APL-2024-00143
New York County Clerk's Index No. 154792/2022
Appellate Division, First Department Case No. 2022-05629

Court of Appeals

State of New York

NEW YORK CIVIL LIBERTIES UNION,

Petitioner-Appellant,

– against –

NEW YORK STATE OFFICE OF COURT ADMINISTRATION,

Respondent-Respondent

AMICI CURIAE BRIEF OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND OTHER MEDIA ORGANIZATIONS IN SUPPORT OF PETITIONER-APPELLANT NEW YORK CIVIL LIBERTIES UNION

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CORPORATE DISCLOSURE STATEMENTS

American Broadcasting Companies, Inc. is an indirect, wholly-owned subsidiary of The Walt Disney Company, a publicly traded corporation.

BuzzFeed Inc. is a privately owned company, and National Broadcasting Company (NBC) owns 10% or more of its stock.

The E.W. Scripps Company is a publicly traded company with no parent company. No individual stockholder owns more than 10% of its stock.

The National Press Club is a not-for-profit corporation that has no parent company and issues no stock.

The National Press Club Journalism Institute is a not-for-profit corporation that has no parent company and issues no stock.

The New York News Publishers Association has no parent company and issues no stock.

New York Public Radio is a privately supported, not-for-profit organization that has no parent company and issues no stock.

The New York Times Company is a publicly traded company and has no affiliates or subsidiaries that are publicly owned. No publicly held company owns 10% or more of its stock.

Newsday LLC is a Delaware limited liability company whose members are Tillandsia Media Holdings LLC and Newsday Holdings LLC. Newsday Holdings LLC is an indirect subsidiary of Cablevision Systems Corporation. Cablevision Systems Corporation is (a) directly owned by Altice USA, Inc., a Delaware corporation which is publicly traded on the New York Stock Exchange and (b) indirectly owned by Altice N.V., a Netherlands public company.

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Pro Publica, Inc. ("ProPublica") is a Delaware nonprofit corporation that is tax-exempt under section 501(c)(3) of the Internal Revenue Code. It has no statutory members and no stock.

The Tully Center for Free Speech is a subsidiary of Syracuse University.

Vox Media, LLC has no parent corporation. NBCUniversal Media, LLC, a publicly held corporation, owns at least 10% of Vox's stock.

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STATEMENT OF INTEREST OF AMICI CURIAE

Lead amicus the **Reporters Committee for Freedom of the Press** is an unincorporated nonprofit association founded by leading journalists and media lawyers in 1970 when the nation's news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide pro bono legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists.

Fellow amici, as representatives and members of the news media, frequently rely on New York's Freedom of Information Law ("FOIL") and other freedom of information laws to gather information about government and report on matters of vital public concern. Amici thus have a strong interest in ensuring that such laws are interpreted by courts in a manner that facilitates public access to government records and assures government accountability. These amici are:

American Broadcasting Companies, Inc. is a broad-based communications company. Alone or through its subsidiaries, it owns ABC News, abcnews.com, and local broadcast television stations that regularly gather and report news to the public. ABC News produces the television programs *World*

News with David Muir, *Good Morning America*, *Nightline*, *20/20*, and *This Week*, among others.

BuzzFeed, Inc. is a social news and entertainment company that provides shareable breaking news, original reporting, entertainment, and video across the social web to its global audience of more than 200 million and owns news website **HuffPost.com**.

The E.W. Scripps Company is the nation's fourth-largest local TV broadcaster, operating a portfolio of 61 stations in 41 markets, including ABC affiliate WKBW-TV in Buffalo, New York. Scripps also owns Scripps Networks, which reaches nearly every American through the national news outlets Court TV and Newsy and popular entertainment brands ION, Bounce, Grit, Laff and Court TV Mystery. The company also runs an award-winning investigative reporting newsroom in Washington, D.C., and is the longtime steward of the Scripps National Spelling Bee.

The National Press Club is the world's leading professional organization for journalists. Founded in 1908, the Club has 3,100 members representing most major news organizations. The Club defends a free press worldwide. Each year, the Club holds over 2,000 events, including news conferences, luncheons and panels, and more than 250,000 guests come through its doors.

The National Press Club Journalism Institute is the non-profit affiliate of the National Press Club, founded to advance journalistic excellence for a transparent society. A free and independent press is the cornerstone of public life, empowering engaged citizens to shape democracy. The Institute promotes and defends press freedom worldwide, while training journalists in best practices, professional standards and ethical conduct to foster credibility and integrity.

The New York News Publishers Association is a trade association which represents daily, weekly and online newspapers throughout New York State. It was formed in 1927 to advance the freedom of the press and to represent the interests of the newspaper industry.

With an urban vibrancy and a global perspective, **New York Public Radio** produces innovative public radio programs, podcasts, and live events that touch a passionate community of 23.4 million people monthly on air, online and in person. From its state-of-the-art studios in New York City, NYPR is reshaping radio for a new generation of listeners with groundbreaking, award-winning programs including Radiolab, On the Media, The Takeaway, and Carnegie Hall Live, among many others. New York Public Radio includes WNYC, WQXR, WNYC Studios, Gothamist, The Jerome L. Greene Performance Space, and New

Jersey Public Radio. Further information about programs, podcasts, and stations may be found at www.nypublicradio.org.

The New York Times Company is the publisher of *The New York Times* and *The International Times*, and operates the news website nytimes.com.

Newsday LLC ("Newsday") is the publisher of the daily newspaper, Newsday, and related news websites. Newsday is one of the nation's largest daily newspapers, serving Long Island through its portfolio of print and digital products. Newsday has received 19 Pulitzer Prizes and other esteemed awards for outstanding journalism.

Penguin Random House LLC publishes adult and children's fiction and nonfiction in print and digital trade book form in the U.S. The Penguin Random House global family of companies employ more than 10,000 people across almost 250 editorially and creatively independent imprints and publishing houses that collectively publish more than 15,000 new titles annually. Its publishing lists include more than 60 Nobel Prize laureates and hundreds of the world's most widely read authors, among whom are many investigative journalists covering domestic politics, the justice system, business and international affairs.

Pro Publica, Inc. ("ProPublica") is an independent, nonprofit newsroom that produces investigative journalism in the public interest. It has won six Pulitzer Prizes, most recently a 2020 prize for national reporting, the 2019

prize for feature writing, and the 2017 gold medal for public service. ProPublica is supported almost entirely by philanthropy and offers its articles for republication, both through its website, propublica.org, and directly to leading news organizations selected for maximum impact. ProPublica has extensive regional and local operations, including ProPublica Illinois, which began publishing in late 2017 and was honored (along with the Chicago Tribune) as a finalist for the 2018 Pulitzer Prize for Local Reporting, an initiative with the Texas Tribune, which launched in March 2020, and a series of Local Reporting Network partnerships.

The Tully Center for Free Speech began in Fall, 2006, at Syracuse University's S.I. Newhouse School of Public Communications, one of the nation's premier schools of mass communications.

Vox Media, LLC owns New York Magazine and several web sites, including Vox, The Verge, The Cut, Vulture, SB Nation, and Eater, with 170 million unique monthly visitors.[1]

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[1] No counsel for a party authored this brief in whole or part, and no person or entity, other than amici and their counsel, contributed money toward preparing and submitting this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The New York Civil Liberties Union ("Petitioner-Appellant" or "NYCLU") asks this Court to reverse a decision of the First Department that denied NYCLU's petition for the disclosure of public records from the New York Office of Court Administration ("Respondent" or "OCA") requested under New York's Freedom of Information Law, N.Y. Pub. Off. Law §§ 84–90 ("FOIL"). Specifically, NYCLU requested certain OCA memoranda sent to the judiciary for the purpose of assisting judges in interpreting and applying certain judicial precedent. This included memoranda summarizing and interpreting the First Department's decision in *Matter of Crawford v. Ally*, 197 A.D.3d 27 [1st Dept. 2021] (the "*Crawford* Memorandum"). Petitioner-Appellant's Br. at 6.[2]

If allowed to stand, the First Department's decision would allow OCA to advise judges on how to interpret law and apply judicial precedent in secrecy. By permitting OCA to claim a privilege in these memoranda, and to withhold public

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[2] In *Matter of Crawford v. Ally*, the First Department held that due process considerations require that individuals charged with crimes are afforded an evidentiary hearing before being subjected to a pre-trial temporary order of protection ("TOP"). 197 A.D.3d at 33–34. Following this decision, the OCA issued the *Crawford* Memorandum, which advised judges that the First Department's decision should not be interpreted as to require these evidentiary hearings to allow for live witnesses and/or non-hearsay testimony and that judges should resist permitting testimonial hearings. Petitioner-Appellant's Br. at 5–6 (citing R. 60, 63).

records on the bases of that asserted privilege and purported burden in fulfilling NYCLU's request, the First Department makes FOIL more difficult to use and puts important records out of reach to the press and public. Here, the decision hinders New Yorkers' ability to understand the judicial decision-making process, which includes interpretative guidance that OCA provides to the judiciary. That guidance may be right or wrong, well-reasoned or lacking adequate context, but without the ability to see it, the public cannot know. Such a decision thereby limits the public's understanding of how government functions and the judiciary's ability to benefit from the give-and-take of debate that follows from transparency.

Amici therefore write to emphasize the public interest in access to the records at issue here. The requirement under FOIL that records are presumptively available to the public should be interpreted broadly when, as here, the withheld records implicate government activity of public concern. In addition, amici urge the Court to affirm the statutory standard for a "reasonably described" request, FOIL § 89(3)(a), and reject OCA's denial of a FOIL request based on its erroneous conflation of the reasonable description requirement with what OCA contends is the purported burden of fulfilling the FOIL request. Amici urge the Court to reverse the order of the First Department.

ARGUMENT

I. FOIL provides for information about governmental decision-making to be disclosed to the public, which is vital to news reporting, and the Court should examine claimed exceptions and privileges with caution.

