

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

In the Matter of

AMERICA FIRST LEGAL FOUNDATION,

*Petitioner,*

For a judgment pursuant to Article 78 of the  
Civil Practice Law and Rules,

v.

ALVIN BRAGG, in his official capacity as  
DISTRICT ATTORNEY OF THE COUNTY  
OF NEW YORK, and NEW YORK  
COUNTY DISTRICT ATTORNEY'S  
OFFICE,

*Respondents.*

Index Number: \_\_\_\_\_

**VERIFIED PETITION**

**PRELIMINARY STATEMENT**

1. Petitioner AMERICA FIRST LEGAL FOUNDATION (“AFL” or “Petitioner”) brings this action against Respondent ALVIN BRAGG, in his official capacity as DISTRICT ATTORNEY OF THE COUNTY OF NEW YORK (“Bragg”), and Respondent NEW YORK COUNTY DISTRICT ATTORNEY’S OFFICE (the “DA’s Office,”) (each a “Respondent” and together, “Respondents”), and alleges as follows to compel compliance with the New York Freedom of Information Law (“FOIL”), codified at Public Officers Law (“POL”) §§ 84–90.

2. This petition arises from the Respondents’ repeated denial of multiple FOIL requests seeking information and records related to, *inter alia*, communications between the Respondents and the Biden-Harris Administration,<sup>1</sup> communications related to President Donald

<sup>1</sup> See Letter from Jim Jordan, Chairman, H. Comm. on the Judiciary, to Merrick Garland, Att’y Gen., Dep’t of Just. (Apr. 30, 2024), <https://bit.ly/3yBJUH9>.

J. Trump, and communications related to Judge Juan Merchan,<sup>2</sup> who recently presided over the matter captioned *People of the State of New York v. Donald J. Trump*, a case of immense national and political significance. The Respondents denied AFL’s FOIL requests for a variety of reasons, including that they are “overbroad,” that they impose too great a burden on the Respondents, and that they seek information protected by privilege or are otherwise exempt from disclosure. As demonstrated herein and in the annexed memorandum of law, the Respondents’ denial of AFL’s FOIL requests (and the appeals thereof) are arbitrary, capricious, and unlawful and must be vacated.

### JURISDICTION AND VENUE

3. This Court has jurisdiction over this action pursuant to Article 78 of the New York Civil Law and Practice Rules (“CPLR”). *See* CPLR §§ 306-b, 7801, 7804.

4. The Petitioner has exhausted all administrative remedies before seeking judicial review of the administrative decisions of Respondents. This Court now has jurisdiction over the matter because the Respondents’ denial of Petitioner’s appeals cannot be further “reviewed by appeal to a court or to some other body or officer.” *See* CPLR § 7801(1).

5. Venue is proper in this Court pursuant to CPLR § 506(b).

### PARTIES

6. The Petitioner, AFL, is a nonprofit organization working to promote the rule of law in the United States, prevent executive overreach, ensure due process and equal protection for all Americans, and encourage public knowledge and understanding of the law and individual rights

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<sup>2</sup> *See* Letter from Jim Jordan, Chairman, H. Comm. on the Judiciary, to Loren Merchan, President, Authentic Campaigns Inc. (Aug. 1, 2024), <https://bit.ly/4cqr4kd>; STAFF OF THE H. COMM. ON THE JUDICIARY, 118TH CONG., LAWFARE: HOW THE MANHATTAN DISTRICT ATTORNEY’S OFFICE AND A NEW YORK STATE JUDGE VIOLATED THE CONSTITUTIONAL AND LEGAL RIGHTS OF PRESIDENT DONALD J. TRUMP (July 9, 2024), <https://bit.ly/3X1ZbdC>.

guaranteed under the United States Constitution and the laws of the United States. AFL's mission includes promoting government transparency and accountability by gathering official information, analyzing it, and disseminating it through reports, press releases, and/or other media, including social media platforms, all to educate the public.

7. Respondent Alvin Bragg is the District Attorney of the County of New York and is in possession of, or otherwise the proper owner, in his official capacity as District Attorney, of the records that the Petitioner seeks. He is sued in his official capacity only.

8. Respondent New York County District Attorney's Office is subject to the FOIL by being a "state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof[.]" with its main office located at One Hogan Place, New York, NY 10013 and additional offices at 163 West 125<sup>th</sup> Street New York, NY 10027 and 530 West 166<sup>th</sup> Street, Suite 600A, New York, NY 10032.

9. The Respondents have possession, custody, and control of the requested records.

### **BACKGROUND**

10. In the FOIL, the New York Legislature has declared that "[t]he 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. Access to such information should not be thwarted by shrouding it with the cloak of secrecy or confidentiality." POL § 84.

11. The New York Legislature also declared "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." *Id.*

12. In a historic and unprecedented criminal trial, the New York Supreme Court found President Donald J. Trump guilty on 34 counts of falsifying business records in the first degree. *People of New York State v. Donald J. Trump*, 2024 WL 2783752 (Sup. Ct. N.Y. Cty. May 30, 2024) (the “Business Records Case”).

13. Because President Trump was a defendant in the Business Records Case, the details of this proceeding garnered significant national and international attention.<sup>3</sup>

14. Unsurprisingly, individuals and members of the press, including AFL, sought information related to the Business Records Case.

15. As a result of the Business Records Case, AFL submitted several FOIL requests seeking, *inter alia*, documents, records, communications, and information related to District Attorney Bragg’s prosecution of the Business Records Case.

16. Since the Business Records Case was highly politicized and attracted immense media coverage, AFL’s FOIL requests also sought information related to communications between District Attorney Bragg’s Office and outside groups, including the New York Times, the Free and Fair Litigation Group, and other organizations that were and continue to express opposition to President Trump and his re-election campaign.

17. As set forth in more detail below, the Respondents have consistently restricted AFL’s attempts to review records, documents, and communications related to President Trump, including records related to the Business Records Case.

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<sup>3</sup> See, e.g., Brooke Singman, *Trump Guilty on All Counts in New York Criminal Trial*, FOX NEWS (May 30, 2024), <https://bit.ly/4cjkhc2>; Madeline Halpert & Kayla Epstein, *Sentencing Set for 11 July as Trump Says Verdict ‘A Disgrace,’* BBC (May 30, 2024), <https://bit.ly/3WxH7qw>; Jesse McKinley, *‘Guilty,’ and History Is Made*, N.Y. TIMES (May 30, 2024), <https://bit.ly/4diJX9U>.

18. As set forth in more detail below, in response to AFL's FOIL requests, the Respondents insist that a single document is the only responsive and non-privileged or otherwise exempt record related to a variety of topics.

19. It is beyond cavil that the prosecuting attorneys of a historic case that commanded national and international attention are in possession of records or documents relating to the parties, officials, and other government entities involved in the Business Records Case.

20. This Court should reject the Respondents' attempts to shroud the records of historic significance in secrecy on the bases that the FOIL requests are allegedly "overbroad" and the efforts to collect and compile the requested records would be too burdensome for the Respondents, or that exemptions asserted in a conclusory fashion warrant the denial of these requests.

### **AFL'S FOIL REQUESTS**

#### *Requests 1, 2, and 3<sup>4</sup>*

21. On March 27, 2023, AFL submitted a FOIL request ("Request 1") to the Respondents requesting records of communications by custodians in the New York County District Attorney's Office relating to Donald J. Trump. *Exhibit 1.*

22. Request 1 sought a waiver of all search and duplication fees. *Id.*

23. On April 3, 2023, AFL received a letter from the Respondents acknowledging it had received Request 1 on March 27, 2023, stating that the Respondents would update AFL on the process on or before May 3, 2023. *Exhibit 2.*

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<sup>4</sup> Because the DA's Office assigned identification numbers to the FOIL Requests at issue, this Petition adopts the DA's Office's nomenclature.

24. On May 2, 2023, AFL received a letter from the Respondents stating that the Respondents estimated requiring an additional 90 days to process Request 1 and that it would provide an update on or before August 3, 2023. *Exhibit 3.*

25. On April 7, 2023, AFL submitted a FOIL request (“Request 2”) to the Respondents identifying additional custodians for the records described in Request 1. *Exhibit 4.*

26. Request 2 sought a waiver of all search and duplication fees. *Id.*

27. On April 10, 2023, AFL received a letter from the Respondents acknowledging it had received Request 2 request on April 7, 2023 and stating that the Respondents would update AFL on the process on or before May 10, 2023. *Exhibit 5.*

28. On April 20, 2023, AFL submitted a FOIL request (“Request 3”) to the Respondents identifying additional custodians for the records described in Request 1. *Exhibit 6.*

29. Request 3 sought a waiver of all search and duplication fees. *Id.*

30. On April 26, 2023, AFL received a letter from the Respondents acknowledging it had received Request 3 on April 20, 2023 and stating that the Respondents would update AFL on the process on or before May 19, 2023. *Exhibit 7.*

31. Until the August 3, 2023 letter identified below, AFL did not receive any correspondence related to Request 3.

32. On May 9, 2023, AFL received a letter from the Respondents stating that the Respondents estimated requiring an additional 90 days to process Request 2 and that it would provide an update on or before August 9, 2023. *Exhibit 8.*

33. On August 3, 2023, AFL received a letter from the Respondents stating that it had combined three AFL Requests 1, 2, and 3 because, as the Respondents described, the requests

“seek the same information and require the same search parameters, although they contain different custodian lists and a slight difference as to the time period.” *Exhibit 9*.

