SUPREME COURT FOR THE STATE OF NEW YORK

APPELLATE DIVISION – THIRD DEPARTMENT

APPELLATE ADVOCATES

Petitioner-Appellant,

v.

Docket No. 531737

NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION

Respondent-Respondent.

[PROPOSED] BRIEF OF *AMICUS CURIAE* REINVENT ALBANY AND NEW YORK COALITION FOR OPEN GOVERNMENT, INC. IN SUPPORT OF PETITIONER-APPELLANT.

CIVIL RIGHTS AND TRANSPARENCY CLINIC
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Supreme Court, Albany County, Index No. 907522/2019

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INTEREST OF THE AMICI

Reinvent Albany is a non-partisan, New York State non-profit group that has advocated for open and accountable government in New York State since 2010. In that time, Reinvent Albany has been one of New York's most prominent public voices for government transparency, especially in strengthening the State Freedom of Information Law and open data. Reinvent Albany strongly believes that government records belong to the people of New York and that the vast majority are subject to disclosure under the Freedom of Information Law. To that end, Reinvent Albany has successfully championed new state Freedom of Information and open data laws and practices, and has been cited by state and national news media more than 2,000 times in the last decade. Reinvent Albany is the New York State representative of the National Freedom of Information Coalition.

New York Coalition for Open Government is a non-partisan non-profit organization dedicated to government transparency. NYCOG works to ensure that all people have full access to government records and proceedings to foster responsive, accountable government, stimulate civic involvement and build trust in government. NYCOG conducts Freedom of Information audits, accesses government records to conduct its watchdog function, and uses its expertise to propose legislative improvements to FOIL.

INTRODUCTION

The Court should require the release of documents under the Freedom of Information Law where the documents represent an agency's interpretation of the law, even if the documents are drafted by attorneys. The New York State Freedom of Information Law (FOIL) is designed to protect the people's right to know. One vital aspect of the public's right to know is the right to know what the law is. Access to this information is necessary to avoid arbitrary governance, and to promote government accountability through democratic means. When an agency adopts an interpretation of the law, it creates the working law of the agency. The public's access to agency interpretations of the law is necessary to prevent governance by secret law.

ARGUMENT

I. Access to Agency Law Is a Necessary Condition for the Rule of Law.

The purpose of FOIL is "to shed light on government decision-making, which permits the electorate to make informed choices regarding governmental activities and facilitates exposure of waste, negligence and abuse." *Abdur-Rashid v New York City Police Dept.*, 992 NYS2d 870, 873 (2014). "The public should have access to the law and the government's interpretations of it." Jameel Jaffer & Brett Max Kaufman, *A Resurgence of Secret Law*, The Yale Law Forum Nov. 21, 2016. It is a basic precept of our government that we are a society governed by the rule of

law. Thomas Carothers, *The Rule of Law Revival*, Foreign Affairs Vol. 77 No. 2 (Mar. – Apr. 1998). To be governed by the rule of law, and hold the government accountable, when it steps beyond the confines of the law, the people must know what the law is. *Id*.; Donald F. Kettl, *Administrative Accountability and the Rule of Law*, 42 Political Science and Politics, 11, 12 (January 2009). Thus, access to the law—and necessarily the government's interpretations of the law—is a prerequisite to republican governance and due process.

The Freedom of information Law has always required the disclosure of final interpretations of law and adopted policy. Public Officers Law § 87(2)(g)(ii)-(iii); Public Officers Law § 88(1)(b) (repealed and replaced in by L 1977, ch 933, § 1). The 1974 version of FOIL required the disclosure of "those statements of policy and interpretations which have been adopted by the agency." § 88(1)(b) (repealed 1977). This language was drawn in large part from the federal freedom of information act. Pub L 89-487, 80 Stat. 250(b) (Requiring disclosure of "… statements of policy and interpretations which have been adopted by the agency") The 1977 amendments were intended "to expand the scope of FOIL and make presumptively available virtually all agency records unless otherwise specifically exempted." *Weston v Sloan*, 84 NY2d 462, 466 (1994); Div. Mem. Recommendation, Bill Jacket, L.1977, c. 933, § 1.

The legislative declaration confirms that "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." Public Officers Law § 84. Any interpretation of FOIL must require the release of agency interpretations of law and policy to fully vindicate the purpose of FOIL. Without access to information, the people lack assurance that they are governed fairly. Increased access to information not only provides a check against government abuses but also improves trust in government systems in the long-run.