FOIL is rooted in the understanding that "the public is vested with an inherent right to know and that official secrecy is anathematic to our form of government." *Newsday, Inc. v. State Dep't of Transp.*, 5 N.Y.3d 84, 88 [2005] (citations and quotations omitted). In enacting FOIL, the Legislature expressly "declare[d] that government is the public's business and that the public, individually and collectively and represented by a free press, should have access to the records of government in accordance with the provisions of this article." FOIL § 84. "The people's right to know the process of governmental decision-making and to review the documents and statistics leading to determinations is basic to our society." *Id.* The statute requires a government agency in receipt of a valid request for public records to produce those records unless a specific statutory exemption applies. *See* FOIL § 87(2). Under the law, "[a]ll records are presumptively available for public inspection and copying, unless the agency satisfies its burden of demonstrating that 'the material requested falls squarely within the ambit of one of [the] statutory exemptions.'" *Abdur-Rashid v. N.Y.C. Police Dep't*, 31 N.Y.3d 217, 225 [2018] (quoting *Fink v. Lefkowitz*, 47 N.Y.2d 567, 571 [1979]). "Consistent with the [FOIL's] legislative declaration," which

"imposes a broad duty on government agencies to make their records available to the public," the statute "is liberally construed." *Id.* at 224–25 (citing *Matter of Data Tree, LLC v. Romaine*, 9 N.Y.3d 454, 462 [2007]). And "its statutory exemptions" are to be "narrowly interpreted." *Id.* at 225.

Amici write to emphasize the practical importance of the foregoing holdings to the press' ability to do its work. Amici also submit this brief to draw the Court's attention to the public interest value, to the press and the public it serves, in the *Crawford* Memorandum, and other records like it, that are the subject of this appeal. Because the public has an interest in understanding the functioning of New York's legal system, it has a legitimate interest in knowing that a state agency interprets and summarizes precedent for use by the judiciary and what those interpretations say. There is nothing inherently wrong with OCA providing its interpretative guidance, but to do so while claiming protection for these views under a theory of privilege (now attorney-client privilege), should be viewed with deep skepticism because of its obvious impact on transparency. When the *Crawford* Memorandum came to light via media coverage, for example, it sparked an important public debate about whether OCA was urging an unduly cramped reading of the First Department's decision—a reading that OCA sought to keep secret. New Yorkers need and deserve access to public records like those at issue here.

And there is no question the press and public seek to remain informed. When the First Department issued its unanimous decision regarding TOP in the *Crawford* case, it was covered extensively by the news media. *See, e.g.*, Andy Newman, *Barred From Her Own Home: How a Tool for Fighting Domestic Abuse Fails*, N.Y. Times (June 17, 2021), https://perma.cc/D6BR-F66H; Andy Newman, *A Judge's Order Left Her Homeless. A New Ruling Will Help Others Like Her.*, N.Y. Times (June 25, 2021), https://perma.cc/3CHY-4VNY ("Within hours after the decision was issued, lawyers who represent others in similar situations had already begun requesting what Ms. Crawford's lawyers are calling a 'Crawford hearing.'"); Sam Mellins, *New York Judges Lock the Accused Out of Their Homes, Skirting Review Required by Landmark Ruling, Critics Charge*, N.Y. Focus (July 23, 2021), https://perma.cc/2MDJ-B3ZF (describing the *Crawford* decision as a "landmark ruling" and potential "game changer"); Barry Kamins, *The New 'Crawford' Hearing: What Will It Look Like?*, N.Y. L. J. (Aug. 2, 2021), https://perma.cc/8593-WVD2. The decision generated public discussion about, for example, whether other jurisdictions should adopt similar standards and whether the *Crawford* decision should be codified by statute. *See, e.g.*, Leigh Goodmark, *Commentary: Orders of Protection Need Reform*, Times Union (Sept. 18, 2021), https://perma.cc/L7WS-43JZ; Isabelle Leipziger, *Note: The Collateral Effects of Criminal Orders of Protection on Parent Defendants in Cases of Intimate Partner*

Violence, 91 Fordham L. Rev. 273 (2022); N.Y. City Council Member Tiffany Cabán, *Press Release: Council Member Tiffany Cabán Introduces Bill to Track Property Seized by NYPD and Das, Resolution in Support of PromPT Stability Act*, N.Y.C. Council (Sept. 14, 2022), https://perma.cc/3L6V-XESG; *Fact Sheet: Spotlight on the Promoting Pre-Trial Stability Act*, Brooklyn Defenders Services (Sept. 18, 2024), https://perma.cc/M2TG-GWKQ.

Unsurprisingly then, when OCA's *Crawford* Memorandum became public approximately one month later, it was highly newsworthy. In it, OCA arguably interpreted the First Department's decision narrowly. *See* Mellins, *supra*; *compare* R. 36–39. ("*Crawford* . . . **should <u>not</u> be read** as to require live witnesses and/or non-hearsay testimony as a matter of law.") *with Matter of Crawford*, 197 A.D.3d at 34 ("when the defendant presents the court with information showing that there may be an immediate and significant deprivation of a substantial personal or property interest upon issuance of the TOP, the Criminal Court should conduct a prompt evidentiary hearing . . . in a manner that enables the judge to ascertain the facts necessary to decide whether or not the TOP should be issued."). Press coverage of the *Crawford* Memorandum sparked debate not only about OCA's analysis but also its role in privately interpreting judicial decisions for the judiciary. For instance, critics called the Memorandum "cynical" and "ahistorical," Mellins, *supra*, while OCA downplayed its importance. Molly

Crane-Newman, *NYCLU Claims 'Secret Memos' from Court Administrators Advise Judges on Tough Decisions*, N.Y. Daily News (Oct. 1, 2021), https://perma.cc/5USL-GAFA. The *Crawford* Memorandum and its authoritative weight featured in one of the first "*Crawford* hearings," R. 104, and professional legal organizations sent a letter critical of its analysis to OCA. R. 94–97. It has also generated discussion about transparency in New York's court system more generally. *See* N.Y. Daily News Editorial Bd., *The New York State Court System Should Make Guidance Memos and Policy Board Meetings Public*, N.Y. Daily News (Sept. 9, 2023), https://perma.cc/W55Q-Z9CX; *see also* Evelyn Malavé, *Opinion: New York's Complex Court Bureaucracy Shields Judges from Accountability*, City & State New York (May 5, 2024), https://perma.cc/U7QQ-SLH8 ("Only through meaningfully throwing open the courthouse doors, by shining light not only on individual judicial actions but also on the actions that put judges in their seats and influence their decision-making, can we begin to ensure that judges are truly accountable to the people they serve."); Oded Oren, *Lack of Transparency in New York Courts Undermines Democracy*, State Ct. Rep. (Nov. 28, 2023), https://perma.cc/LJF4-T4Q7 (describing how New York's court administration's fight to keep legal memos secret demonstrates that "some judges and court systems, unaccustomed to scrutiny, react defensively and dismissively when confronted with greater transparency."); Brian Lee, *Lawsuit Demands New*

York Courts to Make Public 'Secret' Directives to Judges, N.Y. L. J. (June 2, 2022), https://perma.cc/27FP-URT9 (detailing generally the need for public access to judicial administrative directives). The multi-layered and rich policy debate was possible only because journalists obtained and published the *Crawford* Memorandum.

The powerful public interest in access to the records at issue in this appeal is relevant to the Court's consideration of OCA's categorical invocation of the attorney-client and attorney work product privileges, which the First Department referred to as an "alternative holding." *See* Respondent's Br. at 39; *Matter of N.Y. C.L. Union v. N.Y. State Off. of Ct. Admin.*, 224 A.D.3d 458, 459 [1st Dept. 2024]. For the reasons set forth by Petitioner, the application of the privilege here is unsupported. Petitioner-Appellant's Br. at 12-22. But even assuming, *arguendo*, that the privilege could otherwise apply here, "where the technical requirements of the privilege are satisfied, it may, nonetheless, yield in a proper case, where strong public policy requires disclosure." *Priest v. Hennessy*, 51 N.Y.2d 62, 69, 409 N.E.2d 983, 986 [1980] (gathering cases) (emphasis added). This is such a case.

While the *Crawford* Memorandum is only one of the OCA memoranda at issue, the intense public interest in the *Crawford* Memorandum exemplifies the public's strong interest in memoranda in which OCA interprets significant precedent for the benefit of the judiciary—memoranda that play an important role

in determining how lower courts implement binding opinions from appellate divisions. As part of the larger debate about OCA's role and the need for greater transparency, one law professor asked: "Is what's in these [OCA] memos something that the public would be upset to learn about?" Sam Mellins, *The Secret Memos New York Courts Refuse to Give Up*, N.Y. Focus (Sept. 5, 2023), https://perma.cc/H75C-84KH. That question can be answered only if the public has access to them.

II. FOIL reflects an informed policy choice by the Legislature, and agencies are not free to disregard the law's "reasonably described" standard.

Whether an agency is permitted to evade the applicable standard under FOIL, conflating other considerations with the threshold question of whether a valid request was submitted, is a question whose import extends beyond the facts of this case. It is a question that has a direct impact on the public and the press, which relies on information obtained through public records to report the news and thus depends on agencies properly interpreting and applying the law's standard. FOIL requires an agency to timely respond to a written "request for a record reasonably described." FOIL § 89(3)(a). A description is reasonable when it enables the agency to "locate and identify [the] records in question." *Matter of Jewish Press Inc., v. N.Y. State Educ. Dep't*, 212 A.D.3d 916, 917 [3d Dept. 2023].

Amended in 2008, FOIL now expressly states that a request "shall not" be denied as "voluminous" or "burdensome" absent a showing by the agency that it is unable to fulfill the request. FOIL § 89(3)(a); *Matter of Time Warner Cable News NY1 v. N.Y.C. Police Dept.*, No. 150305/2016, 2017 WL 1354833, at *1 [N.Y. Sup. Ct. Apr. 07, 2017] ("It is well settled that a request pursuant to FOIL cannot be rejected merely because of its 'breadth or burdensomeness.'" (collecting cases)). The Legislature directed that if a request could be satisfied by engaging an outside service, an agency cannot deny it on the grounds it was too burdensome for agency staff to complete. FOIL § 89(3)(a).

