileged attorney-client communications. The court observed that the training 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). When viewed "in their full content and context," the court stated, 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.) In addition, the court held that the documents were exempt from disclosure 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). (R6.) Petitioner appealed. (R1.)

C. The Appellate Division's Affirmance

1. The Court's Opinion

A three-justice majority of the Third Department affirmed, with a partial concurrence and dissent by Justice Lynch, and a separate partial concurrence and dissent by Justice Pritzker. *Matter of Appellate Advocates v. New York State Dept. of Corr. & Community Supervision*, 203 A.D.3d 1244 (3d Dep't 2022). The court held that all 11 documents were protected by attorney-client privilege—and thus were exempt from disclosure—because they were made "for the purpose of facilitating the rendition of legal advice or services, in the course of a professional relationship." *Id.* at 1246 (citing *Spectrum Sys. Intl. Corp. v Chemical Bank*, 78 N.Y.2d 371, 378 (1991), quoting *Rossi v Blue Cross & Blue Shield of Greater N.Y.*, 73 NY2d 588, 593 (1989) (internal citations omitted)). Having determined that the records were shielded by the attorney-client privilege, the court did not reach the applicability of the intra-agency exemption. *Id.*

Specifically, the court found that the Minor Offenders memoranda (documents 2 and 3) contain counsel's legal advice to the Board regarding the state of law and how the Board should conduct interviews in accordance with such law. The court also held that the handouts entitled "Favorable Court Decisions" and "Unfavorable Court Decision" (documents 8 and 11) reflect counsel's summary, view, and impression of recent case law as conveyed to the Board. Similarly, the court found that the presentation slides (documents 4, 6 and 10) and the Parole Interviews and Decision-Making handout (document 7) are privileged because they discuss various legal standards and regulations and, as noted by the Board's counsel, were provided to the Board to facilitate its understanding of the legal requirements imposed by them and how it can comply with them. *Id.* at 1246. With respect to the remaining documents—the Board of Parole Interviews handout (document 1), the

Sample Decision Language Concerning Departure from COMPAS (document 5), and Hypothetical Board Decisions (document 9)—the court found that these documents "also involve legal advice as to how to reach decisions on parole matters so as to be in compliance with applicable regulations." *Id.*

2. Justice Lynch's Concurrence and Dissent

Justice Lynch agreed with the majority's conclusion that four of the documents—the Minor Offenders memoranda (documents 2 and 3), the Sample Decision Language Concerning Departure from COMPAS (document 5), and the Hypothetical Board Decisions handout (document 9)—were exempt from disclosure under the attorney-client privilege. He dissented, however, with respect to the remaining seven documents, as he would have found that they should be released in their entirety or released with potential redactions for confidential or exempt material. *Id.* at 1246.

Specifically, with respect to the documents entitled "Board of Parole Interviews," "Favorable Court Decisions," and "Unfavorable Court Decisions" (documents 1, 8 and 11), Justice Lynch concluded that these documents should be released in their entirety as they contained no legal advice, confidential information or exempt material. *Id.* at 1248. Similarly, Justice Lynch would have found that the three presentation slides (documents 4, 6 and 10) and the handout entitled "Parole Interviews and Decision-Making" (document 7)—should be disclosed, "subject to potential redactions for any confidential communications, fact-specific discussions or statements conveying ideas or advice exchanged as part of the consultative or deliberative process of decision-making." *Id.* at 1248-1249.

3. Justice Pritzker's Concurrence and Dissent

Justice Pritzker dissented, but only to the extent he would have held that one of the 11 documents should have been disclosed under FOIL. He otherwise concurred in the result.

Justice Pritzker agreed "with much of the majority's opinion, except to the conclusions reached" as to three records. *Matter of Appellate Advocates*, 203 A.D.3d at 1249. As to the "Sample Decision Language Concerning Departure from COMPAS" handout (document 5) and the "Hypothetical Board Decisions" handout (document 9), Justice Pritzker agreed with the majority that they were exempt from disclosure, albeit as intra-agency materials rather than attorney-client privileged communications. *Id.* 1249-1251. And as to the "Board of Parole Interviews" handout (document 1), Justice Pritzker agreed with Justice Lynch that no exemption applied and this document should have been disclosed under FOIL.