II. Disclosing the Parole Board's Training Documents Promotes Accountability and Public Trust.

The need for transparency and accountability is magnified in the context of the Parole Board. Parole boards make consequential decisions, and their decision-making process has historically been haphazard. *See Greenholtz v Inmates of Nebraska Penal & Corr. Complex,* 442 US 1, 10 (1979) (describing the parole decision-making process as a "discretionary assessment of a multiplicity of imponderables, entailing primarily what a man is and what he may become rather than simply what he has done."). Parole Boards throughout the country have been criticized for being opaque, politically motivated, or arbitrary. *See e.g.*, Beth Schwartzapfel, *How parole boards keep prisoners in the dark and behind bars* Washington Post July 11, 2015 [2015 WLNR 20592296].

Decisions of the New York Board of Parole (BOP) have long been cloaked in secrecy. *Jordan v Loos*, 204 Misc. 814 (Sup. Ct. 1953) (preventing release of parole board decision even where there were allegations of political corruption). BOP has also faced longstanding allegations of arbitrary decision-making and racial discrimination. Edward McKinley, *Activists, lawmakers announce campaign to pass two parole reform bills*, Albany Times Union, January 14, 2021 https://perma.cc/9FK8-3JVD ; Michael Winerip, Michael Schwirtz and Robert Gebeloff, *For blacks facing parole in New York State, signs of a broken system*, New York Times December 4, 2016 *https://perma.cc/DFK4-UV7G*. In response, New York has constrained BOP's discretion and promoted transparent decision-making. For example, in 2017 the Department of Corrections and Community Supervision adopted new rules "to clearly establish what the Board must consider when conducting an interview and rendering a decision." NY Reg, Sept 27, 2017 at 1. New York has also constrained the discretion of BOP members by increasing determinate sentencing. *See* William C. Donnino, *Legislative Rational and History Practice Commentary to Penal Law* § 70.45 (McKinney). In 2014 the New York State Permanent Commission on Sentencing proposed eliminating indeterminate sentencing, in-part, to avoid arbitrary parole decisions. New York State Permanent Commission on Sentencing, *A proposal for "fully determinate" sentencing for New York State*, December 2014 at 5. Similarly, a pending bill, the Fair and Timely

Parole Act, proposes reducing discretion by creating a presumption of release. 2021 NY Senate-Assembly Bill S1415 A4231.

Despite reforms and reform efforts, the Parole Board retains significant discretion to determine who is or is not released from prison. Executive Law § 259-c. BOP decisions are also free from searching judicial review. A BOP decision is upheld so long as it complies the statutory requirements and is not "irrational bordering on impropriety." Executive Law § 259–i; *Perea v Stanford*, 149 AD3d 1392 (3d Dept 2017); *Russo v N.Y. State Bd. of Parole*, 50 NY2d 69 (1980). Because BOP retains significant discretion that is largely beyond review, the public has an even greater need to know what rules and law BOP applies when exercising its discretion.

III. The Freedom of Information Law Requires the Release of the Working Law of an Agency.

FOIL requires the disclosure of "records drafted by the body charged with enforcement of a statute which merely clarify procedural or substantive law." *Fink v Lefkowitz*, 47 NY2d 567, 572 (1979). Similarly, "[t]here is no exemption for final opinions which embody an agency's effective law and policy." *Matter of Miracle Mile Assoc. v Yudelson*, 68 AD2d 176, 182 (4th Dept 1979). Together, records that serve as authoritative interpretations of law, final determinations and consistent instructions to staff serve as an agency's working law.

This case concerns the application of the inter- and intra-agency exemption and the attorney-client privilege to training documents that contain authoritative interpretations of the law. Public Officers Law §§ 87(2)(a) & (g). Neither exemption protects authoritative interpretations of law by government agencies. *See Fink v Lefkowitz*, 47 NY2d 567, 572 (1979); *Matter of Miracle Mile Assoc. v Yudelson,* 68 AD2d at 182 *and Matter of Charles v Abrams*, 199 AD2d 652, 653 (3d Dept 1993). Both exemptions are intended to allow the "exchange [of] 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 Dept.,* 4 NY3d 477, 488 (2005); *see also Upjohn Co. v United States*, 449 US 383, 389 (1981) *and Fisher v United States*, 425 US 391, 403 (1976). However, neither exemption protects information where the withholding does not support the goal of free and frank communication in the deliberative process or the attorney-client relationship. *Matter of Gould v New York City Police Dept.,* 89 NY2d 267, 277 (1996); *and Fisher v United States*, 425 US 391, 403 (1976).

To address the goal of FOIL, to promote open government, and the competing goal of the exemptions to encourage full and frank communication, the court should require disclosure of documents that represent an agency's authoritative interpretations of law. *Miracle Mile Assoc. v Yudelson,* 68 AD2d at 182 *and Matter of Charles v Abrams*, 199 AD2d 652, 653 (3d Dept 1993).