Following this amendment, courts have rightly regarded claims of burden with heavy skepticism. *See Matter of Puig v. N.Y. State Police*, 212 A.D.3d 1025, 1027 [3d Dept. 2023] ("[A]n agency may not evade the broad disclosure provisions of FOIL by merely asserting that compliance could potentially require the review of a large volume of records." (internal quotation marks, brackets, and citation omitted))); *NYP Holdings, Inc. v N.Y.C. Police Dep't.*, 220 A.D.3d 487, 489 [1st Dept 2023] (holding that while certain requests for records were "voluminous," disclosure was still required pursuant to FOIL); *Surveillance Tech. Oversight Project, Inc. v. N.Y.C. Police Dep't.*, No. 158227/2020, 2024 WL 4202668, at *2 [NY. Sup. Ct. Sept. 16, 2024] (observing that "courts have generally not embraced burdensome claims" since FOIA was amended). Additionally, "before denying a

FOIL request for reasons of overbreadth," an agency must "establish that the descriptions were insufficient for purposes of locating and identifying the documents sought." *Konigsberg v. Coughlin*, 68 N.Y.2d 245, 249 [1986] (citations and quotation marks omitted). As with other justifications for denying a FOIL request, "the burden of proof rests solely with the [agency]." *Matter of Data Tree, LLC*, 9 N.Y.3d at 463; *accord Matter of Puig*, 212 A.D.3d at 1026 (stating that agency denying request on the basis that it is not reasonably described "bears the burden to establish that the descriptions were insufficient for [the] purposes of locating and identifying the documents sought." (citation and internal quotation marks omitted)).

Importantly, an agency may not "conflate[] the requirement of reasonable description with the related, but separate, consideration as to whether it would be unduly burdensome for the respondent to comply with the petitioner's request." *Matter of Jewish Press, Inc. v. N.Y.C. Dep't of Educ.*, 183 A.D.3d 731, 733 [2d Dept. 2020]; *see also Matter of Asian Am. Legal Def. & Educ. Fund v. N.Y.C. Police Dep't*, 125 A.D.3d 531 [1st Dept. 2015] (citing *Konigsberg*, 68 N.Y.2d at 249) (considering reasonable description and overbreadth separately); *Matter of Aron L., PLLC v. N.Y.C. Dep't of Educ.*, 192 A.D.3d 552 [2d Dept. 2021], *leave to appeal denied*, 37 N.Y.3d 907 [1st Dept. 2021] (citing *Matter of Asian Am. Legal Def. & Educ. Fund*, 125 A.D.3d at 531) (same); *see also Matter of Lost Lake*

Holdings LLC v. Hogue, 231 A.D.3d 1406, 1410 [3d Dept. 2024] ("Although petitioner's request in this case is broad in scope, we find that the record lacks support for the conclusion that the request was not reasonably described.").

Yet, OCA has done exactly that. In attempting to meet its burden to demonstrate that NYCLU's request was not reasonably described, OCA claims too heavy a burden imposed on it from fulfilling the request because of the purported volume of potentially responsive records. *See, e.g.*, Respondent's Br. at 19 (asserting the First Department applied the correct standard when determining that NYCLU's request "was plainly overbroad and did not reasonably describe the records sought because it failed to identify particular records and contained vague terms and descriptors that made it impossible for OCA to conduct a *targeted search*" (emphasis added)); *id.* at 23 (arguing that NYCLU's request "potentially implicates tens of thousands of records generated by OCA over the course of more than a decade."). The trial court correctly concluded that OCA's "ability to conduct an efficient search of responsive documents" was "not a dispositive consideration" with respect to whether NYCLU's request was reasonably described. R. 5–6. OCA was required to "establish that the descriptions were insufficient for purposes of locating and identifying the documents sought." *Konigsberg*, 68 N.Y.2d at 249 (citation and internal quotation marks omitted). It did not do so. Accordingly, amici urge the Court, in reversing the order of the First

Department, to clarify once again that agencies cannot conflate the distinct questions of whether a FOIL request is reasonably described and whether it is voluminous or burdensome.

CONCLUSION

For the foregoing reasons, amici urge this Court to reverse the decision of the First Department.

Dated: May 16, 2025
New York, NY

Respectfully submitted,

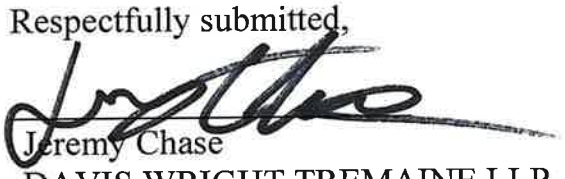

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EXHIBIT B

Supreme Court of the State of New York
Appellate Division, First Judicial Department

Oing, J.P., González, Shulman, Pitt-Burke, Higgitt, JJ.

1626 In the Matter of NEW YORK CIVIL LIBERTIES UNION,
Petitioner-Respondent,

-against-

NEW YORK STATE OFFICE OF COURT ADMINISTRATION et al.,
Respondents-Appellants.

Index No. 154792/22
Case No. 2022-05629

David Nocenti, Office of Court Administration, New York (Robyn L. Rothman of counsel), for appellants.

New York Civil Liberties Union Foundation, New York (Terry Tianyun Ding of counsel), for respondent.

Order and judgment (one paper), Supreme Court, New York County (Lyle E. Frank, J.), entered October 20, 2022, which, to the extent appealed from, granted the petition to compel respondent New York State Office of Court Administration to disclose records requested by petitioner pursuant to the Freedom of Information Law (FOIL) (Public Officers Law §§ 84-90), to the extent of directing respondent to disclose to petitioner, within 180 days of service of the order with notice of entry, all documents directed to judges or their chambers staff, from January 1, 2011 to the present, in which federal or state court decisions, statutes, regulations, or ordinances are summarized, analyzed, interpreted, construed, explained, clarified, or applied, unanimously reversed, on the law, without costs, the petition denied, and the proceeding brought pursuant to CPLR article 78 dismissed.

Petitioner's concern that respondent is privately instructing judges how to interpret and apply substantive law is unfounded, as the court is not bound by respondent's interpretations. It has always been the province of the court to declare what the law is (*see People v Knickerbocker Ice Co.*, 99 NY 181, 184 [1885].

Respondent properly denied the FOIL request, insofar as raised on appeal, on the ground of overbreadth. Respondent established that the request — seeking records respondent created during a period of more than 10 years that summarized, interpreted, explained, analyzed, or applied any state or federal court decisions, statutes, or regulations — sought information "not stored in any centralized manner, and responding to the FOIL request would involve manually reviewing employees' ... files and making individual determinations as to" each file (*Matter of Oustatcher v Clark*, 217 AD3d 478, 479 [1st Dept 2023], *lv denied* 40 NY3d 908 [2023] [internal quotation marks omitted]). Under the circumstances presented, respondent made a particularized showing that attempting to comply with this broad request would be impracticable (*see Matter of Aron Law, PLLC v New York City Dept. of Educ.*, 192 AD3d 552, 552 [1st Dept 2021], *lv denied* 37 NY3d 907 [2021]). It does not avail petitioner to argue "that their [FOIL] request should have been interpreted in a much more limited form," where "nothing in the language of the original request or the administrative appeal supports such an interpretation" (*Matter of Reclaim the Records v New York State Dept. of Health*, 185 AD3d 1268, 1272 [3d Dept 2020], *lv denied* 36 NY3d 910 [2021]).

As an alternative holding, we find that respondent properly determined that the records at issue were exempt under the attorney-client privilege (*see Matter of Appellate Advocates v New York State Dept. of Corr. & Community Supervision*, ___

NY3d ___, 2023 NY Slip Op 06466 [2023]; CPLR 4503[a][1]) and the attorney work product privilege (CPLR 3101[c]; Public Officers Law § 87[2][a]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: February 8, 2024

Susanna Molina Rojas
Clerk of the Court

EXHIBIT C

Court of Appeals

State of New York

NEW YORK CIVIL LIBERTIES UNION,

Petitioner-Appellant,

-against-

NEW YORK STATE OFFICE OF COURT ADMINISTRATION,

Respondent-Respondent.

NOTICE OF MOTION AND MOTION FOR PERMISSION TO APPEAL TO THE COURT OF APPEALS

Dated: April 2, 2024
New York, N.Y.

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Appellate Division First Department Docket No. 2022-05629
New York County Supreme Court Index No. 154792/2022

COURT OF APPEALS
STATE OF NEW YORK

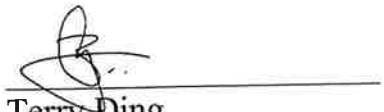
NEW YORK CIVIL LIBERTIES UNION, *Petitioner-Appellant,* v. NEW YORK STATE OFFICE OF COURT ADMINISTRATION, *Respondent-Respondent.*	New York County Supreme Court Index No. 154792/2022 Appellate Division First Department Case No. 2022-05629

NOTICE OF MOTION FOR LEAVE TO APPEAL

PLEASE TAKE NOTICE that the petitioner-appellant New York Civil Liberties Union will move this Court, pursuant to CPLR 5602 [a] and Rule 500.22 of this Court's Rules of Practice, upon the accompanying Memorandum of Law in Support of Motion for Leave to Appeal with attached exhibits, at 20 Eagle Street, Albany, New York 12207, on April 29, 2024, or as soon thereafter as it can be heard, for an order granting leave to appeal to this Court from an order and judgment of the Appellate Division, First Department, dated February 8, 2024.

Dated: April 2, 2024
New York, N.Y.

NEW YORK CIVIL LIBERTIES UNION FOUNDATION



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COURT OF APPEALS
STATE OF NEW YORK

NEW YORK CIVIL LIBERTIES UNION,

Petitioner-Appellant,

v.

NEW YORK STATE OFFICE OF COURT ADMINISTRATION,

Respondent-Respondent.