34. The Respondents stated in the August 3, 2023 letter that it estimated that the Respondents anticipated requiring an additional 60 days to process Requests 1, 2, and 3, and that the Respondents would update AFL on the process on or before October 3, 2023. *Id.*

35. On October 3, 2023, AFL received a letter from the Respondents stating that the Respondents anticipated requiring an additional 60 days to process Requests 1, 2, and 3, and that the Respondents would update AFL on the process on or before December 1, 2023. *Exhibit 10*.

36. In the October 3, 2023 letter, the Respondents also assigned Request 1 the tracking number 23F0204, Request 2 the tracking number 23F0236, and Request 3 the tracking number 23F0273. *Id.*

37. On December 1, 2023, AFL received a letter from the Respondents stating that the Respondents anticipated requiring an additional 30 days to process Requests 1, 2, and 3, and that the Respondents would update AFL on the process on or before January 2, 2024. *Exhibit 11*.

38. On January 2, 2024, AFL received a letter from the Respondents stating that the Respondents anticipated requiring an additional 30 days to process Requests 1, 2, and 3, and that the Respondents would update AFL on the process on or before February 2, 2024. *Exhibit 12*.

39. On February 2, 2024, AFL received a letter from the Respondents stating that the Respondents anticipated requiring an additional 30 days to process Requests 1, 2, and 3, and that the Respondents would update AFL on the process on or before March 4, 2024. *Exhibit 13*.

40. On March 4, 2024, AFL received a letter from the Respondents stating that the Respondents anticipated requiring an additional 30 days to process Requests 1, 2, and 3, and that the Respondents would update AFL on the process on or before April 4, 2024. *Exhibit 14*.

41. On April 5, 2024, AFL received a letter from the Respondents stating that the Respondents anticipated requiring an additional 30 days to process Requests 1, 2, and 3, and that the Respondents would update AFL on the process or a determination on or before May 3, 2024. *Exhibit 15.*

42. On May 3, 2024, AFL received a letter from the Respondents stating that the Respondents anticipated requiring an additional 30 days to process Requests 1, 2, and 3, and that the Respondents would update AFL on the process or a determination on or before June 3, 2024. *Exhibit 16.*

43. On June 3, 2024, AFL received a letter from the Respondents (the “June 3 Determination Letter”) stating that the Respondents’ Requests 1, 2, and 3 had been granted in part and denied in part. *Exhibit 17.*

44. The June 3 Determination Letter informed AFL that the Respondents had “conduct[ed] a diligent search for responsive records” and had identified one single-page record in response to AFL’s request for “all emails...or other communications...mentioning or regarding Donald J. Trump” with any of the following email domains: @who.eop.gov, @usdoj.gov, @usss.dhs.gov, @nytimes.com, and @freeandfairlitigation.org. *Id.*

45. The June 3 Determination Letter further informed AFL that the Respondents denied AFL’s requests for “All internal communications... mentioning or regarding Donald J. Trump” and for “All emails... or other communications with Lanny Davis” in their entirety, on the basis that they are “exempt from disclosure under FOIL because they relate to a pending criminal litigation, possibly contain attorney work product, and would fall under the grand jury secrecy protection.” *Id.*



46. The June 3 Determination Letter further denied AFL's request for "communications mentioning or regarding Donald J. Trump" with the email domain @usdoj.gov on the grounds of grand jury secrecy. *Id.*

47. The June 3 Determination Letter further denied AFL's request for communications with any person who is a Biden Administration political appointee, any person who is employed by the Department of Justice, any person employed by the Department of Homeland Security, any person employed by the New York Times, and any person on the team of the Free and Fair Litigation Group as "overly broad." *Id.*

48. The June 3 Determination Letter further denied AFL's request for "records relating to the processing" of documents sought by Requests 1, 2, and 3, was "necessarily denied." *Id.*

49. In sum, after taking over fourteen months to "conduct a diligent search," the Respondents produced one single-page record and summarily denied the remainder of Requests 1, 2, and 3.

50. On June 11, 2024, AFL appealed the June 3 Determination Letter to the DA's Office (the "June 11 Appeal"), arguing generally that the Respondents' wholesale refusal to disclose responsive records (rather than asserting particularized exemptions for individual records) was an error, and further arguing that the Respondents erred by failing to indicate whether the records could be redacted to prevent disclosure of exempted information. *Exhibit 18.*

51. On June 25, 2024, AFL received a letter from the Respondents (the "June 25 Appeal Denial") stating that the June 11 Appeal was denied, ratifying the Records Access Officer's refusal to conduct a search for responsive records, and identifying new grounds for the denial of AFL's request for records of communications with Lanny Davis. *Exhibit 19.*

52. The June 25 Appeal Denial stated, without any specific support, that the request seeking communications with Lanny Davis was denied “pursuant to POL § 87(2)(F)—endangering the life or safety of any person—where information sought could, by its inherent nature give rise to the implication that its release could endanger the life and safety of a witness or have a chilling effect on future witness cooperation.” *Id.*

53. The June 25 Appeal Denial further stated that because AFL’s request for SMS communications with certain custodians “contain[ed] no names, phone numbers, or subject or case references,” it would require more than “reasonable effort” for an agency to conduct a search and identify responsive records. *Id.* This position and the law are inapposite. Specifically, the Respondents are not permitted to deny a request simply because it seeks a large volume of records. POL § 89(3)(a).

54. As of the date of this filing, the Petitioner has received only one single-page document in response to FOIL Requests 1, 2, and 3.

*Request 7<sup>5</sup>*

55. On June 3, 2024, AFL submitted a FOIL request (“Request 7”) to the Respondents requesting records of all communications containing the term “Merchan.” *Exhibit 20.*

56. Request 7 sought a waiver of all search and duplication fees. *Id.*

57. On June 7, 2024, AFL received a letter from the Respondents (the “June 7 Denial”) denying Request 7 on the grounds that it was “overbroad” and “fail[ed] to reasonably describe the records,” further arguing that the request was burdensome because it failed to include a date range, which would require a search of records for the entire official career of each custodian, some

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<sup>5</sup> Because the DA’s Office assigned identification numbers to the FOIL Requests at issue, this Petition adopts the DA’s Office’s nomenclature. Other FOIL Requests filed by AFL have been filed with the DA’s Office, accounting for this numbering discrepancy.

spanning 25 years; because it was not limited to a particular type of communications; and because the search term “Merchan” would yield too many results. *Exhibit 21*.

58. The June 7 Denial was improper because agencies are not permitted to deny FOIL requests on the basis that the records sought are voluminous.

59. Moreover, the June 7 Denial was improper because the agency failed to demonstrate that the search term was insufficient to locate the records sought. The June 7 Denial listed several categories of records that could be searched for documents responsive to Request 7, including records of cases that are or were before Justice Merchan, records from custodians’ files during their employment with the Respondents, and the Respondents’ current electronic email system. *Id.*

60. On June 18, 2024, AFL appealed the June 7 Denial under N.Y. POL § 89(4)(a) (the “June 18 Appeal”), arguing that the Respondents’ denial of Request 4 was improper since, contrary to the Respondents’ assertion that the description was insufficient for the purpose of locating and identifying the requested documents, the Records Access Officer indicated that she knew exactly where to search. *Exhibit 22*.

61. On July 2, 2024, AFL received a letter from the Respondents stating that the June 18 Appeal was denied (the “July 2 Denial of Appeal”), stating that “the only way for this Office to have attempted to identify and locate the records ... would have been to engage in colossal efforts” and blaming the denial on AFL’s lack of an “attempt to narrow [the] FOIL request.” *Exhibit 23*.

62. Shortly after making the claim that AFL had failed to narrow its request, the July 2 Denial of Appeal took issue with the fact that AFL had “agreed to narrow the date range of your June 3, 2023 FOIL Request.” *Id.* This not only contradicts the Respondents’ earlier statement that

AFL had failed to make any effort to narrow its request, but it also demonstrates AFL's willingness to reduce the burden on Respondents as a result of the FOIL requests.

63. The Respondents' insistence that AFL's FOIL requests are "open-ended fishing expeditions" that seek to impose an undue burden on the Respondents is improper. Respondents cannot legitimately object on the basis that the documents sought are high-volume, especially in view of AFL's repeated attempts to narrow or otherwise limit the scope of records sought by the FOIL requests.

64. The Respondents' baseless and continued denial of AFL's FOIL requests infringes on "the people's right to know the process of governmental decision-making and to review the documents and statistics leading to determinations." POL § 84.

65. The Respondents' repeated argument that the documents sought by AFL's FOIL requests are too voluminous is not an adequate basis for denying access to the records sought. AFL has continued to demonstrate its willingness to cooperate with the Respondents, including through the rolling release of documents and narrowing the date ranges to be searched, to no avail. The Respondents remain steadfast in their efforts to keep secret the documents related to a recent criminal case that garnered significant national interest, is of immense historic consequence, and is highly controversial.

66. Accordingly, the Respondents must be required to permit citizen access to the requested records so that they may gain an understanding of recent governmental actions.

**AS AND FOR A FIRST CAUSE OF ACTION**  
(Judgment Pursuant to CPLR § 7801 *et seq.*, POL § 84 *et seq.*)

67. AFL repeats each and every allegation of the preceding paragraphs.

68. AFL explicitly adopts and asserts all of the arguments in the annexed Memorandum of Law in Support of Verified Petition.

69. AFL properly requested records within the possession, custody, and control of the Respondents.

70. The Respondents failed to conduct searches for responsive records.

71. Moreover, because the Respondents failed to conduct searches, it has failed to disclose any segregable, non-exempt portions of responsive records. POL § 87(2).

72. To the extent the Respondents have conducted searches for responsive records, they have improperly refused to disclose those records to AFL.

73. The Respondents have failed to grant AFL's requests within a reasonable time period. *See* POL § 89(3)(a).

74. The Respondents have violated the FOIL by failing to reasonably search for records responsive to AFL's FOIL request and release nonexempt records within a reasonable time period.