Requiring the release of working law comports with FOIL's exhortation to read exemptions narrowly and in a manner that prevents an agency from selectively hiding information from public view. *See Matter of Miracle Mile Assoc. v Yudelson*, 68 AD2d at 182-183 (noting that an agency cannot use the inter-agency exemption to "throw a protective blanket over all information by casting it in the form of an internal memo").

A. All documents that announce any agency's policy or describe its interpretation of the law are available under the inter-agency privilege.

Agencies have a breadth of mechanisms available to make binding policy decisions. Therefore, the court must carefully scrutinize internal documents for binding policy and instructions, rather than looking solely to the power of the administrative mechanism. The legislature empowers administrative agencies to fill in the gaps between its legislative enactment and the day-to-day realities of implementing its mission. *Nicholas v. Kahn*, 47 NY2d 24, 31 (1979). Yet, agencies have considerable latitude to avoid the formal rulemaking process when creating binding rules that they follow in exercising their essential functions. M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. Chi. L. Rev. 1383, 1383-84 (2004). Agencies bind themselves to interpretations of the law and make working law by interpreting regulations, making determinations, writing manuals, and issuing directives. *See e.g.*, *Chinese Staff & Workers' Ass'n v Burden*, 88 AD3d

425, 429 (1st Dept 2011) (utilizing an agency's manual to determine if its environmental review process was lawful); *Fink v Lefkowitz*, 47 NY2d 567, 572 (1979) (requiring the disclosure of staff manuals under FOIL).

DOCCS itself broadly recognizes that these types of materials are subject to disclosure. For example, DOCCS maintains a library of its "directives" to "provide general information/guidance to assist regulated parties in complying with statutes, rules and other legal requirements" Department of Corrections and Community Supervision, *Laws, Rules & Directives Listing* https://perma.cc/GR6N-UKCP. All of these documents are subject to disclosure under FOIL because they constitute the working law of an agency and represent final agency policy or determinations or instructions to staff that affect the public. Public Officers Law 87(2)(g)(ii)-(iii). Any document that binds an agency to a uniform rule, makes a determination, or issues an instruction that affects the public is available through FOIL no matter the administrative mechanism selected by the agency. *Id.*; *Matter of Miracle Mile Assoc. v Yudelson*, 68 AD2d at 182.

B. Materials drafted by an attorney that constitute working law must be disclosed under FOIL.

Final agency policy or determinations and instructions to staff that affect the public remain public even where they are drafted by an attorney. *Matter of Charles v Abrams*, 199 AD2d at 653; *see Fink v Lefkowitz*, 47 NY2d at 572 (upholding the

disclosure of portions of an investigative manual drafted by attorneys that represented instructions to staff that affect the public); *and Williams & Connolly v Axelrod*, 139 AD2d 806 (3d Dept 1988) (noting that portions of a memorandum drafted in-part by an attorney may be subject to disclosure where it contained legal opinions, interpretations of a statute, recommendations for an administrative process, and opinions about whether an administrative process complied with the law). Inserting an attorney into the process of developing authoritative interpretations of law, or communicating the agency's final policy, does not change the analysis. *c.f. NLRB v Sears Roebuck & Co*., 421 US 132, 152-153 (1975). Records are subject to disclosure once an agency has adopted a policy or procedure, or has given an instruction to its staff that affects the public. Any contrary rule provides agencies with the opportunity to keep information secret solely by assigning the work to an attorney.

IV. Public Policy Interests Against Secrecy Outweighs Government Agency Interest in the Attorney-Client Privilege.

The justification for the attorney-client privilege is at its weakest where the government is the client. Leslie, 77 Ind. L.J. at 481. The attorney-client privilege in the government context is an extension of the corporate privilege *See Ross v City of Memphis*, 423 F.3d 596, 601 (6th Cir. 2005). Unfortunately, the privilege is often reflexively applied to the government without an examination of the rationale

for extending the attorney-client privilege to government entities. *In re Grand Jury Investigation*, 399 F.3d 527, 531 (2d Cir. 2005).

A government agency differs from a corporate client in important ways. First, the government differs from a corporate client because the government holds a position of public trust. *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 920 (8th Cir. 1997). The attorney-client privilege is an obstacle to truth-finding and to open government. *See Williams & Connolly v Axelrod*, 139 AD2d at 808-09. Like all exemptions to FOIL, the attorney-client privilege should be narrowly interpreted. *See Matter of Miracle Mile Assoc. v Yudelson*, 68 AD2d at 182. Where the attorney-client privilege would operate to bar access to the working law of an agency it should be cast aside. *See Fink v Lefkowitz*, 47 NY2d at 572 (1979); *see also* Kenneth Culp Davis, *The Information Act: A Preliminary Analysis*, 34 U. Chi. L. Rev 761, 792 (1967) (noting that the "the lawyer-client privilege is of little consequence" and would not modify a freedom of information act's directive to release an agency's working law). The government's position of public trust weighs heavily against applying the attorney-client privilege indiscriminately to all documents drafted by attorneys.