New York County
Supreme Court
Index No. 154792/2022

Appellate Division First
Department Case No.
2022-05629

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR LEAVE TO APPEAL

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PRELIMINARY STATEMENT

This proposed appeal presents an issue of great importance directly implicating the legitimacy of the judicial system over which this Court has supervisory responsibility: whether the New York State Office of Court Administration can conceal from public view memoranda it issues to judges advising them on how to interpret law and adjudicate cases. The First Department permitted OCA to do so here, reversing Supreme Court and dismissing on privilege and overbreadth grounds a Freedom of Information Law request by the New York Civil Liberties seeking OCA's guidance to judges. If allowed to stand, the First Department's decision would—in defiance of FOIL and this Court's precedents—shut the door on New Yorkers' access to documents that affect the adjudication of their rights while opening the door for agencies to shield records from the public based on sweeping and unsupported claims of privilege and overbreadth.

OCA disputes neither the existence nor the import of the legal guidance it gives judges, yet refuses to disclose it to the public. Were it not for the leak of a 2021 memorandum urging judges to narrowly construe a landmark due-process ruling by the Appellate Division, to this day New Yorkers would have no inkling that OCA plays a substantive role in judicial decision-making—including on issues as weighty as barring pre-trial defendants from their families and homes, granting or denying bail, and subjecting individuals to involuntary commitment. This appeal

would allow this Court to affirm the public's entitlement to such documents going to the heart of FOIL's promise of government transparency and accountability.

This appeal would also allow this Court to correct the First Department's misapplication of several lines of this Court's caselaw. First, the First Department cited this Court's recent decision in *Appellate Advocates v New York State Department of Corrections & Community Supervision* (40 NY3d 547 [2023]) to uphold OCA's blanket claim of privilege over its guidance based on a purported attorney-client relationship with every judge in the Unified Court System. The First Department made this sweeping ruling even though OCA failed to establish such an expansive relationship, misreading *Appellate Advocates* to go far beyond what this Court could have intended and eviscerate the requirement that a party must establish an attorney-client relationship to invoke the attorney-client privilege.

Second, this case exemplifies the First Department's recent practice of improperly rejecting FOIL requests as overbroad or not reasonably described in reliance on agencies' assertion that their record-keeping practices make it burdensome to respond to the requests. This practice conflicts with precedents of this Court and other Appellate Division departments cautioning against conflating the "reasonable description" requirement with burden. This Court's intervention is necessary to address the First Department's anomalous application of FOIL.

Third, in denying the FOIL claim, the First Department explicitly considered and dismissed the concerns animating the NYCLU's request, contradicting this Court's holding that a requester's "motive for seeking the records is . . . irrelevant" and "constitutes an improper basis for denying [a] FOIL request."

For these reasons and those discussed below, the NYCLU respectfully submits that this Court should grant leave to appeal and reverse.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

The background of this case is set forth in full in the record (*see* R. 146–54, 345–50). The NYCLU offers here a summary of the facts relevant to this motion.

In July 2021, public reporting brought to light that the New York State Office of Court Administration ("OCA") issues guidance to judges in the Unified Court System ("UCS") on how to interpret and apply substantive law in adjudicating cases (R. 22–23).[1] The previous month, the Appellate Division had rendered a decision, *Crawford v Ally*, holding that due process requires courts to provide people charged with crimes an evidentiary hearing before they can be subjected to a pre-trial temporary order of protection that may deprive them of significant personal or

[1] *See* Sam Mellins, *New York Judges Lock the Accused Out of Their Homes, Skirting Review Required by Landmark Ruling, Critics Charge*, N.Y. Focus (July 23, 2021), available at https://www.nysfocus.com/2021/07/23/new-york-judges-crawford-hearing/ [last accessed Apr. 2, 2024].

property interests (197 AD3d 27, 34 [1st Dept 2021]). These evidentiary hearings should have been an important safeguard protecting low-income New Yorkers, particularly people of color, from being barred from their homes and separated from their families without due process.[2]

Within days of the Appellate Division's ruling, however, OCA issued a memorandum urging judges to read *Crawford* narrowly (R. 60–63). The *Crawford* memorandum, authored by OCA's Deputy Counsel of Criminal Justice and marked "Confidential" and "Internal Use Only," instructed judges that "*Crawford* . . . **should <u>not</u> be read** as to require live witnesses and/or non-hearsay testimony" at the evidentiary hearing (R. 60 [emphases in original]). The memorandum further advised judges that they "should resist—unless absolutely necessary and appropriate—anything approaching a full testimonial hearing . . . ." (R. 63). Since OCA issued the *Crawford* memorandum, New York City courts have consistently denied defense counsel's requests for live-witness testimony in *Crawford* hearings (R. 88–89). In response to reporting about the memorandum, an OCA spokesperson stated that it is "normal practice" for the agency "to issue memos with context on cases that have potential significant operational impacts on the courts" (R. 22).

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[2] *See* brief of *amici curiae* Brooklyn Defender Services et al. at 5–7, *Crawford v Ally*, 197 AD3d 27 (1st Dept 2021).

Seeking to understand this "normal practice," the NYCLU on September 30, 2021 submitted a FOIL request to OCA seeking such legal guidance (R. 33–39). The initial request sought "all documents created by the OCA" since 2011 and "distributed within the OCA and/or to judges in the New York State Unified Court System" in which "federal or state court decisions" or "statutes, regulations, or ordinances" are "summarized, analyzed, interpreted, construed, explained, clarified, and/or applied" (R. 34–35).[3] The NYCLU explained the request was prompted by the revelation of the *Crawford* memorandum and appended it as an example of the documents sought (R. 33–39).

OCA denied the request, claiming it was "overly broad" and did not "reasonably describe records" because, in OCA's view, it encompassed any document that "might involve" or "implicate" "any interpretation or evaluation" of decisional or statutory law (R. 43–44). OCA also asserted, without explanation and without identifying any specific records, that every responsive document would be exempt from disclosure as intra-agency and privileged materials (R. 44).

The NYCLU administratively appealed the denial (R. 46–48). Explicitly addressing OCA's expansive construction of the FOIL request, the NYCLU clarified that it was "*not* seeking documents that merely '*implicate* a federal or state court

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[3] The FOIL request also sought certain OCA policies (R. 35). That portion of the request is not at issue in this litigation.

decision, statute, regulation, or ordinance'" (R. 46–47 [first emphasis added]). Rather, the NYCLU specified, the request sought "documents created by the OCA that contain instructions or guidance as to how judges should interpret and/or apply court decisions, statutes, regulations, or ordinances"—that is, "substantive law"—as exemplified by the *Crawford* memorandum (R. 46–47). And the NYCLU pointed out that OCA's conclusory and blanket claims of exemption and privilege were insufficient to justify withholding records (R. 47–48). OCA denied the administrative appeal (R. 50–56).

The NYCLU then filed this lawsuit in New York County Supreme Court alleging that OCA's refusal to produce the requested documents violated FOIL (R. 19–30).[4] In light of OCA's mischaracterization of the initial FOIL request, at oral argument before Supreme Court, the NYCLU reiterated that its operative request was set forth in its administrative appeal (R. 264 at 3:1–9). On October 19, 2022, Supreme Court ordered OCA to turn over the requested records, holding that OCA's "denial of the FOIL request . . . was in error after [the NYCLU] amended the request"

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[4] In addition to its FOIL claim brought under Article 78, the NYCLU also brought two declaratory-judgment claims alleging that OCA's refusal to produce the requested documents violates the First Amendment and common law (R. 29–30). Because Article 78 and declaratory-judgment claims proceed on separate procedural tracks (*Rosenberg v New York State Off. of Parks, Recreation, & Historic Pres.*, 94 AD3d 1006, 1008 [2d Dept 2012]), the Supreme Court order giving rise to this appeal addressed only the FOIL claim (*see* R. 5–6). The NYCLU's declaratory-judgment claims are currently before the First Department on a separate appeal (*see* R. 349 n 6).

in the administrative appeal (Exhibit 1; R. 5–6). The court found that the request, as clarified, was "sufficiently tailored" and that OCA's purported inability to locate responsive records was "not persuasive" (R. 5). Supreme Court further rejected OCA's blanket assertions of the intra-agency exemption and privilege (R. 5–6).

Instead of producing the records, OCA on November 16, 2022 appealed Supreme Court's decision to the First Department (R. 3–4). OCA failed to timely perfect the appeal (NYSCEF Doc No. 5 ¶¶ 9–11, in *New York Civil Liberties Union v New York State Off. of Ct. Admin.*, App Div, 1st Dept, Case No. 2022-05629). Accordingly, on January 16, 2023, the First Department deemed the appeal dismissed (*id.*). After OCA moved to vacate the dismissal, the First Department ultimately permitted OCA to reinstate the appeal (Exhibit 2).

On the merits, OCA maintained that its refusal to produce the requested records was proper. First, although it acknowledged that "[a] requestor is permitted to clarify its FOIL request with the agency . . . during the administrative FOIL process" (R. 313), OCA contended the NYCLU had not clarified its FOIL request in the administrative appeal and that the initial request was overbroad (R. 304–20). But OCA conceded that the clarified request, if accepted, describes an identifiable set of documents (*see* R. 408). Second, OCA abandoned its claim that the requested records are intra-agency materials as well as its belated claim, raised for the first time before the Appellate Division, that the records are also inter-agency materials

(*see* R. 381–414 [OCA reply brief making no mention of either exemption in response to the NYCLU's pointing out that the judiciary is neither a part of OCA nor an "agency" at all for purposes of FOIL]; R. 369–75). Third, OCA made the blanket assertion that all requested records were privileged because OCA serves as "in-house counsel" to every judge in the UCS (R. 326–28), even while acknowledging that judges are not part of OCA (R. 236 n 7). OCA also admitted that generally, before a court rules on privilege, "[a]n agency should submit documents it deems privileged to a court for an *in camera* inspection"—which OCA has not done here (R. 411).

On February 8, 2024, the First Department issued an order reversing Supreme Court (the "Decision") (Exhibit 3). The Decision began by dismissing the NYCLU's motivation for submitting the FOIL request: "Petitioner's concern that [OCA] is privately instructing judges how to interpret and apply substantive law is unfounded, as the court is not bound by [OCA's] interpretations" (*id.* at 2). Next, the Decision held that the NYCLU had not clarified its FOIL request and that the initial request was overbroad, based on OCA's representation that the requested "information [is] not stored in any centralized manner, and responding to the FOIL request would involve manually reviewing employees' … files" (*id.* [citation omitted]). Finally, the First Department held in the "alternative"—in a single sentence and without OCA having identified a single responsive document—that all the requested records were "exempt [from disclosure] under the attorney-client privilege . . . and the attorney

work product privilege," citing this Court's recent decision in *Appellate Advocates v New York State Department of Corrections & Community Supervision* (40 NY3d 547 [2023]) (Exhibit 3 at 2–3).