ARGUMENT

This Court should affirm the Appellate Division's order. As the Third Department found, the 11 documents Board counsel provided to the Commissioners were protected by the attorney-client privilege—and thus exempt under FOIL—because they were confidential communications providing legal advice and services in the course of a professional relationship. *Spectrum Sys. Intl. Corp.*, 78 N.Y.2d at 378. Alternatively, the Court may affirm the order on the ground that the documents are exempt from disclosure because they are intra-agency materials consisting of predecisional, non-final recommendations prepared to assist members of the Board in discharging their statutory duties. *Xerox Corp. v. Webster*, 65 N.Y.2d 131, 132 (1985).

A. The Attorney-Client Privilege Exempts the Training Materials from Disclosure

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 protected under C.P.L.R. 4503(a). *See*

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).

As this Court has observed, "FOIL is generally liberally construed and its exemptions narrowly interpreted so that the public is granted maximum access to the records of government." *Washington Post Co. v. New York State Ins. Dep't*, 61 N.Y.2d 557, 564 (1984). At the same time, although FOIL exemptions are narrowly read, "they must of course be given their natural and obvious meaning where such interpretation is consistent with legislative intent and with the general purpose and manifest policy underlying FOIL." *Matter of Abdur-Rashid v. New York City Police Dept.*, 76 N.Y.S.3d 460, 464 (quoting *Matter of Hanig v. State of N.Y. Dept. of Motor Vehs.*, 79 N.Y.2d 106, 11 (1992)).

The attorney-client privilege serves the vital purpose of fostering the open dialogue between attorneys and clients "that is deemed essential to effective representation." *Spectrum Sys. Intl. Corp.*, 78 N.Y.2d at 377. As this Court has explained, the privilege protects communications between attorneys and clients that are made for the purpose of obtaining or rendering legal advice in the course of a professional relationship. *Id.* at 378-379; *see also Rossi*, 73 N.Y.2d at 592-593; *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 often 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 nonprivileged information is included in the otherwise privileged communication between lawyer and client. *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). As this Court has recognized, a lawyer must often refer to nonprivileged matter when transmitting legal advice and providing legal services. *Spectrum Sys. Intl. Corp.*, 78 N.Y.2d at 378.

To be sure, invocation of the attorney-client privilege, as with all privileges, may interfere with the truth-finding process and thus should be "cautiously observed to ensure that its application is consistent with its purpose." *Matter of Jacqueline F.*, 47 N.Y.2d 215, 218-219 (1979); *see also Ambac Assur. Corp. v. Countrywide Home Loans, Inc.*, 27 N.Y.3d 616, 624 (2016) (noting tension exists between the social utility of the attorney-client privilege and State's policy favoring liberal discovery).

Applying these standards, the training materials at issue here—which have been submitted to this Court *in camera*—are protected attorney-client communications and thus exempt from disclosure. As explained by Board Counsel Kiley, the 11 withheld documents are training materials consisting of handouts and presentation slides and legal memoranda covering specific legal issues. Counsel Kiley created them for the specific purpose of rendering "legal advice and counsel" to Board Commissioners regarding their conduct of parole release interviews involving both adult and minor offenders, and the statutory and regulatory factors that must be considered to render a lawful decision, including advice on decision-making in light of recent case law developments. In addition, the materials include recommendations on evaluating individual scores on the COMPAS risk assessment instrument and composing written decisions addressing such scores. (*See in camera materials*; R162-163.) And the Commissioners were notified in the course of their training that these materials were confidential communications provided under the attorney-client privilege.

While statutory, regulatory or decisional law is not per se confidential or privileged, counsel's selection of and references to these authorities are covered by the privilege because they constitute the "foundation of the legal advice" that counsel provided to the Board Commissioners. *Spectrum Sys. Intl. Corp.*, 78 N.Y.2d at 379. Counsel Kiley's selection of—and emphasis on—particular cases, statutes and regulations was integral to the legal advice that she provided during Board training sessions. (R162, ¶5.) Viewing these communications in their "full content and context"—that is, as part of a whole training experience rather merely as individual documents or handouts—it is evident that counsel's selection of these training materials in tandem with practical advice on conducting a parole interview and preparing a

release decision, reflected her professional judgment as to the applicable law and thus fall within the attorney-client privilege. *Id.*

For several reasons, this Court should reject petitioner's argument (Letter Br. at 7-9) that the training materials are not privileged because the privilege only applies in "a real-world factual situation" or "a particularized factual context," and these documents "provide only general legal principles with no application to real facts" or a specific legal issue. (Letter Br. at 7-10.)