75. The Respondents' decisions denying each of AFL's FOIL requests are improper and/or are demonstrably arbitrary, capricious, and unlawful.

76. The Respondents' decisions delaying its responses to each of AFL's FOIL requests is arbitrary, capricious, and unlawful.

77. Since the "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," the Respondents' denial of AFL's FOIL requests violates POL § 84 *et seq.*

### **PRAYER FOR RELIEF**

WHEREFORE, AFL respectfully requests that this Court:

- i. Declare that the records sought by AFL's requests must be disclosed pursuant to POL § 87(2);

- ii. Order the Respondents to search for the requested records and demonstrate to AFL that the Respondents used search methods reasonably likely to lead to the discovery of responsive records;
- iii. Order the Respondents to produce by a date certain all records, or segregable portions of records, responsive to AFL's FOIL requests that are subject to release under the New York Freedom of Information Law, accompanied by a list enumerating or describing the documents withheld under legitimate exemptions together with a description of the basis for those exemptions;
- iv. Declare the Respondents are estopped from seeking costs and fees for the requests due to the balance of the equities and the incorporation of common law principles by POL § 89(6);
- v. Award AFL attorneys' fees and costs incurred in this action pursuant to POL § 89(4)(c); and
- vi. Grant AFL such other and further relief as this Court deems proper.

Dated: August 12, 2024  
New York, New York

Respectfully submitted,

By: /s/ Edward A. Paltzik  
Edward Andrew Paltzik, Esq.  
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Michael Ding (admission pro hac vice forthcoming)  
William Scolinos (admission pro hac vice forthcoming)  
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William.Scolinos@aflegal.org  
(202) 964-3721

*Counsel for the Petitioner  
America First Legal Foundation*

**VERIFICATION**

EDWARD ANDREW PALTZIK, Esq., duly affirms and deposes as follows:

I am Of Counsel to the Law Firm of Bochner PLLC, attorneys for Petitioner AMERICA FIRST LEGAL FOUNDATION (hereinafter "Petitioner") in this special proceeding. I have read the annexed Verified Petition and know the contents thereof to be true to the best of my knowledge and based upon my own personal knowledge, except as to matter therein stated on information and belief, and as to those matters I believe them to be true. The grounds of my belief as to all matters not stated upon my personal knowledge are correspondence and other documentation furnished to me by Petitioner and by other members of this Law Firm. The reason why the verification is not made by the Petitioner is that, pursuant to CPLR § 3023(d)(3), the Petitioner is located in a county other than that in which my practice is located.

Dated: August 12, 2024  
New York, New York

/s Edward Andrew Paltzik  
EDWARD ANDREW PALTZIK



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

In the Matter of

AMERICA FIRST LEGAL FOUNDATION,

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For a judgment pursuant to Article 78 of the  
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ALVIN BRAGG, in his official capacity as  
DISTRICT ATTORNEY OF THE COUNTY  
OF NEW YORK, and NEW YORK  
COUNTY DISTRICT ATTORNEY'S  
OFFICE,

*Respondents.*

Index Number: \_\_\_\_\_

**NOTICE OF PETITION**

**PLEASE TAKE NOTICE**, that upon the annexed Verified Petition, dated the August 12, 2024, the exhibits attached thereto, the Memorandum of Law in Support of the Verified Petition dated August 12, 2024, and upon all of the pleadings and proceedings heretofore had herein, an application will be made at a Civil Term of the Supreme Court of the State of New York, County of New York, at an I.A.S. part thereof, to be held at the Courthouse thereof, located at 60 Centre Street New York, NY 10007 on the 5th day of September, 2024, at 9:30 in the forenoon of that day, or as soon thereafter as counsel can be heard, for a judgment pursuant to C.P.L.R. § 7801 *et seq.* and Public Officers Law (“POL”) § 84 *et seq* for relief as follows:

- i. A declaration that the records sought by Petitioner’s requests must be disclosed pursuant to New York Freedom of Information Law (“FOIL”), codified at “POL” §§ 84–90;

ii. An order requiring the Respondents to search for the requested records, and demonstrate to Petitioner that Respondents used search methods reasonably likely to lead to the discovery of responsive records;

iii. An order that the Respondents to produce by a date certain all records, or segregable portions of records, responsive to Petitioner's FOIL requests that are subject to release under the POL, accompanied by a list enumerating or describing the documents withheld under legitimate exemptions together with a description of the basis for those exemptions;

iv. A declaration that the Respondents are estopped from seeking costs and fees for the requests, due to the balance of the equities and the incorporation of common law principles by POL § 89(6);

v. An award to Petitioner of attorneys' fees and costs incurred in this action pursuant to POL § 89(4)(c); and

vi. Such other and further relief as this Court deems proper.

**PLEASE TAKE FURTHER NOTICE** that, pursuant to C.P.L.R. § 7804(c), an Answer and supporting Affidavits, if any, are to be served no later than five days prior to the return date hereof.

Dated: August 12, 2024  
New York, New York

Respectfully submitted,

By: /s/ Edward A. Paltzik  
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*Counsel for the Petitioner  
America First Legal Foundation*



March 27, 2023

**Via Electronic Mail:** FOIL@dany.nyc.gov

Office of the General Counsel, Civil Litigation Unit  
New York County District Attorney's Office  
One Hogan Place, New York, NY 10013  
Attn: Records Access Officer

## **Freedom of Information Law Request: Communications Regarding Donald J. Trump**

Dear Sir/Madam:

America First Legal Foundation (“AFL”) is a national, nonprofit legal foundation working to promote the rule of law, prevent executive overreach, protect due process and equal protection, and educate Americans about the individual rights guaranteed under the Constitution and laws of the United States. Our mission includes promoting government transparency and accountability by gathering official information, analyzing it, and disseminating it through reports, press releases, and media, including social media platforms, all to educate the public and to keep government officials accountable for their duty to faithfully execute, protect, and defend the Constitution and laws of the United States.

To shed light on government operations and decision-making, we file Freedom of Information requests on issues of pressing public concern, then disseminate the information we obtain, making documents broadly available to the public, scholars, and the media. Using our editorial skills to turn raw materials into distinct work, we distribute that work to a national audience through traditional and social media platforms. AFL’s email list contains over 55,000 unique addresses, our Twitter page has 63,700 followers, the Twitter page of our Founder and President has over 422,6800 followers, our Facebook page has 120,000 followers, and we have another 31,700 followers on GETTR.

### **I. Custodians**

- A. Alvin Bragg
- B. Cyrus Vance
- C. Meg Reiss
- D. Brian Crow

611 Pennsylvania Ave SE #231

Washington, DC 20003

320 South Madison Avenue

Monroe, Georgia 30655

- E. Lisa DelPizzo
- F. Leslie Dubeck
- G. Gloria Garcia
- H. Susan Hoffinger
- I. Peter Pope
- J. Jordan Stockdale
- K. Chanterelle Sung

## II. Requested Records

Pursuant to the New York Freedom of Information Law, N.Y. Pub. Off. Law § 86 et seq., AFL requests disclosure of the following records:

- A. All internal communications—via email, SMS text, Signal, WhatsApp, or other messaging platforms—mentioning or regarding Donald J. Trump.
- B. All emails, SMS text, Signal, WhatsApp, or other communications on similar messaging platforms mentioning or regarding Donald J. Trump with any of the following email domains:
  - 1. @who.eop.gov
  - 2. @usdoj.gov
  - 3. @usss.dhs.gov
  - 4. @nytimes.com
  - 5. @freeandfairlitigation.org
- C. All SMS text, Signal, WhatsApp, or similar communications with any of the following persons:
  - 1. Any person who is a Biden Administration political appointee
  - 2. Any person who is employed by the United States Department of Justice
  - 3. Any person employed by the United States Department of Homeland Security
  - 4. Any person employed by the New York Times
  - 5. Any person on the team of the Free and Fair Litigation Group
- D. All emails, SMS text, Signal, WhatsApp, or other communications with Lanny Davis of the law firm of Davis Goldberg & Galper PLLC and/or the public relations firm Trident DMG.
- E. All records relating to the processing of these items.

The relevant time frame is February 1, 2022, to the date of production.

### III. Processing and Production

AFL, as a news media requestor, seeks a waiver of all search and duplication fees. The requested documents will be posted in their entirety on our website and made freely available to the public, and this request is not being made for commercial purposes.

Processing should occur in strict compliance with applicable state laws and regulations. Among other things, you must search the custodians' personal emails and devices. Encrypted messaging does not shield disclosable records from public view.

If you have any questions about our request or believe further discussions regarding search and processing would facilitate more efficient production, then please contact me at FOIA@aflegal.org. Also, if AFL's fee waiver request is not granted in full, please contact us immediately upon making that determination.

To accelerate your release of responsive records, AFL welcomes production on an agreed rolling basis. Please provide responsive records in an electronic format by email. Alternatively, please provide responsive records in native format or in PDF format on a USB drive to America First Legal Foundation, 611 Pennsylvania Ave SE #231, Washington, DC 20003.

Thank you in advance for your cooperation.

Sincerely,

/s/ Reed D. Rubinstein

America First Legal Foundation

**DISTRICT ATTORNEY  
COUNTY OF NEW YORK  
ONE HOGAN PLACE  
New York, N. Y. 10013  
(212) 335-9000**



**ALVIN L. BRAGG, JR.**  
DISTRICT ATTORNEY

April 3, 2023

[VIA EMAIL: [foia@aflegal.org](mailto:foia@aflegal.org)]  
Reed D. Rubenstein  
America First Legal Foundation  
611 Pennsylvania Ave. SE #231  
Washington, DC 20003

Re: FOIL Request  
Communications Regarding Donald J. Trump

To Reed D. Rubenstein:

I am an Assistant District Attorney in New York County assigned to be the Records Access Officer in connection with your request under the Freedom of Information Law (FOIL). The request was received by this office via email on March 27, 2023.