On March 4, 2024, OCA entered the Decision and served the Notice of Entry on the NYCLU (Exhibit 4). This timely motion for leave to appeal follows.

JURISDICTIONAL STATEMENT

This Court has jurisdiction over this motion and proposed appeal pursuant to CPLR 5602 (a) (1) (i) and Rule 500.22 because the Decision constitutes a final determination on two independent grounds.

First, the Decision is final under the doctrine of party finality because it fully adjudicates the FOIL claim, which is the only claim against OCA in this case (*see* R. 28–29; Arthur Karger, Powers of the New York Court of Appeals § 5:9 [3d ed rev, Sept. 2023 update] ["[A] determination of the Appellate Division which finally adjudicates the rights and/or liabilities of any one of [multiple] parties will be accorded the status of finality for purposes of appeal to the Court of Appeals even though there are other unresolved issues in the case not affecting that party."]; *e.g.*, *Hain v Jamison*, 28 NY3d 524, 535 n 2 [2016] [hearing appeal where the order was final as to one party even though claims remained as to other, non-appealing parties]).

Second, the order is final under the doctrine of express severance because Supreme Court necessarily severed the FOIL claim that is the subject of this

proposed appeal from the declaratory-judgment claims that are being adjudicated separately (*see* R. 349 n 6; *Klonowski v Dept. of Fire of City of Auburn*, 58 NY2d 398, 402 n 3 [1983] ["By reason of the severance, the judgment [on one claim] is final notwithstanding that [another claim] remains to be litigated."]; *see also Burke v Crosson*, 85 NY2d 10, 16 n 2 [1995] [addressing the doctrine of severance]). Supreme Court entered order and judgment on only the FOIL claim in its October 19, 2022 decision and, on appeal, the First Department likewise entered order and judgment on that claim (R. 5–6; Exhibit 3 [ordering "the proceeding brought pursuant to CPLR article 78 dismissed"]; *see Shah v 20 E. 64th St., LLC*, 198 AD3d 23, 33–34 [1st Dept 2021] [finding it "evident" that Supreme Court expressly severed and rendered final judgment on one claim, notwithstanding that the order "did not include the language of express severance," where the court "ORDERED AND ADJUDGED that judgment shall be entered" on only that claim]; New York Court of Appeals Civil Jurisdiction and Practice Outline at 34 [July 2023] [explaining that in *Weizenecker v Weizenecker* (72 NY2d 809 [1988], *denying lv*, 140 AD2d 517 [2d Dept 1988]), an "order finally disposing of certain causes of action and transferring another cause of action to another court for prosecution [was] deemed to effect an express severance"]).

QUESTIONS PRESENTED FOR REVIEW

1. Whether, in denying public access to guidance issued by OCA to judges based on OCA's blanket claim of an attorney-client relationship with every judge in the Unified Court system, the First Department erroneously applied this Court's recent decision in *Appellate Advocates v New York State Department of Corrections & Community Supervision* (40 NY3d 547 [2023]) to effectively eliminate the requirement for an agency asserting privilege to establish an underlying attorney-client relationship.

2. Whether FOIL permits an agency to deny a specific and circumscribed FOIL request as not "reasonably described" based on the agency's representation that its record-keeping practices render a search for records difficult or that responding to the request would otherwise be burdensome.

3. Whether it was proper for the First Department, in denying the NYCLU's Freedom of Information Law claim for records concerning court transparency, to question the NYCLU's perceived motivation for making the request based on the First Department's stated belief that concerns about OCA "privately instructing judges how to interpret and apply substantive law" are "unfounded."

ARGUMENT

This Court should grant leave to appeal in this case for three reasons (*see* 22 NYCRR 500.22 [b] [4]). First, this case concerns public access to documents of

undisputed public importance. Second, granting leave would allow this Court to correct the First Department's misapplication of this Court's recent decision in *Appellate Advocates* and prevent an unprecedented expansion of privilege doctrine. Third, this Court's review is necessary to address a recent practice by the First Department of mischaracterizing FOIL requests as overbroad or not reasonably described, which conflicts with the precedents of this Court and of other departments of the Appellate Division.

I. THIS APPEAL CONCERNS THE DENIAL OF ACCESS TO DOCUMENTS OF UNDISPUTED PUBLIC IMPORTANCE.

This Court should review the First Department's Decision because it allowed OCA to withhold from the public documents of public importance while improperly questioning the NYCLU's motives for seeking the documents (*see* 22 NYCRR 500.22 [b] [4] [providing that "issues . . . of public importance" may merit this Court's review]). Absent this Court's intervention, the Decision would leave New Yorkers in the dark about legal guidance informing how courts adjudicate their rights and frustrate FOIL's promise of government transparency and accountability.

OCA does not dispute either the existence of its substantive legal guidance to judges nor the import of that guidance. OCA has admitted that providing judges with guidance on how to interpret and apply the law is the agency's "normal practice" (R. 22; *see, e.g.*, R. 60–63, 69–81). And by OCA's own description, the guidance "inform[s] members of the judiciary in their decision-making processes" (R. 289).

In other words, the guidance influences the adjudication of cases and thus the rights of litigants and the public at large.[5]

The few examples of OCA guidance that have been leaked to the public confirm that they pertain to the adjudication of important issues and substantive rights—including whether New Yorkers should be separated from their families pending trial or forcibly committed. For instance, the *Crawford* memorandum urges judges to "resist—unless absolutely necessary and appropriate—anything approaching a full testimonial hearing" when determining whether to impose a temporary order of protection (R. 63). And in an April 2022 memorandum, OCA not only instructed judges that the "least restrictive means" standard governing bail determinations only "*arguably* weigh[s] against setting higher bail amounts or remanding a defendant in specific cases," but also encouraged courts to take an expansive view of their authority to commit defendants for mental-health reasons (R. 75 [emphasis added], 79 n 9).

Had these memoranda not been leaked, New Yorkers would have no inkling that confidential guidance from OCA informs courts' adjudication of cases. And without awareness that judges were receiving such guidance, litigants would not

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[5] The First Department's statement that courts are "not bound by [OCA's] interpretations" is beside the point (Exhibit 3 at 2), as the NYCLU's request did not assert that OCA's guidance is binding (*see* R. 33–35), and whether the guidance is binding is irrelevant to the validity of the request.

know to argue that the legal positions OCA espouses are incorrect or should not be followed in their cases. In short, the documents at issue in this case go to the heart of FOIL's commitment to "open government and public accountability" (*Capital Newspapers Div. of Hearst Corp. v Burns*, 67 NY2d 562, 565 [1986]); of "[t]he people's right to know the process of governmental decision-making and to review the documents . . . leading to determinations" (Public Officers Law § 84); and of "the premise that . . . official secrecy is anathematic to our form of government" (*M. Farbman & Sons, Inc. v New York City Health & Hosps. Corp.*, 62 NY2d 75, 79 [1984]; *see* R. 430 [*amici curiae* brief submitted in this case by fourteen media organizations "emphasiz[ing] the public interest in access to records like those at issue here," which "implicate government activity of public concern"]).[6]

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[6] The public importance of this case is also evidenced by the extensive news coverage that it has received (*see, e.g.*, Marco Poggio, *NY Panel Rejects NYCLU Demand For Memos To State Judges*, Law360, Feb. 9, 2024, available at https://www.law360.com/pulse/daily-litigation/articles/1795989/ny-panel-rejects-nyclu-demand-for-memos-to-state-judges [last accessed Apr. 2, 2024]; Emily Saul, *NY Office of Court Administration Wins Bid to Shield Judicial Communications*, New York Law Legal, Feb. 8, 2024, available at https://www.law.com/newyorklawjournal/2024/02/08/ny-office-of-court-administration-wins-bid-to-shield-judicial-communications/ [last accessed Apr. 2, 2024]; Emily Saul, '*We Cannot Tell a Judge What to Do': Judicial Guidance From OCA Still Subject to Discretion, Attorney Argues*, New York Law Legal, Jan. 18, 2024, available at https://www.law.com/newyorklawjournal/2024/01/18/we-cannot-tell-a-judge-what-to-do-judicial-guidance-from-oca-still-subject-to-discretion-attorney-argues/ [last accessed Apr. 2, 2024]; New York Daily News Editorial Board, *The New York State court system should make guidance memos and policy board meetings public*, New York Daily News, Sept. 9, 2023, available at https://www.nydailynews.com/2023/09/09/the-new-york-state-court-system-should-make-guidance-memos-and-policy-board-meetings-public/ [last accessed Apr. 2, 2024]; Sam Mellins, *The Secret Memos New York Courts Refuse to Give Up*, N.Y. Focus, Sept. 5, 2023,

The public importance of these documents is only underscored by the First Department's attempt to dispel concerns about OCA's practice of issuing guidance to judges. Both at oral argument[7] and in the Decision, the court questioned and dismissed the NYCLU's perceived motivations for submitting the FOIL request: "Petitioner's concern that [OCA] is privately instructing judges how to interpret and apply substantive law is unfounded" (Exhibit 3 at 2). As a matter of law, the court's consideration of the purpose of the FOIL request was "improper" because a FOIL petitioner's "motive for seeking the records is . . . irrelevant" (*Data Tree, LLC v*

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available at https://www.nysfocus.com/2021/07/23/new-york-judges-crawford-hearing/ [last accessed Apr. 2, 2024]; Andrea Keckley, *NYCLU Wins Release Of Memos To New York Judges*, Law360, Oct. 20, 2022, available at https://www.law360.com/articles/1541877/nyclu-wins-release-of-memos-to-new-york-judges [last accessed Apr. 2, 2024]; Molly Crane-Newman, *NYCLU claims 'secret memos' from court administrators advise judges on tough decisions*, New York Daily News, Oct. 1, 2021, available at https://www.nydailynews.com/2021/10/01/nyclu-claims-secret-memos-from-court-administrators-advise-judges-on-tough-decisions/ [last accessed Apr. 2, 2024]; Matt Perez, *NYCLU Sues To Obtain Court Office's Memos To Judges*, Law360, June 2, 2021, available at https://www.law360.com/articles/1499089/nyclu-sues-to-obtain-court-office-s-memos-to-judges [last accessed Apr. 2, 2024]).