First, petitioner's reliance (Letter Br. at 7) on *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980), for the proposition that the attorney-client privilege only applies when a client has previously communicated confidential information to an attorney, is misplaced. In New York, the privilege is broader than the D.C. Circuit's formulation in *Coastal States*. 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 of facilitating open dialogue. *Spectrum Sys. Intl. Corp.*, 78 N.Y.2d at 377; *see also ACLU v. NSA*, 925 F.3d 576, 598 (2d Cir. 2019). While many of the cases in this area concern communications by clients to their attorneys, the privilege applies equally 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.

Second, the Court should reject petitioner's claim (Letter Br. at 7-8) that the withheld materials are not protected because they are unconnected to a specific legal issue or "particularized factual context." In making this assertion, petitioner misconstrues the Third Department's holding in *Matter of Charles v. Abrams*, 199 A.D.2d 652 (3d Dep't 1993). In *Matter of Charles*, the petitioner sought policy documents from the Attorney General's Office that provided staff attorneys with

final agency policy regarding the provision of legal representation to public employees under Public Officers Law § 17. The Third Department rejected the Attorney General's claim that the policy documents were protected by the attorney-client privilege because the documents did not relate to any "existing attorney-client relationship." *Id.* at 653. The AG's policy related to litigation generally and did not facilitate the rendition of legal services to any particular, current client or concern a particular lawsuit. The core holding of *Matter of Charles*—that "[i]n the absence of an attorney-client relationship, the privilege does not arise," *id.* at 653—has no applicability here because there is no dispute that counsel's advice was rendered during the course of an existing an attorney-client relationship with the Board. Contrary to petitioner's characterization, the court did not hold that the privilege only arises in the context of pending or imminent litigation—which ignores the myriad other situations in which lawyers provide legal advice. And indeed, petitioner provides no legal support for his assertion that application of the privilege is limited to advice concerning an imminent or pending legal matter.

Third, contrary to petitioner's suggestion (Letter Br. at 8-9), training materials are not categorically outside the protection of the attorney-client privilege. *See Currency Conversion Antitrust Litig. v. Bank of Am., N.A.*, 2010 U.S. Dist. LEXIS 117008, *23-24 (S.D.N.Y. 2012) (finding training documents covered by attorney-client privilege). While the assertion of the privilege must be carefully scrutinized, training materials prepared by agency counsel that are primarily or predominantly of a legal character, and which are confidentially conveyed to agency employees in a position to act on that advice, are protected by the attorney-client privilege. *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); *see also McKnight v. Honeywell Safety Prods. USA*, 2019 U.S. Dist. LEXIS 18076, *5 (D.R.I. 2019).

Here, a review of these documents shows that Counsel Kiley's communications were tailored to provide specific legal advice to assist the Board in carrying out its ongoing statutory duty to make discretionary

parole release decisions. As the Third Department held, these documents are privileged because they contain "counsel legal advice to the Board regarding the state of law and how the Board should conduct interviews in accord with such law" (documents 2 and 3); reflect counsel's summary, view and impression of recent case law to the Board (documents 8 and 11); discuss legal standards and regulations to facilitate the Board's understanding of the legal requirements imposed by them and how it may comply with them (documents 4, 6, 10 and 11); and, similarly, provide "legal advice as to how to reach decisions on parole matters so as to be in compliance with applicable regulations" (documents 1, 5, 7 and 9). *Appellate Advocates*, 163 A.D.3d at 1246-1247. Thus, the documents plainly reflect Counsel Kiley's professional judgment about how the Board may comply with the governing 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 the context of this particular responsibility of the Board. Notably, review of the materials also shows that counsel's advice was, in part, provided to address specific legal issues arising in the context of parole release interviews that 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 petitioner's assertion (Letter Br. at 11), public policy does not dictate disclosure of the privileged documents. Although

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[4] Respondent notes that 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 that 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, set forth at pages 47 to 56 of a court transcript that is attached to respondent's brief to the Appellate Division.

petitioner does not address the value of the attorney-client privilege in protecting the communications of government lawyers with their clients, the purpose of the privilege is no less relevant to the work of government agencies. 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 1032, 1036-37 (2d Cir. 1984). Conversely, the public interest in effective government would be ill served by artificially narrowing application of the attorney-client privilege as applied to government attorneys. As the Second Circuit aptly stated, "the traditional rationale for the privilege applies with special force in the government context" as it "furthers a culture in which consultation with government lawyers is accepted as a normal, desirable, and even indispensable part of conducting public business. Abrogating the privilege undermines that culture and thereby impairs the public interest." *United States v. Doe (In re Grand Jury Investigation)*, 399 F.3d 527, 534 (2d Cir. 2005).