Given the complexity and size of your request we will need additional time to gather the relevant records, which must be reviewed in order to rule upon your request. I am unable to give you a definite date for completion of this determination, however, you can expect an update of the process on or before May 3, 2023.

Sincerely,

Madeleine Guilmain  
Assistant District Attorney  
Records Access Officer

**DISTRICT ATTORNEY  
COUNTY OF NEW YORK  
ONE HOGAN PLACE  
New York, N. Y. 10013  
(212) 335-9000**



**ALVIN L. BRAGG, JR.**  
DISTRICT ATTORNEY

May 2, 2023

[VIA EMAIL: [foia@aflegal.org](mailto:foia@aflegal.org)]  
Reed D. Rubinstein  
America First Legal Foundation  
611 Pennsylvania Ave. SE #231  
Washington, DC 20003

Re: FOIL Request #1, dated March 27, 2023  
Communications Regarding Donald J. Trump

To Reed D. Rubenstein:

As the assigned Records Access Officer for your request under the Freedom of Information Law ("FOIL"), I am writing to let you know that we are in the process of collecting the records you requested.

Given the size and complexity of your request, we will require significantly more time to gather and review those materials before we can reach a determination on your request. We estimate this process will take at least 90 days. I will therefore provide you with either my determination, or a further update, on or before August 3, 2023.

Sincerely,

A handwritten signature in black ink, appearing to read "Madeleine Guilmain", written over a horizontal line.

Madeleine Guilmain  
Assistant District Attorney  
Records Access Officer





April 7, 2023

**Via Electronic Mail:** FOIL@dany.nyc.gov

Office of the General Counsel, Civil Litigation Unit  
New York County District Attorney's Office  
One Hogan Place, New York, NY 10013  
Attn: Records Access Officer

## **Freedom of Information Law Request: Communications Regarding Donald J. Trump**

Dear Sir/Madam:

America First Legal Foundation (“AFL”) is a national, nonprofit legal foundation working to promote the rule of law, prevent executive overreach, protect due process and equal protection, and educate Americans about the individual rights guaranteed under the Constitution and laws of the United States. Our mission includes promoting government transparency and accountability by gathering official information, analyzing it, and disseminating it through reports, press releases, and media, including social media platforms, all to educate the public and to keep government officials accountable for their duty to faithfully execute, protect, and defend the Constitution and laws of the United States.

To shed light on government operations and decision-making, we file Freedom of Information requests on issues of pressing public concern, then disseminate the information we obtain, making documents broadly available to the public, scholars, and the media. Using our editorial skills to turn raw materials into distinct work, we distribute that work to a national audience through traditional and social media platforms. AFL’s email list contains over 55,000 unique addresses, our Twitter page has 63,700 followers, the Twitter page of our Founder and President has over 422,6800 followers, our Facebook page has 120,000 followers, and we have another 31,700 followers on GETTR.

### **I. Custodians**

- A. Matthew Colangelo
- B. Mark Pomerantz

611 Pennsylvania Ave SE #231

Washington, DC 20003

320 South Madison Avenue

Monroe, Georgia 30655

## II. Requested Records

Pursuant to the New York Freedom of Information Law, N.Y. Pub. Off. Law § 86 et seq., AFL requests disclosure of the following records:

- A. All internal communications—via email, SMS text, Signal, WhatsApp, or other messaging platforms—mentioning or regarding Donald J. Trump.
- B. All emails, SMS text, Signal, WhatsApp, or other communications on similar messaging platforms mentioning or regarding Donald J. Trump with any of the following email domains:
  1. @who.eop.gov
  2. @usdoj.gov
  3. @usss.dhs.gov
  4. @nytimes.com
  5. @freeandfairlitigation.org
- C. All SMS text, Signal, WhatsApp, or similar communications with any of the following persons:
  1. Any person who is a Biden Administration political appointee
  2. Any person who is employed by the United States Department of Justice
  3. Any person employed by the United States Department of Homeland Security
  4. Any person employed by the New York Times
  5. Any person on the team of the Free and Fair Litigation Group
- D. All emails, SMS text, Signal, WhatsApp, or other communications with Lanny Davis of the law firm of Davis Goldberg & Galper PLLC and/or the public relations firm Trident DMG.
- E. All records relating to the processing of these items.

The relevant time frame is January 1, 2022, to the date of production.

## III. Processing and Production

As a news media requestor, AFL seeks a waiver of all search and duplication fees. The requested documents will be posted in their entirety on our website and made freely available to the public, and this request is not being made for commercial purposes.

Processing should occur in strict compliance with applicable state laws and regulations. Among other things, you must search the custodians' personal emails and devices. Encrypted messaging does not shield disclosable records from public view.

If you have any questions about our request or believe further discussions regarding search and processing would facilitate more efficient production, then please contact me at FOIA@aflegal.org. Also, if AFL's fee waiver request is not granted in full, please contact us immediately upon making that determination.

To accelerate your release of responsive records, AFL welcomes production on an agreed rolling basis. Please provide responsive records in an electronic format by email. Alternatively, please provide responsive records in native format or in PDF format on a USB drive to America First Legal Foundation, 611 Pennsylvania Ave SE #231, Washington, DC 20003.

Thank you in advance for your cooperation.

Sincerely,

/s/ Jacob Meckler

America First Legal Foundation

**DISTRICT ATTORNEY  
COUNTY OF NEW YORK  
ONE HOGAN PLACE  
New York, N. Y. 10013  
(212) 335-9000**



**ALVIN L. BRAGG, JR.**  
DISTRICT ATTORNEY

April 10, 2023

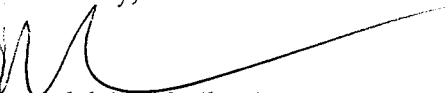
[VIA EMAIL: [foia@aflegal.org](mailto:foia@aflegal.org)]  
Jacob Meckler  
America First Legal Foundation  
611 Pennsylvania Ave. SE #231  
Washington, DC 20003

Re: FOIL Request  
Communications Regarding Donald J. Trump

To Jacob Meckler:

I am an Assistant District Attorney in New York County assigned to be the Records Access Officer in connection with your request under the Freedom of Information Law (FOIL). The request was received by this office via email on April 7, 2023.

Given the complexity and size of your request we will need additional time to gather the relevant records, which must be reviewed in order to rule upon your request. I am unable to give you a definite date for completion of this determination, however, you can expect an update of the process on or before May 10, 2023.

Sincerely,  
  
Madeleine Guilmain  
Assistant District Attorney  
Records Access Officer



April 20, 2023

**Via Electronic Mail:** FOIL@dany.nyc.gov

Office of the General Counsel, Civil Litigation Unit  
New York County District Attorney's Office  
One Hogan Place, New York, NY 10013  
Attn: Records Access Officer

## **Freedom of Information Law Request: Communications Regarding Donald J. Trump**

Dear Sir/Madam:

America First Legal Foundation is a national, nonprofit organization working to promote the rule of law in the United States, prevent executive overreach, and ensure due process and equal protection for all Americans, all to promote public knowledge and understanding of the law and individual rights guaranteed under the Constitution and laws of the United States. To that end, we file Freedom of Information Act (FOIA) requests on issues of pressing public concern, then disseminate the information we obtain, making documents broadly available to the public, scholars, and the media. Using our editorial skills to turn raw materials into distinct work, we distribute that work to a national audience through traditional and social media platforms. AFL's email list contains over 63,000 unique addresses, our Twitter page has 68,700 followers, the Twitter page of our Founder and President has over 429,000 followers, our Facebook page has 122,000 followers, and we have another 31,800 followers on GETTR.

### **I. Custodians**

- A. Elyssa Abuhoff
- B. Caroline Williamson
- C. Gary T. Fishman

### **II. Requested Records**

Pursuant to the New York Freedom of Information Law, N.Y. Pub. Off. Law § 86 et seq., AFL requests disclosure of the following records:

611 Pennsylvania Ave SE #231

320 South Madison Avenue

Washington, DC 20003

Monroe, Georgia 30655

- A. All internal communications—via email, SMS text, Signal, WhatsApp, or other messaging platforms—mentioning or regarding Donald J. Trump.
- B. All emails, SMS text, Signal, WhatsApp, or other communications on similar messaging platforms mentioning or regarding Donald J. Trump with any of the following email domains:
  - 1. @who.eop.gov
  - 2. @usdoj.gov
  - 3. @usss.dhs.gov
  - 4. @nytimes.com
  - 5. @freeandfairlitigation.org
- C. All SMS text, Signal, WhatsApp, or similar communications with any of the following persons:
  - 1. Any person who is a Biden Administration political appointee
  - 2. Any person who is employed by the United States Department of Justice
  - 3. Any person employed by the United States Department of Homeland Security
  - 4. Any person employed by the New York Times
  - 5. Any person on the team of the Free and Fair Litigation Group
- D. All emails, SMS text, Signal, WhatsApp, or other communications with Lanny Davis of the law firm of Davis Goldberg & Galper PLLC and/or the public relations firm Trident DMG.
- E. All records relating to the processing of these items.

The relevant time frame is February 1, 2022, to the date of production.

### III. Processing and Production

AFL, as a news media requestor, seeks a waiver of all search and duplication fees. The requested documents will be posted in their entirety on our website and made freely available to the public, and this request is not being made for commercial purposes.

Processing should occur in strict compliance with applicable state laws and regulations. Among other things, you must search the custodians' personal emails and devices. Encrypted messaging does not shield disclosable records from public view.