[7] For example, at oral argument, the court stated:

- "This FOIL request . . . I don't know where we're heading with this. You get all these documents . . . where are you going to go with that? Because at the end of the day, if the trial judges are actually . . . following what the *Crawford* memo is doing, I don't think there's anybody on this panel who would hesitate [to reverse]."
- "There's something called an appeal [for correcting any erroneous trial court rulings made in reliance on OCA guidance]. That's what we're here for."
- "The last I looked I don't think senior [OCA] attorneys tell judges what to do."

(Appellate Division, First Department, *Oral Argument Archives* at 2:26:47, 2:28:17, 2:29:28 [Jan. 18, 2024], https://cmi.nycourts.gov/vod/WowzaPlayer/AD1/AD1_Archive2024_Jan18_13-58-32.mp4).

Romaine, 9 NY3d 454, 463 [2007]; *see M. Farbman & Sons*, 62 NY2d at 80 ["FOIL does not require that the party requesting records make any showing of need, good faith or legitimate purpose . . . . Full disclosure by public agencies is, under FOIL, a public right and in the public interest."]). What is more, the First Department's statement illustrates why it is critical for the public to have access to OCA's guidance and why FOIL exists: so that the government cannot deflect concerns about its operations through its own say-so that there is nothing concerning to see (*see Richmond Newspapers, Inc. v Virginia*, 448 US 555, 572 [1980] ["People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing."]).

Given this Court's and the Chief Judge's institutional role in overseeing the Unified Court System (*see, e.g.*, NY Const, art VI, § 28; Judiciary Law § 210), granting leave would be especially appropriate in this case to affirm the importance of public access to documents that promote court transparency.

II. THIS APPEAL WOULD ALLOW THIS COURT TO CORRECT THE FIRST DEPARTMENT'S MISAPPLICATION OF THIS COURT'S RECENT DECISION IN *APPELLATE ADVOCATES* AND TO PREVENT AN UNPRECEDENTED EXPANSION OF PRIVILEGE.

The proposed appeal additionally would allow this Court to review the First Department's sweeping privilege ruling (Exhibit 3 at 2–3), which not only misapplied this Court's recent decision in *Appellate Advocates v New York State Department of Corrections & Community Supervision* (40 NY3d 547 [2023]), but

also dramatically lowered, in contravention of this Court's precedents, the showing parties must make to invoke privilege (*see* 22 NYCRR 500.22 [b] [4] [providing that Appellate Division decisions that "present a conflict with prior decisions of this Court" merit review]). In particular, the First Department effectively eviscerated the requirement that a party asserting the attorney-client privilege must establish an underlying attorney-client relationship.

Appellate Advocates was a narrow decision addressing whether the *content* of certain attorney-client communications was privileged. This Court concluded that the specific documents at issue were privileged because they "reflect counsel's legal analysis of statutory, regulatory and decisional law, and provide guidance for the [Board of Parole] commissioners on how to exercise their discretionary authority" (*Appellate Advocates*, 40 NY3d at 553). The existence of an attorney-client relationship was not in dispute in that case because the documents were sent by "counsel for the Board of Parole" to "Board of Parole commissioners" (*id.* at 550; *see* Brief for Respondent at 22, *Appellate Advocates*, NY Ct App, APL-2022-00063 [noting "there is no dispute that counsel's advice was rendered during the course of an existing an attorney-client relationship with the Board"]; July 8, 2022 Letter Brief at 7, *Appellate Advocates*, NY Ct App, APL-2022-00063 [same]).

But the First Department relied on *Appellate Advocates* to hold that the documents here are categorically privileged even though OCA has not established

an underlying attorney-client relationship—contrary to this Court's precedent that "no attorney-client privilege arises unless an attorney-client relationship has been established" (*Priest v Hennessy*, 51 NY2d 62, 68–69 [1980]). As this Court has cautioned, "independent facts . . . must be shown" to "demonstrate the existence of an underlying attorney-client relationship"; an attorney's "mere statement that [a] party was a 'client' does not satisfy this burden" (*id.* at 70). OCA adduced no such facts here. It offered only the "mere statement" that OCA serves as "in-house counsel" to every judge in the OCA and a citation to Judiciary Law § 212 (1) (r) (R. 326–28; R. 177–78 ¶ 23). OCA's conclusory assertion of an "in-house" relationship with every UCS judge is contradicted by the agency's own concession that "[j]udges . . . are *not* considered staff of OCA" (R. 236 n 7 [emphasis added]). This concession alone confirms that *Appellate Advocates*—in which the senders and recipients were undisputedly within the same agency (*see* 40 NY3d at 550)—is inapposite here. And all Judiciary Law § 212 (1) (r) provides is that OCA may "[e]stablish educational programs, seminars and institutes" for judges; it says nothing about an attorney-client relationship.[8] Yet the First Department addressed none of these glaring

[8] The NYCLU recognizes that OCA may be able to establish an attorney-client relationship with judges in certain contexts, for example, where OCA is representing particular judges in litigation. But in this case, OCA has not met its burden to establish an attorney-client relationship with every judge based on the agency's distributing guidance.

deficiencies, apparently misreading *Appellate Advocates* to relieve agencies of their burden to establish an attorney-client relationship when claiming privilege.[9]

The First Department's far-reaching privilege ruling is all the more troubling because it conflicts with three other lines of this Court's precedents. First, by endorsing OCA's categorical invocation of privilege without identifying a single document, the First Department disregarded this Court's instruction that "blanket exemptions for particular types of documents are inimical to [FOIL]" (*Gould v New York City Police Dept.*, 89 NY2d 267, 275 [1996]). "The proper procedure for reaching a determination" on privilege is for the agency to provide the documents for an "*in camera* inspection" (*M. Farbman & Sons*, 62 NY2d at 83), as OCA admits (*see* R. 411). Second, by allowing OCA to baselessly claim privilege over a wide swathe of important documents, the First Department ran afoul of this Court's admonition that "[FOIL's] statutory exemptions are narrowly interpreted" (*M. Farbman & Sons*, 62 NY2d at 80) and that privilege "must be narrowly construed" because it "constitutes an 'obstacle' to the truth-finding process" (*Ambac Assur. Corp. v Countrywide Home Loans, Inc.*, 27 NY3d 616, 624 [2016] [citation

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[9] The First Department also accepted, without explanation, OCA's blanket claim of the work-product privilege over every document (*see* Exhibit 3 at 3), even though that claim was premised on the same unsupported assertion that OCA is "in-house counsel" to every UCS judge (R. 327–28). Moreover, OCA's reply brief offered no response to the NYCLU's argument that OCA waived any privilege by distributing its guidance outside the agency (*see* R. 377–78 [NYCLU brief]; R. 407–12 [OCA reply brief invoking only the attorney-client privilege]).

omitted]). Third, the First Department failed to address this Court's holding that even if "the technical requirements of the privilege are satisfied," privilege must yield where "strong public policy requires disclosure" (*Priest*, 51 NY2d at 69). The NYCLU argued that there is an overriding public interest in OCA's legal guidance to judges (R. 257–58, 378–79)—an argument that OCA made no attempt to refute before the First Department (*see generally* R. 325–28, 407–12).

III. THIS APPEAL WOULD ALLOW THIS COURT TO REVIEW THE FIRST DEPARTMENT'S APPLICATION OF THE "REASONABLE DESCRIPTION" REQUIREMENT FOR FOIL REQUESTS, WHICH IS INCONSISTENT WITH THIS COURT'S AND OTHER APPELLATE DIVISIONS' PRECEDENTS.

Finally, granting leave would allow this Court to review the First Department's practice of denying FOIL claims, like the one in this case, for "overbreadth" or failure to "reasonably describe" the documents sought based on an agency's inadequate assertion that it cannot easily locate responsive records. This practice, which emerged in recent years over at least four cases, is both inconsistent with this Court's decisions distinguishing the specificity of a FOIL request from the burden of searching for responsive records and in tension with decisions of other departments (*see* 22 NYCRR 500.22 [b] [4] [providing that Appellate Division decisions that "present a conflict with prior decisions of this Court" or "involve a conflict among the departments of the Appellate Division" merit review]).

This Court has repeatedly explained that "[c]omplaining that [a] request is so broad as to require thousands of records" does "not establish[] that the descriptions were insufficient for purposes of locating and identifying the documents" (*M. Farbman & Sons*, 62 NY2d at 83; *see Konigsberg v Coughlin*, 68 NY2d 245, 249 [1986] [holding that agencies "cannot evade the broad disclosure provisions of [FOIL] upon the naked allegation that the request will require review of thousands of records" [citation omitted]]). But in recent years, the First Department routinely has been denying public access to important documents in reliance on agencies' complaints about burden thinly disguised as objections to the specificity of the FOIL request (*see, e.g.*, *Oustatcher v Clark*, 217 AD3d 478, 479 [1st Dept], *lv denied*, 40 NY3d 908 [2023] [denying access to records relating to prosecutorial misconduct where agency represented it would have to "manually review[] employees' personnel files"]; *Jewish Press v Metro. Transp. Auth.*, 193 AD3d 460 [1st Dept 2021] [denying access to records relating to religious accommodations for public employees where agency represented its employees would have to "search through their paper and electronic records"]).

The First Department did just that here, denying the NYCLU's FOIL claim "on the ground of overbreadth" because OCA asserted the documents sought are "not stored in any centralized manner, and responding to the FOIL request would involve manually reviewing employees' . . . files" (Exhibit 3 at 2). The court did so

even though OCA's FOIL officer revealed the true basis for the agency's denial was that responding to the request "would have been extremely burdensome" (R. 175 ¶ 16); even though OCA conceded that the good-faith "clarifications" the NYCLU made to its request in the administrative proceedings "do identify a subset of documents" (R. 408)[10]; and even though this clarified request is conducive to a targeted search because it seeks records that could only have been authored by a small number of senior OCA attorneys (R. 358–59).