Second, government attorneys serve more than one role inside the government. In particular, attorneys can engage in policy formation, dissemination of formed policy, or neutral analysis of the law unconnected to pending litigation.

See Matter of Charles v Abrams, 199 AD2d at 653. As in the corporate context, an in-house attorney has mixed business and legal responsibility. *Saran v Chelsea GCA Realty Partnership, L.P.,* 174 AD3d 759, 760 (2d Dept 2019). "There is a heightened need to apply the privilege cautiously and narrowly in the case of in-house counsel, lest the mere participation of an attorney be used to seal off disclosure." *Id*. Where an attorney operates to formulate policy, rather than as a legal advisor, the attorney-client privilege does not apply. *In re Lindsey*, 148 F3d 1100, 1106 (D.C. Cir 1998); *and Matter of Charles v Abrams*, 199 AD2d 652, 653 (3d Dept 1993).

The need for heightened scrutiny is amplified in the government context because the "business" responsibility of a government attorney is to conduct the core functions of the agency including determining what the law is or should be. In-house government attorneys who analyze the law for compliance are different from corporate attorneys, because agencies are empowered to determine what the law is. *See Matter of Charles v Abrams*, 199 AD2d at 653; *and Fink v Lefkowitz*, 47 NY2d at 572. In fact, the process of making law is so integral to the business of an administrative agency that courts grant deference to agency interpretations of regulations. *427 West 51st St. Owners Corp. v Division of Hous. & Community Renewal*, 3 NY3d 337 (2004). Agencies have expansive power to "prescribe all that may fairly be thought necessary to foster … its essential functions." *Metro.*

Life Ins. Co. v New York State Labor Relations Bd., 280 NY 194, 208 (1939). It is this expansive power of the administrative state that spurred the passage of the Freedom of Information Law to allow the public access to agencies' internal workings. Public Officers Law §84 (noting the increased "sophistication and complexity" of the government).

Government attorneys make policy where their legal analysis is adopted by the agency. "Final" agency policy does not need to come from the highest official in an agency. *Matter of Miracle Mile Assoc. v Yudelson*, 68 AD2d at 181-82. Rather, final agency policy is available from each employee in a multilevel administrative process. *Id*. at 182. For example, a hearing officer's "report and recommendation" in an employee disciplinary proceeding is subject to disclosure even if it is sent to the Common Council to ultimately approve or deny. *Lee Enters., Inc. v City of Glen Falls*, 53 Misc3d 1217(A), 2016 N.Y. Slip Op. 51709(U) *2 (Sup Ct Warren County. 2016). In contrast, "drafts … revisions … and offers of advice" are not explanations of final agency decisions because they are "internal discussions on the entirely separate decision regarding what information to disclosed to the public." *Matter of Smith v New York State Off. of Attorney General*, 116 AD3d 1209, 1211 (3d Dept 2014). Where a lower-level government employee provides an analysis of policy options that is ultimately adopted by the agency, the analysis is subject to disclosure under FOIL. *Id.*; see

Yudelson, 68 AD2d at 182; *see also Matter of Ramahlo v Bruno*, 273 AD2d 521, 522 (3d Dept 2000). FOIL protects policy formation, but not descriptions or reasoning of already adopted policy. The same is true where that lower-level employee is a government attorney. *Matter of Charles v Abrams*, 199 AD2d at 653 *Coastal States Gas Corp v Dept of Energy*, 617 F2d 854, 863 (D.C. Cir. 1980).

The documents at issue in this case are training materials developed by agency attorneys. R. 169. They do not appear to be connected to any specific litigation, and they likely contain neutral analysis of the law. The court should closely scrutinize these documents to determine whether they provide a menu of policy options that the parole board can select or merely clarify the procedural and substantive law. If it is the former, the documents may still be available if the parole board accepts the agency attorney recommendations. If it is the latter, the documents are subject to disclosure without additional analysis.

CONCLUSION

The court should narrowly interpret the attorney-client privilege and inter-agency exemptions to FOIL to require the disclosure of agency working law. In particular, any document that reflects a neutral description of substantive or procedural law divorced from specific litigation is available under FOIL. Providing access to an agency's own interpretation of the law promotes democratic governance.

Dated: March 31, 2021
Buffalo, New York

Respectfully submitted,

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