If you have any questions about our request or believe further discussions regarding search and processing would facilitate more efficient production, then please contact me at FOIA@aflegal.org. Also, if AFL's fee waiver request is not granted in full, please contact us immediately upon making that determination.

To accelerate your release of responsive records, AFL welcomes production on an agreed rolling basis. Please provide responsive records in an electronic format by email. Alternatively, please provide responsive records in native format or in PDF format on a USB drive to America First Legal Foundation, 611 Pennsylvania Ave SE #231, Washington, DC 20003.

Thank you in advance for your cooperation.

Sincerely,

/s/ Michael Ding

America First Legal Foundation

DISTRICT ATTORNEY  
COUNTY OF NEW YORK  
ONE HOGAN PLACE  
New York, N. Y. 10013  
(212) 335-9000



ALVIN L. BRAGG, JR.  
DISTRICT ATTORNEY

April 26, 2023

[VIA EMAIL: [foia@aflegal.org](mailto:foia@aflegal.org)]  
Michael Ding  
America First Legal Foundation  
611 Pennsylvania Ave. SE #231  
Washington, DC 20003

Re: FOIL Request  
Communications Regarding Donald J. Trump

Dear Mr. Ding,

I am an Assistant District Attorney in New York County assigned to be the Records Access Officer in connection with your request under the Freedom of Information Law (FOIL). The request was received by this office via email on April 20, 2023.

Given the complexity and size of your request we will need additional time to locate and identify potentially responsive records, which in turn must be reviewed in order to rule upon your request. You can expect a determination or an update of the process on or before May 19, 2023.

Sincerely,

Victor Olds  
Assistant District Attorney  
Records Access Officer



**DISTRICT ATTORNEY  
COUNTY OF NEW YORK  
ONE HOGAN PLACE  
New York, N. Y. 10013  
(212) 335-9000**



**ALVIN L. BRAGG, JR.**  
DISTRICT ATTORNEY

May 9, 2023

[VIA EMAIL: [foia@aflegal.org](mailto:foia@aflegal.org)]  
Jacob Meckler  
America First Legal Foundation  
611 Pennsylvania Ave. SE #231  
Washington, DC 20003

Re: FOIL Request #2 - dated April 7, 2023  
Communications Regarding Donald J. Trump

To Jacob Meckler:

As the assigned Records Access Officer for your request under the Freedom of Information Law (“FOIL”), I am writing to let you know that we are in the process of searching for potentially responsive records.

Given the size and complexity of your request, we will require significantly more time to gather and review those materials before we can reach a determination on your request. We estimate this process will take at least 90 days. I will therefore provide you with either my determination, or a further update, on or before August 9, 2023.

Sincerely,

Madeleine Guilmain  
Assistant District Attorney  
Records Access Officer

**DISTRICT ATTORNEY**  
**COUNTY OF NEW YORK**  
ONE HOGAN PLACE  
New York, N. Y. 10013  
(212) 335-9000

RECEIVED NYSCEF: 08/12/2024



**ALVIN L. BRAGG, JR.**  
DISTRICT ATTORNEY

August 3, 2023

[VIA EMAIL: [foia@aflegal.org](mailto:foia@aflegal.org)]

Reed Rubinstein

Jacob Meckler

Michael Ding

America First Legal Foundation

611 Pennsylvania Ave. SE #231

Washington, DC 20003

Re: FOIL Request #1 – dated March 27, 2023  
FOIL Request #2 – dated April 7, 2023  
FOIL Request #3 – dated April 20, 2023  
Communications Regarding Donald J. Trump

To Reed Rubinstein, Jacob Meckler and Michael Ding:

Please note that because the three FOIL requests listed above seek the same information and require the same search parameters, although they contain different custodian lists and a slight difference as to the time period, we are combining the three requests for the purpose of greater efficiency in conducting our search for records. In addition, request dated April 20, 2023, formerly handled by ADA Victor Olds, has been reassigned to me. As the assigned Records Access Officer for your requests under the Freedom of Information Law (“FOIL”), I am writing to update you on the process of our search for potentially responsive records.

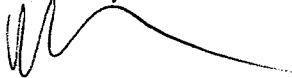
A request to search e-mails to and from those custodians listed in your three requests has been submitted and is currently in the queue of other FOIL and discovery requests that must be handled by our IT department, in the order in which they are received. Please note that we have a large number of other FOIL requests, including other requests for communications connected to the Trump investigation. Moreover, to the extent that your request overlaps with discovery obligations in the Trump criminal prosecution, those criminal discovery obligations must receive priority. Once the records to be searched are collected and gathered into a searchable system,

the specific term searches you requested will be conducted in order to identify potentially responsive records.

Based on the information provided by our IT unit and the number of similar searches pending, I estimate that the process of collecting records and conducting the term searches will take at least an additional 60 days. Please be advised that once potentially responsive records are identified and collected in a searchable form, they must then be reviewed by me before a determination is made.

You can expect an update of this process on or before October 3, 2023.

Sincerely,



Madeleine Guilmain  
Assistant District Attorney  
Records Access Officer

**DISTRICT ATTORNEY  
COUNTY OF NEW YORK  
ONE HOGAN PLACE  
New York, N. Y. 10013  
(212) 335-9000**



**ALVIN L. BRAGG, JR.**  
DISTRICT ATTORNEY

October 3, 2023

[VIA EMAIL: [foia@aflegal.org](mailto:foia@aflegal.org)]

Reed Rubinstein  
Jacob Meckler  
Michael Ding  
America First Legal Foundation  
611 Pennsylvania Ave. SE #231  
Washington, DC 20003

Re: 23F0204 - FOIL Request #1 – dated March 27, 2023  
23F0236 - FOIL Request #2 – dated April 7, 2023  
23F0273 - FOIL Request #3 – dated April 20, 2023  
Communications Regarding Donald J. Trump

To Reed Rubinstein, Jacob Meckler and Michael Ding:

Per my last update letter dated August 3, 2023, I am writing to update you on the process of searching for responsive records. I have been informed by IT that keyword searches of the relevant email accounts should be completed within the next two weeks. Once I have received the results I will review them to determine whether the records are responsive and for any applicable exemptions. As I have indicated previously, given the size and complexity of your request, and the number of other FOIL requests pending, some of which were submitted to this office prior to yours, I estimate that this process will take at least another 60 days. I will therefore provide you with an additional update, or a determination, on or before December 1, 2023.

Sincerely,

Madeleine Guilmain  
Assistant District Attorney  
Records Access Officer

**DISTRICT ATTORNEY  
COUNTY OF NEW YORK  
ONE HOGAN PLACE  
New York, N. Y. 10013  
(212) 335-9000**



**ALVIN L. BRAGG, JR.**  
DISTRICT ATTORNEY

December 1, 2023

[VIA EMAIL: [foia@aflegal.org](mailto:foia@aflegal.org)]

Reed Rubinstein  
Jacob Meckler  
Michael Ding  
America First Legal Foundation  
611 Pennsylvania Ave. SE #231  
Washington, DC 20003

Re: 23F0204 - FOIL Request #1 – dated March 27, 2023  
23F0236 - FOIL Request #2 – dated April 7, 2023  
23F0273 - FOIL Request #3 – dated April 20, 2023  
Communications Regarding Donald J. Trump

To Reed Rubinstein, Jacob Meckler and Michael Ding:

Per my last update letter dated October 3, 2023, I am writing to update you on the process of searching for responsive records. As I previously explained, I submitted a request to our IT unit for keyword searches of the relevant email accounts pursuant to your request. I have just recently received several thousand records as the result of those searches. Those records must now be reviewed first for responsiveness to your request and then for a determination as to whether responsive records fall under any exceptions to disclosure under FOIL. I am in the process of reviewing these records at this time. Given the volume of records, and the amount of time it is taking to review them, I estimate that I will need another 30 days to complete my review. You can therefore expect an update of the review process, or a determination, on or before January 2, 2024.

Sincerely,

Madeleine Guilmain  
Assistant District Attorney  
Records Access Officer

**DISTRICT ATTORNEY  
COUNTY OF NEW YORK  
ONE HOGAN PLACE  
New York, N. Y. 10013  
(212) 335-9000**



**ALVIN L. BRAGG, JR.**  
DISTRICT ATTORNEY

January 2, 2024

[VIA EMAIL: [foia@aflegal.org](mailto:foia@aflegal.org)]

Reed Rubinstein  
Jacob Meckler  
Michael Ding  
America First Legal Foundation  
611 Pennsylvania Ave. SE #231  
Washington, DC 20003

Re: 23F0204 - FOIL Request #1 – dated March 27, 2023  
23F0236 - FOIL Request #2 – dated April 7, 2023  
23F0273 - FOIL Request #3 – dated April 20, 2023  
Communications Regarding Donald J. Trump

To Reed Rubinstein, Jacob Meckler and Michael Ding:

Per my last update letter dated December 1, 2023, I am writing to update you on the process of searching for responsive records. As I previously explained, I submitted a request to our IT unit for keyword searches of the relevant email accounts pursuant to your request, and received several thousand records as the result of those searches. I am still in the process of reviewing those records, first for responsiveness to your request and then for a determination as to whether responsive records fall under any exceptions to disclosure under FOIL. Given the volume of records, and the amount of time it is taking to review them, I estimate that I will need another 30 days to complete my review. You can therefore expect an update of the review process, or a determination, on or before February 2, 2024.