Unlike the First Department, other departments of the Appellate Division have understood that "the requirement of reasonable description" should not be "conflated" with the "separate[] consideration as to whether it would be unduly burdensome for the [agency] to comply with the [FOIL] request" (*Jewish Press, Inc. v New York City Dept. of Educ.*, 183 AD3d 731, 733 [2d Dept 2020]; *Puig v New York State Police*, 212 AD3d 1025, 1027 [3d Dept 2023] [same]). Moreover, other departments have recognized they should not unquestioningly accept an agency's assertion that its record-keeping practices render it impracticable to locate

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[10] The First Department's determination that the NYCLU had not clarified its original request overlooked that the NYCLU explicitly stated in its administrative appeal that, "contrary to OCA's characterization," the request was "*not* seeking documents that merely 'implicate'" decisional or statutory law, but rather only "documents created by the OCA [since 2011] that contain instructions or guidance as to how judges should interpret and/or apply" decisional or statutory law (R. 46–47 [emphasis added]). This request was "not vague or unlimited" given that it was "circumscribed as to subject matter, groups of individuals to whom they pertained, and time period" (*Goldstein v Inc. Vill. of Mamaroneck*, 221 AD3d 111, 120 [2d Dept 2023]).

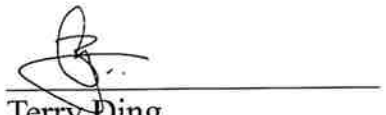
responsive records with respect to "records stored electronically, given the advent of electronic word search mechanisms" (*Goldstein v Inc. Vill. of Mamaroneck*, 221 AD3d 111, 119–20 [2d Dept 2023]; *see also, e.g.*, *Puig*, 212 AD3d at 1026; *Pflaum v Grattan*, 116 AD3d 1103, 1104 [3d Dept 2014]). Notably, the NYCLU's request seeks only records created since 2011, a period in which email-based communications and electronic recordkeeping have been the norm. But the First Department failed to hold OCA to its burden of showing that "the descriptions provided are insufficient for purposes of extracting or retrieving the requested documents from the virtual files through an electronic word search . . . or other reasonable technological effort" (*Goldstein*, 221 AD3d at 119, quoting *Puig*, 212 AD3d at 1026).

CONCLUSION

This appeal presents this Court with the opportunity to rectify the First Department's misapplication of numerous lines of this Court's precedent to frustrate the core purpose and promise of the Freedom of Information Law. The NYCLU submits that this Court's review is warranted and necessary to prevent other courts and agencies from relying on the First Department's errors to insulate documents of significant public import from public view through blanket, baseless claims of privilege or unsupported claims of overbreadth. Accordingly, the NYCLU respectfully requests that the Court grant this motion for leave to appeal.

Respectfully submitted,

NEW YORK CIVIL LIBERTIES
UNION FOUNDATION



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Counsel for Petitioner-Appellant

Dated: April 2, 2024
New York, N.Y.

DISCLOSURE STATEMENT PURSUANT TO RULE 500.1(f)

The New York Civil Liberties Union is a non-profit, 501(c)(4) organization and is the New York State affiliate of the American Civil Liberties Union.

CERTIFICATE OF COMPLIANCE

Pursuant to the State of New York, Court of Appeals Rules of Practice (*see* 22 NYCRR Part 500.1 §§ [j][l]; Part 500.13 §§ [c][1], [c][1][3]), I certify that the foregoing brief was prepared on a word processor, using 14-point Times New Roman proportionally spaced typeface, double-spaced, with 12-point single-spaced footnotes and 14-point single-spaced block quotations. The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the disclosure statement, table of contents, table of citations, certificate of compliance, and affidavit of service, is 5,729.

Dated: April 2, 2024
New York, N.Y.

Terry Ding

Counsel for Petitioner-Appellant

EXHIBIT 1

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYLE E. FRANK **PART** 11M
Justice

----------X

NEW YORK CIVIL LIBERTIES UNION,

Petitioner,

- v -

NEW YORK STATE OFFICE OF COURT ADMINISTRATION, LAWRENCE K. MARKS

Respondent.

----------X

INDEX NO. 154792/2022

MOTION DATE 06/21/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

Petitioners move to obtain documents, and other items, which they allege were withheld in violation of the Freedom of Information Law (FOIL). Pursuant to FOIL, petitioners attempted to obtain records and materials in which the Office of Court Administration advises judges how to interpret, analyze, and apply court decisions, statutes, or regulations. Respondents have denied both petitioners initial FOIL request, as well as the administrative appeal of that request. For the reasons set forth below the petition is granted to the extent indicated below.

Respondents contend that the class of documents requested are overly broad and not reasonably searchable as well as protected as intra-agency communications and attorney work-product.

The Court finds that petitioners have sufficiently tailored its request with respect to the documents that it seeks, and while the Court does consider the respondents ability to conduct an efficient search of responsive documents, that is not a dispositive consideration. The Court finds that respondents' inability to search by terms or content of documents is not persuasive. It was

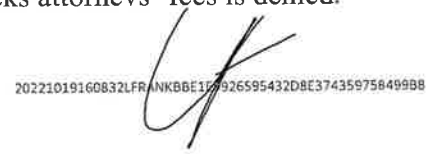
made clear during oral argument that the requested documents are sufficiently specific. Moreover, the Court will give the respondents 180 days to produce the documents requested,

The Court also finds the remaining arguments of the respondents unavailing. As Judges are not employees of the New York Court System, the communications cannot be considered interagency communications, even where such communications are directed to Judges' Chambers staff, who would receive the communications in order to benefit their role in working for the judge. In addition, the Court does believe that the documents in question are final communications.

Moreover, the Court declines to grant the petitioner attorney's fees as respondents' denial of the FOIL request was not unreasonable; however, the Court does find that the denial was in error after petitioners amended the request. Accordingly, it is hereby

ORDERED that respondents shall produce to petitioners, within 180 days of the date of service of this Order with notice of entry, all documents directed to Judges and/or Judge's Chambers staff from January 1, 2011, until present, in which federal or state court decisions, statutes, regulations, and ordinances are summarized, analyzed, interpreted, construed, explained, clarified, and/or applied; and it is further

ADJUDGED that the portion of the petition that seeks attornevs' fees is denied.



10/19/2022
DATE

CHECK ONE:	X	CASE DISPOSED				NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE

EXHIBIT 2

Supreme Court of the State of New York
Appellate Division, First Judicial Department

Present – Hon. Ellen Gesmer, Justice Presiding,
Saliann Scarpulla
Manuel J. Mendez
Martin Shulman
John R. Higgitt, Justices.

New York Civil Liberties Union,
Petitioner/Plaintiff-Respondent,

Motion No. 2023-02765
Index No. 154792/22
Case No. 2022-05629

-against-

New York State Office of Court Administration,
Respondent-Appellant,

Chief Administrative Judge Lawrence K. Marks, in his official capacity,
Defendant-Appellant,

An appeal having been taken from an order of the Supreme Court, New York County, entered on or about October 20, 2022,

And respondent-appellant/defendant-appellant having moved, pursuant to POL § 89 (4) (C)(ii)(C)22 NYCRR 1250.10(c), and CPLR 2005, to vacate the dismissal of the appeal, and, upon vacatur, pursuant to 22 NYCRR 1250.9(b) and CPLR 2004, for an extension of time to perfect same,

Now, upon reading and filing the papers with respect to the motion, and due deliberation having been had thereon,

It is ordered that the motion is granted to the extent of vacating the dismissal and reinstating the aforesaid appeal and extending the time to perfect same to the December 2023 Term of this Court.

ENTERED: August 03, 2023

Susanna Molina Rojas
Clerk of the Court

EXHIBIT 3

Supreme Court of the State of New York
Appellate Division, First Judicial Department

Oing, J.P., González, Shulman, Pitt-Burke, Higgitt, JJ.

1626 In the Matter of NEW YORK CIVIL LIBERTIES UNION,
Petitioner-Respondent,

-against-

NEW YORK STATE OFFICE OF COURT ADMINISTRATION et al.,
Respondents-Appellants.

Index No. 154792/22
Case No. 2022-05629

David Nocenti, Office of Court Administration, New York (Robyn L. Rothman of counsel), for appellants.

New York Civil Liberties Union Foundation, New York (Terry Tianyun Ding of counsel), for respondent.

Order and judgment (one paper), Supreme Court, New York County (Lyle E. Frank, J.), entered October 20, 2022, which, to the extent appealed from, granted the petition to compel respondent New York State Office of Court Administration to disclose records requested by petitioner pursuant to the Freedom of Information Law (FOIL) (Public Officers Law §§ 84-90), to the extent of directing respondent to disclose to petitioner, within 180 days of service of the order with notice of entry, all documents directed to judges or their chambers staff, from January 1, 2011 to the present, in which federal or state court decisions, statutes, regulations, or ordinances are summarized, analyzed, interpreted, construed, explained, clarified, or applied, unanimously reversed, on the law, without costs, the petition denied, and the proceeding brought pursuant to CPLR article 78 dismissed.

Petitioner's concern that respondent is privately instructing judges how to interpret and apply substantive law is unfounded, as the court is not bound by respondent's interpretations. It has always been the province of the court to declare what the law is (*see People v Knickerbocker Ice Co.*, 99 NY 181, 184 [1885].