B. Alternatively, the Court May Affirm on the Ground that the Documents Are Exempt as Intra-Agency Materials.

Although the Third Department did not address whether the training materials at issue were exempt from FOIL disclosure as intra-agency materials, this Court may affirm that court's order on this alternative ground. Public Officers Law § 87(2)(g) 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 internal records such as "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, this Court has construed the term to mean "deliberative material," *i.e.*, communications exchanged for discussion purposes not constituting final policy decisions. *Matter of Xerox Corp.,* 65 N.Y.2d at 132. 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) (citing *Matter of Xerox Corp*, 65 N.Y.2d at 132-33). The purpose of the 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 New York Times Co. v. City of N.Y. Fire Dep't*, 4 N.Y.3d 477, 488 (2005); *see also 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 training materials were properly withheld as intra-agency materials because they represent counsel's advice and ideas about how Commissioners making parole release decisions should conduct the interviews, consider the required factors that must govern their deliberations, and then 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 them in interviewing candidates for parole and 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.

This Court should reject petitioner's claim (Letter Br. at 12-13) that the training materials are not intra-agency materials because they constitute "final agency policy." *See* POL § 87(2)(g)(iii). As this Court can discern from its own *in camera* review, the materials do not establish any agency policy that Commissioners must follow when making their individual or collective decisions to grant or deny parole; rather, the guidance provided by counsel leaves intact the considerable discretion that is vested in the Commissioners. Contrary to petitioner's assertion (Letter Br. at 12-13), there is no legal support for its claim that intra-agency materials must be the subject of repeated exchanges—in petitioner's words, a "reciprocal feedback cycle" (at 12)—to qualify as nonfinal agency policy or predecisional material under Public Officers Law § 87(2)(g). Although predecisional materials may involve various degrees of back-and-forth among agency employees, *see Matter of Stein*, 25 A.D.3d at 847-848, there is no legal requirement for extended discussions over them. Rather, it is enough that the recommendations be conveyed once. In addition, the training materials are not transformed into "final agency policy" merely because some documents contain samples of language or phrasing that Commissioners may use in formulating final decisions. Counsel's advice regarding the conduct of interviews and drafting of decisions that comport with the Board's statutory obligations are just that—advice and suggestions. These documents do not establish any "final agency policy" to which the Commissioners *must* adhere during the parole interview or decision-making process.

Similarly, there is no merit to petitioners' claim (Letter Br. at 13-14) that the materials are "instructions to staff that affect the public." *See* POL § 87(2)(g)(ii). 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. And contrary to petitioner's argument (Letter Br. at 13, n. 9), the training materials cannot be classified as "instructions to staff that affect the public" because they are pre-deliberative and do not represent a final instruction, decision, or policy directly affecting the public. *See, e.g.,*

Matter of Tuck-It-Away Assoc., L.P. v. Empire State Dev. Corp., 54 A.D.3d 154, 166 (1st Dep't 2008). The Commissioners were certainly not required "to do as they were instructed" in these training materials, which do not command a single course of action. Rather, they contain advice, recommendations, and suggestions for how the Commissioners should exercise their discretionary authority in conformance with the law.

* * *

Accordingly, this Court should affirm the Third Department's conclusion that the training materials were exempt from disclosure under the attorney client privilege. Alternatively, the Court may affirm the Third Department's order on the ground that the training materials are exempt intra-agency materials.

Finally, in the event petitioner were to "substantially prevail" on this appeal, the Court should decline to assess attorney's fees because respondent agency had a reasonable basis for relying on the exemptions asserted, *see* POL § 89(4)(c), as is evident from the holdings of the courts below.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a) of the Federal Rules of Appellate Procedure, Frank Brady, an employee in the Office of the Attorney General of the State of New York, hereby certifies that according to the word count feature of the word processing program used to prepare this brief, the brief contains 5,350 words and complies with the typeface requirements and length limits of Rule 32(a)(5)-(7).

/s/ Frank Brady