Sincerely,

Madeleine Guilmain  
Assistant District Attorney  
Records Access Officer



**DISTRICT ATTORNEY  
COUNTY OF NEW YORK  
ONE HOGAN PLACE  
New York, N. Y. 10013  
(212) 335-9000**



**ALVIN L. BRAGG, JR.**  
DISTRICT ATTORNEY

February 2, 2024

[VIA EMAIL: [foia@aflegal.org](mailto:foia@aflegal.org)]  
Reed Rubinstein  
Jacob Meckler  
Michael Ding  
America First Legal Foundation  
611 Pennsylvania Ave. SE #231  
Washington, DC 20003

Re: 23F0204 - FOIL Request #1 – dated March 27, 2023  
23F0236 - FOIL Request #2 – dated April 7, 2023  
23F0273 - FOIL Request #3 – dated April 20, 2023  
Communications Regarding Donald J. Trump

To Reed Rubinstein, Jacob Meckler and Michael Ding:

Per my last update letter dated January 2, 2024, I am writing to update you on the process of searching for responsive records. I am still in the process of reviewing the records we located pursuant to a search for relevant keywords, first for responsiveness to your request and then for a determination as to whether responsive records fall under any exceptions to disclosure under FOIL. Given the volume of records, and the amount of time it is taking to review them, I estimate that I will need another 30 days to complete my review. You can therefore expect an update of the review process, or a determination, on or before March 4, 2024.

Sincerely,

Madeleine Guilmain  
Assistant District Attorney  
Records Access Officer

**DISTRICT ATTORNEY  
COUNTY OF NEW YORK  
ONE HOGAN PLACE  
New York, N. Y. 10013  
(212) 335-9000**



**ALVIN L. BRAGG, JR.**  
DISTRICT ATTORNEY

March 4, 2024

[VIA EMAIL: [foia@aflegal.org](mailto:foia@aflegal.org)]

Reed Rubinstein  
Jacob Meckler  
Michael Ding  
America First Legal Foundation  
611 Pennsylvania Ave. SE #231  
Washington, DC 20003

Re: 23F0204 - FOIL Request #1 – dated March 27, 2023  
23F0236 - FOIL Request #2 – dated April 7, 2023  
23F0273 - FOIL Request #3 – dated April 20, 2023  
Communications Regarding Donald J. Trump

To Reed Rubinstein, Jacob Meckler and Michael Ding:

Per my last update letter dated February 2, 2024, I am writing to update you on the process of searching for responsive records. I am still in the process of reviewing the records we located pursuant to a search for relevant keywords, first for responsiveness to your request, and then for a determination as to whether responsive records fall under any exceptions to disclosure under FOIL. Given the volume of records, and the amount of time it is taking to review them, plus the number of other, similar FOIL requests we received at around the same time as yours, I estimate that I will need another 30 days to complete my review. You can therefore expect an update of the review process, or a determination, on or before April 4, 2024.

Sincerely,

Madeleine Guilmain  
Assistant District Attorney  
Records Access Officer



**DISTRICT ATTORNEY  
COUNTY OF NEW YORK  
ONE HOGAN PLACE  
New York, N. Y. 10013  
(212) 335-9000**



**ALVIN L. BRAGG, JR.**  
DISTRICT ATTORNEY

April 5, 2024

[VIA EMAIL: [foia@aflegal.org](mailto:foia@aflegal.org)]  
Reed Rubinstein  
Jacob Meckler  
Michael Ding  
America First Legal Foundation  
611 Pennsylvania Ave. SE #231  
Washington, DC 20003

Re: 23F0204 - FOIL Request #1 – dated March 27, 2023  
23F0236 - FOIL Request #2 – dated April 7, 2023  
23F0273 - FOIL Request #3 – dated April 20, 2023  
Communications Regarding Donald J. Trump

To Reed Rubinstein, Jacob Meckler and Michael Ding:

Per my last update letter dated March 4, 2024, I am writing to update you on the process of searching for responsive records. I am still in the process of reviewing the records we located pursuant to a search for relevant keywords, first for responsiveness to your request, and then for a determination as to whether responsive records fall under any exceptions to disclosure under FOIL. Given the volume of records, and the amount of time it is taking to review them, plus the number of other, similar FOIL requests we received at around the same time as yours, I estimate that I will need another 30 days to complete my review. You can therefore expect an update of the review process, or a determination, on or before May 3, 2024.

Sincerely,

Madeleine Guilmain  
Assistant District Attorney  
Records Access Officer

**DISTRICT ATTORNEY  
COUNTY OF NEW YORK  
ONE HOGAN PLACE  
New York, N. Y. 10013  
(212) 335-9000**



**ALVIN L. BRAGG, JR.**  
DISTRICT ATTORNEY

May 3, 2024

[VIA EMAIL: [foia@aflegal.org](mailto:foia@aflegal.org)]

Reed Rubinstein  
Jacob Meckler  
Michael Ding  
America First Legal Foundation  
611 Pennsylvania Ave. SE #231  
Washington, DC 20003

Re: 23F0204 - FOIL Request #1 – dated March 27, 2023  
23F0236 - FOIL Request #2 – dated April 7, 2023  
23F0273 - FOIL Request #3 – dated April 20, 2023  
Communications Regarding Donald J. Trump

To Reed Rubinstein, Jacob Meckler and Michael Ding:

Per my last update letter dated April 5, 2024, I am writing to update you on the process of searching for responsive records. I am still in the process of reviewing the records we located pursuant to a search for relevant keywords, first for responsiveness to your request, and then for a determination as to whether responsive records fall under any exceptions to disclosure under FOIL. I am making significant progress, however, given the volume of records, and the amount of time it is taking to review them, plus the number of other, similar FOIL requests we received at around the same time as yours, I estimate that I will need another 30 days to complete my review. You can therefore expect an update of the review process, or a determination, on or before June 3, 2024.

Sincerely,

Madeleine Guilmain  
Assistant District Attorney  
Records Access Officer

**DISTRICT ATTORNEY**  
**COUNTY OF NEW YORK**  
ONE HOGAN PLACE  
New York, N. Y. 10013  
(212) 335-9000



**ALVIN L. BRAGG, JR.**  
DISTRICT ATTORNEY

June 3, 2024

[VIA EMAIL: [foia@aflegal.org](mailto:foia@aflegal.org)]

Reed Rubinstein

Jacob Meckler

Michael Ding

America First Legal Foundation

611 Pennsylvania Ave. SE #231

Washington, DC 20003

Re: 23F0204 - FOIL Request #1 – dated March 27, 2023  
23F0236 - FOIL Request #2 – dated April 7, 2023  
23F0273 - FOIL Request #3 – dated April 20, 2023  
Communications Regarding Donald J. Trump

To Reed Rubinstein, Jacob Meckler and Michael Ding:

As the assigned Records Access Officer in connection with the above-referenced three FOIL requests, I have completed my review of potentially responsive material and am ready to make my determination. As an initial matter, I note that all three requests described below seek the same material, in connection with a total of 16 named custodians. For the purpose of conducting the search, the date range used includes January 1, 2022, up to the submission date of the third request, April 20, 2023. Based on my review of the results of those searches, your requests are granted in part and denied in part, as follows:

Adopting your numbering system for convenience, the three FOILs seek:

- A. "All internal communications . . . mentioning or regarding Donald J. Trump";
- B. "All emails . . . or other communications . . . mentioning or regarding Donald J. Trump" with any of five email domains: 1) @who.eop.gov; 2)

- @usdoj.gov; 3) @usss.dhs.gov; 4) @nytimes.com; and 5) @freeandfairlitigation.org;
- C. “All SMS text . . . or similar communications” with: 1) any person who is a Biden Administration political appointee; 2) any person who is employed by the US Department of Justice (“DOJ”); 3) any person employed by the US Department of Homeland Security; 4) any person employed by the New York Times; 5) any person on the team of the Free and Fair Litigation Group;
- D. “All emails . . . or other communications” with Lanny Davis;
- E. “All records relating to the processing of these items.”

As to Request B, upon conducting a diligent search for responsive records using the search terms listed therein, and applying the specified subject matter limitation, I found no records responsive to B(1), B(3) or B(5). An agency cannot provide records that it does not possess. *See* Public Officers Law § 89(3); *see also* *Rattley v. New York City Police Dept.*, 96 NY2d 873 (2001).

As to Request B(4), access is granted to one single-page record, redacted on privacy grounds, provided herein at no cost, as a courtesy.

Access to the remaining requests is denied as follows:

Requests A and D are denied in their entirety. In request A, you seek “[a]ll internal communications” mentioning or regarding Donald J. Trump, a defendant in a pending criminal prosecution, and whose business, the Trump Organization, is a defendant in another criminal case prosecuted by this office, and which is now pending on appeal. Internal communications about those cases are exempt from disclosure under FOIL on numerous grounds, including as deliberative intra-agency materials (*see* POL § 87(2)(g); *Matter of Center for Constitutional Rights v. N.Y.C. Admin. For Children’s Services*, 222 AD3d 537 (1st Dept 2024)), records connected to pending criminal litigation (*see* POL 87(2)(e)(i); *Matter of Legal Aid Society v New York City Police Dept.*, 274 AD2d 207 (1st Dept 2000); *Pittari v Pirro*, 258 AD2d 202 (2d Dept 1999)), attorney work product (*see* Civil Practice Law and Rules (“CPLR”) § 3101; *John Blair Communications, Inc. v Reliance Capital Group*, 182 AD2d 578 (1st Dept 1992); *Corcoran v Peat Marwick*, 151 AD2d 443 (1st Dept 1989)), and grand jury secrecy (*see* POL § 87(2)(a); CPL § 190.25(4)(a); *Matter of James v Donovan*, 130 A.D.3d 1032 (2d Dept. 2015), *lv denied* 26 NY3d 1048 (2015)).