Respondent properly denied the FOIL request, insofar as raised on appeal, on the ground of overbreadth. Respondent established that the request — seeking records respondent created during a period of more than 10 years that summarized, interpreted, explained, analyzed, or applied any state or federal court decisions, statutes, or regulations — sought information "not stored in any centralized manner, and responding to the FOIL request would involve manually reviewing employees' ... files and making individual determinations as to" each file (*Matter of Oustatcher v Clark*, 217 AD3d 478, 479 [1st Dept 2023], *lv denied* 40 NY3d 908 [2023] [internal quotation marks omitted]). Under the circumstances presented, respondent made a particularized showing that attempting to comply with this broad request would be impracticable (*see Matter of Aron Law, PLLC v New York City Dept. of Educ.*, 192 AD3d 552, 552 [1st Dept 2021], *lv denied* 37 NY3d 907 [2021]). It does not avail petitioner to argue "that their [FOIL] request should have been interpreted in a much more limited form," where "nothing in the language of the original request or the administrative appeal supports such an interpretation" (*Matter of Reclaim the Records v New York State Dept. of Health*, 185 AD3d 1268, 1272 [3d Dept 2020], *lv denied* 36 NY3d 910 [2021]).

As an alternative holding, we find that respondent properly determined that the records at issue were exempt under the attorney-client privilege (*see Matter of Appellate Advocates v New York State Dept. of Corr. & Community Supervision*, ___

NY3d __, 2023 NY Slip Op 06466 [2023]; CPLR 4503[a][1]) and the attorney work product privilege (CPLR 3101[c]; Public Officers Law § 87[2][a]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: February 8, 2024

Susanna Molina Rojas
Clerk of the Court

EXHIBIT 4

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

NEW YORK CIVIL LIBERTIES UNION
Petitioner-Plaintiff

v.

NEW YORK STATE OFFICE OF COURT ADMINISTRATION.
Respondent,

and

CHIEF ADMINISTRATIVE JUDGE LAWRENCE K. MARKS, in his official capacity,
Defendant.

NOTICE OF ENTRY

NY County Index No.: 154792/2022

PLEASE TAKE NOTICE that the attached is a true copy of the Decision and Order of the Supreme Court of the State of New York, Appellate Division First Department, which was duly entered by the Clerk of the Court on the 8th day of February 2024 in the above-captioned matter.

Dated: March 4, 2024
New York, New York

DAVID NOCENTI
Counsel
Office of Court Administration
25 Beaver Street, 10th Floor
New York, New York 10004
(212) 428-2150

Attorney for Respondent and Defendant

By: _____
Robyn L. Rothman, Esq.
Assistant Deputy Counsel

Supreme Court of the State of New York
Appellate Division, First Judicial Department

Oing, J.P., González, Shulman, Pitt-Burke, Higgitt, JJ.

1626 In the Matter of NEW YORK CIVIL LIBERTIES UNION,
Petitioner-Respondent,

-against-

NEW YORK STATE OFFICE OF COURT ADMINISTRATION et al.,
Respondents-Appellants.

Index No. 154792/22
Case No. 2022-05629

David Nocenti, Office of Court Administration, New York (Robyn L. Rothman of counsel), for appellants.

New York Civil Liberties Union Foundation, New York (Terry Tianyun Ding of counsel), for respondent.

Order and judgment (one paper), Supreme Court, New York County (Lyle E. Frank, J.), entered October 20, 2022, which, to the extent appealed from, granted the petition to compel respondent New York State Office of Court Administration to disclose records requested by petitioner pursuant to the Freedom of Information Law (FOIL) (Public Officers Law §§ 84-90), to the extent of directing respondent to disclose to petitioner, within 180 days of service of the order with notice of entry, all documents directed to judges or their chambers staff, from January 1, 2011 to the present, in which federal or state court decisions, statutes, regulations, or ordinances are summarized, analyzed, interpreted, construed, explained, clarified, or applied, unanimously reversed, on the law, without costs, the petition denied, and the proceeding brought pursuant to CPLR article 78 dismissed.

Petitioner's concern that respondent is privately instructing judges how to interpret and apply substantive law is unfounded, as the court is not bound by respondent's interpretations. It has always been the province of the court to declare what the law is (*see People v Knickerbocker Ice Co.*, 99 NY 181, 184 [1885].

Respondent properly denied the FOIL request, insofar as raised on appeal, on the ground of overbreadth. Respondent established that the request — seeking records respondent created during a period of more than 10 years that summarized, interpreted, explained, analyzed, or applied any state or federal court decisions, statutes, or regulations — sought information "not stored in any centralized manner, and responding to the FOIL request would involve manually reviewing employees' ... files and making individual determinations as to" each file (*Matter of Oustatcher v Clark*, 217 AD3d 478, 479 [1st Dept 2023], *lv denied* 40 NY3d 908 [2023] [internal quotation marks omitted]). Under the circumstances presented, respondent made a particularized showing that attempting to comply with this broad request would be impracticable (*see Matter of Aron Law, PLLC v New York City Dept. of Educ.*, 192 AD3d 552, 552 [1st Dept 2021], *lv denied* 37 NY3d 907 [2021]). It does not avail petitioner to argue "that their [FOIL] request should have been interpreted in a much more limited form," where "nothing in the language of the original request or the administrative appeal supports such an interpretation" (*Matter of Reclaim the Records v New York State Dept. of Health*, 185 AD3d 1268, 1272 [3d Dept 2020], *lv denied* 36 NY3d 910 [2021]).

As an alternative holding, we find that respondent properly determined that the records at issue were exempt under the attorney-client privilege (*see Matter of Appellate Advocates v New York State Dept. of Corr. & Community Supervision*, ___

NY3d ___, 2023 NY Slip Op 06466 [2023]; CPLR 4503[a][1]) and the attorney work product privilege (CPLR 3101[c]; Public Officers Law § 87[2][a]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: February 8, 2024

Susanna Molina Rojas
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

NEW YORK CIVIL LIBERTIES UNION
Petitioner-Plaintiff

v.

NEW YORK STATE OFFICE OF COURT ADMINISTRATION,
Respondent,

and

CHIEF ADMINISTRATIVE JUDGE LAWRENCE K. MARKS, in his official capacity,
Defendant.

AFFIRMATION OF SERVICE

NY County Index No.: 154792/2022

ROBYN L. ROTHMAN, an attorney at law admitted to practice before this Court, hereby affirms under the penalty of perjury, pursuant to CPLR 2103, and says that deponent is over the age of 18 years, is not a party to the action and is employed at the Office of Court Administration, 25 Beaver Street, New York, New York 10004, that on the 4th day of March 2024, deponent caused the service of a copy of the Notice of Entry of the Order of the Appellate Division upon the following:

NEW YORK CIVIL LIBERTIES UNION
c/o Mr. Terry Ding, Esq
125 Broad Street, 19th Floor
New York, New York 10004
Tel: (212) 607-3300

at the address designated by them, by depositing a true and correct copy thereof, properly enclosed in a post-paid regular mail wrapper, in a post-office box regularly maintained at 25 Beaver Street, New York, New York 10004.

Dated: New York, New York
March 4, 2024

Yours, etc.,

DAVID NOCENTI
Counsel
Office of Court Administration
25 Beaver Street, 10th Floor
New York, New York 10004
(212) 428-2150
Attorney for Respondent-Appellant

By: 
Robyn L. Rothman.
Of Counsel

COURT OF APPEALS
STATE OF NEW YORK

NEW YORK CIVIL LIBERTIES UNION, *Petitioner-Appellant,* v. NEW YORK STATE OFFICE OF COURT ADMINISTRATION, *Respondent-Respondent.*	New York County Supreme Court Index No. 154792/2022 Appellate Division First Department Case No. 2022-05629 **Affirmation of Service**

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss:

I, LOURDES CHAVEZ, being duly sworn, depose and say that:

1. I am not a party to the above-captioned action, am 18 years of age or older, and am an employee of the New York Civil Liberties Union.

2. On the 2nd day of April, 2024, I served one true and correct copy of the Notice of Motion and Motion for Leave to Appeal to the Court of Appeals with all attachments on the New York State Office of Court Administration and the Chief Administrative Judge in the above-captioned matter via USPS Priority Mail Express.

3. The names of the individuals served and the address at which service was made are as follows:

Robyn L. Rothman
David Nocenti
OFFICE OF COURT ADMINISTRATION
NEW YORK STATE UNIFIED COURT SYSTEM
25 Beaver Street, 10th Floor
New York, N.Y. 10004

I affirm this 2nd day of April 2024, under the penalties of perjury under the laws of New York, which may include a fine or imprisonment, that the foregoing is true, and I understand that this document may be filed in an action or proceeding in a court of law.

Lourdes Chavez

APL-2024-00143
New York County Clerk's Index No. 154792/2022
Appellate Division, First Department Case No. 2022-05629

Court of Appeals

of the

State of New York

NEW YORK CIVIL LIBERTIES UNION,

Petitioner-Respondent

– against –

NEW YORK STATE OFFICE OF COURT ADMINISTRATION,

Respondents-Appellants.

AFFIRMATION OF SERVICE BY FEDEX

Daniel K. Garcia affirms the truth of the following under penalty of perjury, pursuant to CPLR 2106:

I am over 18 years of age, of sound mind, and otherwise competent to make this Affirmation. I am not a party in this action.

On May 16, 2025, I caused to be served a true and correct copy of the Motion for Leave to File the Proposed Brief of Amici Curiae Reporters Committee for Freedom of the Press and Other Media Organizations upon the following individuals:

Terry Ding
Bridget Lavender
AMERICAN CIVIL LIBERTIES UNION
125 Broad Street, 17th Floor
New York, New York 10004
(212) 549-2500

Daniel R. Lambright
Emma Curran Donnelly Hulse
Robert Hodgson
NEW YORK CIVIL LIBERTIES UNION
125 Broad Street, 19th Floor
New York, New York 10004
(212) 607-3300

Attorneys for Petitioner-Appellant

Robyn Rothman
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OFFICE OF COURT ADMINISTRATION
NEW YORK STATE UNIFIED COURT SYSTEM
25 Beaver Street, 10th Floor
New York, New York 10004
(212) 428-2150

Attorneys for Respondent-Respondent Office of Court Administration

by enclosing one copy in a properly addressed FedEx overnight delivery wrapper and placing it into the custody of FedEx for overnight delivery, prior to the latest time designated.

I affirm this 16th day of May, 2025, under the penalties of perjury under the laws of New York, which may include a fine or imprisonment, that the foregoing is true, and I understand that this document may be filed in an action or proceeding in a court of law.

Dated: New York, New York
May 16, 2025

By: _____
Daniel K. Garcia