Similarly, in request D, you seek all communications with Lanny Davis, an attorney who represents a witness in the Trump prosecutions. To the extent any such communications exist, they, too, would be exempt from disclosure under FOIL because they relate to a pending criminal litigation, possibly contain attorney work product, and would fall under grand jury secrecy protection. Those communications would also implicate the privacy exemption to FOIL. Moreover, records connected with the



pending criminal prosecution under *People v. Trump*, New York County Indictment Number 71543/2023 are subject to a protective order issued by the New York County Supreme Court and may not be disclosed, pursuant to that order. See *Rondot v. All Season Protection of N.Y. LLC*, 69 Misc3d 1218(A), \*6 (Sup Ct Bronx Co 2020) (protective order for discovery materials given to criminal defendant).

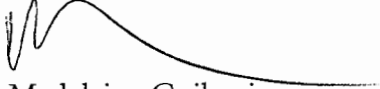
Access is also denied on grand jury secrecy grounds for 36 responsive records identified as a result of a search pursuant to section B(2) of your FOIL requests. POL § 87(2)(a); CPL § 190.25(4)(a); *Matter of James* at 1032. Indeed, the need for secrecy in grand jury proceedings is so highly protected in New York State law that it is a felony to disclose information concerning a grand jury proceeding absent a written order of the court. Penal Law § 215.70; *Id.*; *Matter of Bridgewater v Johnson*, 44 AD3d 549 (1st Dept 2007); *Allen v Strojnowski*, 129 AD2d 700 (2d Dept), *app dismissed and denied* 70 NY2d 871 (1987). These records also relate to pending criminal litigation (POL 87(2)(e)(i)), and some are further exempt from disclosure under FOIL as attorney work product. CPLR § 3101; *John Blair Communications, Inc.* at 578; *Corcoran* at 443.

Request C is denied as overly broad. See *Asian Am. Legal Defense Education Fund, supra*; *Matter of Madden v. Village of Tuxedo Park*, 192 AD3d 802 (2d Dept 2021) *citing* POL § 89(3)(a) and *Matter of Data Tree, LLC v. Romaine*, 9 NY3d 454, 466 (2007). First, this office does not have a centralized system for searching text messages. Second, each request is not for a specific searchable term or record, but for any and all communications between the named custodians and “[a]ny person” employed at the five entities or agencies listed, without limitation as to content or subject. This agency does not maintain lists of all persons who are political appointees of the Biden administration, all persons employed by DOJ, Homeland Security, the New York Times, or the Free and Fair Litigation Group. FOIL does not require an agency to conduct research or analyze large swaths of all communications to or from entire organizations to determine whether any of those communications might be responsive to a FOIL request. Instead, FOIL requires that the records sought be “reasonably described” by the requestor. POL § 89(3)(a); *M. Farbman & Sons, Inc. v NYC HHC*, 62 NY2d 75 (1984); *Matter of Urban Justice Center v NYPD*, 2010 NY Slip Op 32400(U)(Sup Ct NY Co 2010); *see also Asian American Legal Defense Fund v NYPD*, 41 Misc 3d 471 (NY Sup Ct 2013), *affirmed* 125 AD3d 531 (1st Dept 2015); *Matter of Pflaum v Grattan*, 116 AD3d 1103 (3d Dept 2014); *Bader v Bove*, 273 AD2d 466 (2d Dept 2000). These requests do not meet these requirements.

Lastly, section E of your FOIL request, in which you seek “[a]ll records relating to the processing” of the records sought by your request, is necessarily denied. The FOIL statute limits public access to records which are currently in an agency’s possession. POL §§ 86(4) and 89(3). Thus, a FOIL request may not be submitted for records that have not yet been created as of the date the FOIL is submitted, and there is no obligation under FOIL for continual, ongoing searches of requested material *ad infinitum* up to the date records are produced.

The Freedom of Information Law Appeals Officer is Robin McCabe, Chief, Civil Litigation Unit, New York County District Attorney's Office, One Hogan Place, New York, New York 10013.

Sincerely,

A handwritten signature in black ink, appearing to read 'Madeleine Guilmain', with a long horizontal flourish extending to the right.

Madeleine Guilmain  
Assistant District Attorney  
Records Access Officer

Enc.



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June 11, 2024

Via Email and USPS

District Attorney  
County of New York  
Civil Litigation Unit  
ATTN: Robin McCabe, Chief  
One Hogan Place  
New York, New York 10013

Re: Appeal Related to the Following FOIL Requests:  
23F0204 - FOIL Request #1- dated March 27, 2023  
23F0236 - FOIL Request #2 - dated April 7, 2023  
23F0273 - FOIL Request #3- dated April 20, 2023  
Communications Regarding President Donald J. Trump

Dear Ms. McCabe:

This firm represents America First Legal Foundation (“AFL”), which filed the three Freedom of Information Law (“FOIL”) (Public Officers Law (“POL”) §§ 84–90) requests to the District Attorney of the County of New York (the “DA’s Office” or the “Office”) referenced above. This letter is written to appeal your Office’s June 3, 2024 letter denying the majority of AFL’s requests (the “Denial”). See the Denial, annexed hereto as **Exhibit A**. Since the Denial “[a]dopt[ed] [AFL’s] number system for convenience,” this appeal similarly references the same system regarding Requests A through E.

Two points are generally relevant to a number of the Requests, and, as such, they are preliminarily noted as grounds for appeal.

First, the DA’s Office treated Requests A, B(2), and D monolithically, without any indication that the responsive documents were considered individually. Thus, I generally note the error in invoking blanket exemptions for this entire class of documents rather than considering the applicability of any claimed exemption as to the individual responsive records. See *Gould v. New York City Police Dep’t*, 89 N.Y.2d 267, 275 (1996) (“[B]lanket exemptions for particular types of documents are inimical to FOIL’s policy of open government.”). The Office can only invoke any relevant exception to responsive records, not merely recite a laundry list of potential exemptions without considering whether responsive records not subject to an exemption exist.

Second, the Denial does not indicate whether responsive documents could be redacted to take out exempt information. The Court of Appeals has expressly held “that an agency responding to a demand under the [FOIL] may not withhold a record solely because some of the information in that record may be exempt from disclosure. Where it can do so without unreasonable difficulty, the agency must redact the record to take out the exempt information.” *Schenectady Cnty. Soc’y for Prevention of Cruelty to Animals, Inc. v. Mills*, 18 N.Y.3d 42, 45 (2011). The DA’s Office has merely offered one redacted document with respect to Request B(4) but otherwise failed to reckon



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with the question of whether there are other responsive documents which could be disclosed by redacting exempt information. This was plain error, and the Office should produce any responsive records by redacting exempt information.

I. **Request A: All internal communications ... mentioning or regarding Donald J. Trump**

The DA's Office denied Request A on several grounds, each invoked in passing. But none of these purported exemptions warrant a wholesale denial of the Request.

A. **Deliberative Intra-Agency Materials** [POL § 87(2)(g)]

The Denial states that documents responsive to Request A were exempt from disclosure as deliberative intra-agency materials. However, the mere fact that documents were exchanged internally in the DA's Office does not automatically shield them from disclosure. The content of any specific communication is what determines whether the exemption applies. Non-deliberative communications are subject to disclosure, and the mere fact that the email was sent within the DA's Office is non-determinative. Indeed, the very case you cite for this proposition, *Ctr. for Const. Rts. v. New York City Admin. for Children's Servs.*, is crystal clear on this point. 224 A.D.3d 537, 538 (1st Dep't 2024) ("The applicability of the intra-agency materials exemption to those records cannot be determined on this record and therefore, we remand for an in camera review only of those emails."). Because, as noted *supra*, this blanket invocation of the exemption short-circuited the process of determining whether specific emails should be disclosed, the Denial improperly asserted POL § 87(2)(g) as a basis to deny disclosure.

B. **Pending Criminal Litigation** [POL § 87(2)(e)(i)]

The DA's Office cited POL § 87(2)(e)(i) in the Denial as representing an exemption for disclosure due to records being "connected to pending criminal litigation." Ex. A at 2. That, however, is *not* what the statute establishes as an exemption to FOIL disclosure.

Rather, the statute only exempts from disclose records that "are compiled for law enforcement purposes **only to the extent that disclosure would interfere with law enforcement investigations or judicial proceedings.**" POL § 87(2)(e)(i) (emphasis added). Thus, the fact that the requested records *relate* to a criminal litigation is only one small aspect of the equation that was necessary to be considered in order for the DA's Office to assert that the records were exempt from disclosure. *Leshner v. Hynes*, 19 N.Y.3d 57, 67 (2012) ("[T]his does not mean that every document in a law enforcement agency's criminal case file is automatically exempt from disclosure simply because kept there."). Indeed, an agency must articulate "the generic risks posed by disclosure of these categories of documents. Put slightly differently, the agency must still fulfill its burden under Public Officers Law § 89(4)(b) to articulate a factual basis for the exemption." *Id.* But the Denial did no such thing. It merely claimed the "relevant" exemption without providing the required factual basis.





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Because the Office utilized an improper analysis in the Denial—merely claiming that the documents relate to an ongoing criminal litigation, which alone does not warrant withholding the records—disclosure should ensue as to those responsive records whose disclosure would not interfere with the ongoing judicial proceedings.

C. Attorney Work Product [CPLR § 3101]

Similarly, the Denial’s cursory reference to an attorney work product exemption pursuant to CPLR § 3101 fails to specify how the requested records, in their entirety, are appropriately denied as attorney work product.

“Because of the absolute nature of the privilege, **the attorney work product doctrine is narrowly applied** to materials prepared by an attorney, acting as an attorney, which contain his or her analysis and trial strategy.” *Competitive Enter. Inst. v. Att’y Gen. of New York*, 161 A.D.3d 1283, 1286 (3d Dep’t 2018) (emphasis added) (internal quotation marks omitted). Thus, any communication within the DA’s Office that was not issued by an attorney cannot fall within the attorney work product doctrine. Moreover, it is axiomatic that “not every word written by a lawyer enjoys the absolute immunity of work product. The exemption should be limited to those materials which are uniquely the product of a lawyer’s learning and professional skills, such as materials which reflect his or her legal research, analysis, conclusions, legal theory or strategy.” *Gartner v. New York State Att’y Gen.’s Off.*, 160 A.D.3d 1087, 1091–92 (3d Dep’t 2018).

Additionally, the DA’s Office carries the burden to establish non-waiver of an applicable attorney client or work product privilege. *John Blair Commc’ns, Inc. v. Reliance Cap. Grp., L.P.*, 182 A.D.2d 578, 579 (1st Dep’t 1992) (“It is also the burden of the proponent of the privilege to prove non-waiver.”). Thus, to the extent the contents of any such communications have been disclosed during the trial of President Trump, those communications can no longer be withheld on the alleged basis of an attorney work product exemption.

D. Grand Jury Secrecy [CPL § 190.25(4)(a)]

Finally, the last exemption invoked with respect to Request A was that of grand jury secrecy. However, the statute governing that rule, CPL § 190.25(4)(a), only precludes “disclos[ing] the nature or substance of any grand jury testimony, evidence, or any decision, result or other matter attending a grand jury proceeding.” Thus, the universe of communications affected by this law is relatively small, limited to those relating to the grand jury proceeding—not to those which either predate or followed the grand jury proceedings. Moreover, AFL’s arguments regarding Grand Jury Secrecy, more fulsomely discussed *infra*, are incorporated herein.

II. **Request B(2): All emails or other communications mentioning or regarding Donald J. Trump addressed to the email domain @usdoj.gov**

A. Grand Jury Secrecy [CPL § 190.25(4)(a)]

Request B(2) was denied on “grand jury secrecy grounds” as to “36 responsive records identified[.]” Ex. A at 3. As discussed in response to the denial of Request A above, CPL §



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190.25(4)(a) only precludes the disclosure of “the nature or substance of any grand jury testimony, evidence, or any decision, result or other matter attending a grand jury proceeding.” It is unlikely that all 36 responsive records identified in the search initiated pursuant to Request B(2) exist in the relatively small universe of communications affected by this law, as outlined *supra*. Notably, your Office failed to disclose which specific protected categories shield disclosure with respect to each of the 36 responsive records identified. Therefore, it is unclear whether all 36 records identified consist entirely of “the nature and substance” of grand jury testimony, evidence, decisions, results or another matter related to “attending a grand jury proceeding.”

Moreover, to the extent that a portion of each of the 36 responsive records identified by the DA’s Office do in fact fall within the ambit of the protected categories described *supra* – which has yet to be confirmed by your Office—it must be noted that the information sought does not relate to any category of information protected under CPL § 190.25(4)(a). Rather, AFL is specifically seeking any and all information that discloses the nature and extent of communications between your Office and the United States Department of Justice, which is not categorized as information protected by the statute. It is of the public interest to know the nature of those communications, not *necessarily* the specific information related to the grand jury proceedings discussed therein. To the extent that the 36 responsive records contain information that is exempt from disclosure, such information could be redacted.<sup>1</sup>

Here, AFL can establish a compelling and particularized need for access to the information contained in the 36 responsive records identified in your Office’s search which is directly related to the public’s interest in the disclosure of the information. As a prominent legal advocacy group, one of AFL’s core missions is ensuring that all levels of government act in a manner that is consistent with the laws of the land. The information that AFL is seeking is of immeasurable public interest: the public certainly has a right to know whether the Manhattan District Attorney’s Office acted in concert with the United States Department of Justice to engage in a politically motivated prosecution effort against the 45<sup>th</sup> President of the United States, Donald J. Trump, despite repeated assurances from both agencies that this did not occur.

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<sup>1</sup> Even if, *arguendo*, the entirety of the information contained in one of the responsive records falls under one of the categories protected by CPL § 190.25(4)(a), the case law cited in the Denial regarding Request B(2) specifically highlights the established precedent in New York that “secrecy of grand jury minutes is not absolute” and that courts ruling on a petition seeking disclosure of grand jury materials will consider “whether the party seeking disclosure can establish a ‘compelling and particularized need’ for access to them” *James v. Donovan*, 130 A.D.3d 1032, 1037 (2015) (citing *People v. Robinson*, 98 N.Y.2d 755, 781 (2002)). Once this element is established, courts will then consider “whether the public interest in the secrecy of the grand jury is outweighed by the public interest in disclosure” *Id.* However, AFL should not need to seek judicial intervention to obtain copies of all 36 records where, at minimum, some of them could be disclosed with appropriate redactions.



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## B. Pending Criminal Litigation [POL § 87(2)(e)(i)]

Request B(2) was also denied because the 36 responsive records in question “relate to pending criminal litigation (POL 87(2)(e)(i)), and some are further exempt from disclosure under FOIL as attorney work product.” Aside from the objections noted regarding these exemptions as to Request A, which are incorporated herein, the same issue as is present as was noted in subpoint A above regarding grand jury secrecy, namely that the Denial fails to specify which of the 36 responsive records are in fact precluded from disclosure under POL § 87(2)(e)(i). It is well-established law in New York that when an agency seeks to preclude disclosure of information that is produced in response to a FOIL request, the burden lies with the agency “to articulate particularized and specific justification”, and to establish that “the material requested falls squarely within the ambit of [the] statutory exemptions.” *M. Farbman & Sons, Inc. v. New York City Health & Hosps. Corp.*, 62 N.Y.2d 75, 83, (1984). Here, the DA’s Office failed to meet this obligation, as it did not identify precisely which of the 36 responsive records are precluded from disclosure by the relevant statute.

## III. Request C: All SMS text or similar communications with: 1) any person who is a Biden Administration political appointee; 2) any person who is employed by the US Department of Justice; 3) any person employed by the US Department of Homeland Security; 4) any person employed by the New York Times; and 5) any person on the team of the Free and Fair Litigation Group

Your Office denied Request C as overly broad, citing POL § 89(3)(a), claiming the request was not “reasonably described.” Pursuant to the relevant FOIL statute, one seeking disclosure under FOIL must give enough information for the responding Office to locate the records in question. *M. Farbman & Sons, Inc. v. New York City Health & Hosps. Corp.*, 62 N.Y.2d 75, 83 (1984). The agency must first establish that the “the descriptions were insufficient for purposes of locating and identifying the documents sought” before denying a FOIL request for reasons of overbreadth. *Id.*; see *Matter of Johnson Newspaper Corp. v. Stainkamp*, 94 A.D.2d 825, 826 (1983).

The Denial failed to establish that Request C was insufficient for purposes of locating and identifying the requested documents. The DA’s Office claims that the agency “does not have a centralized system for searching text messages.” However, the Denial had earlier cited to POL § 89(3)(a), which states “[a]n agency shall not deny a request on the basis that the request is voluminous or that locating or reviewing the requested records or providing the requested copies is burdensome because the agency lacks sufficient staffing or on any other basis if the agency may engage an outside professional service to provide copying, programming or other services required to provide the copy.” The Office should not be able to shield its otherwise disclosable communications by specifically using a medium which it will subsequently claim it cannot search, notwithstanding that text messages are certainly capable of being searched. The DA’s Office must consider whether using an outside vendor will enable it to respond to this Request.

Additionally, the Denial states that the Office does not have a way of tracking the documents sought in Request C. Even if, *arguendo*, some of the Requests which fall within



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Request C may be overly broad, it is certainly not accurate that there is no way of searching for responsive records regarding these Requests, which were broken up into subparts (and which the DA's Office performed such searched with respect to Request B). Searches for the agencies or organizations in question could very possibly turn up responsive records. To suggest that this Request was overly broad ignores that reasonable search terms could easily uncover responsive documents.

#### IV. Request D: All emails or other communications with Lanny Davis

The Denial's response to Request D incorporates all of the exemptions cited in regard to Request A (with the exception of the intra-agency exemption), and so all of those arguments made *supra* are incorporated herein by reference. I note, however, that it appears that the DA's Office did not actually perform a search for any responsive records based on the Denial's suggestion that responsive records "possibly contain attorney work product." Ex. A at 2. It appears that these blanket exemptions were again invoked without determining whether they applied to the individual records sought. Moreover, any such privilege which could have existed should necessarily have been destroyed by the DA's Office having communicated with Mr. Davis.

The Denial further noted, although without citation, that Request D "would also implicate the privacy exemption to FOIL," Ex. A at 2, presumably a reference to POL § 87(2)(b). In turn, POL § 89(2)(b) provides eight non-exhaustive examples where disclosure of records would constitute "[a]n unwarranted invasion of personal privacy." The request does not, on its face, implicate any of the situations enumerated by POL § 89(2)(b), and the Denial has not specifically invoked one of them.

Importantly, where one of those statutorily defined invasions into personal privacy are not present, it is necessary that there be a "balancing [of] the privacy interests at stake against the public interest in disclosure of the information." *Biwen Liang v. Nassau Cnty. Off. of Consumer Affs.*, 176 A.D.3d 808, 809 (2d Dep't 2019). Thus, the Denial's reference to "the privacy exemption to FOIL" is insufficient standing alone; there must be a balancing of the public's interest in the disclosure of the responsive records. Where the records at issue relate to one of the most hotly debated and discussed issues of the decade, there can be no doubt that the public's interest in disclosure is exceedingly high and should weigh heavily on the scales balancing these interests. That is particularly the case where the Denial did not suggest, in general terms, why disclosure would constitute an unwarranted invasion of personal privacy. Notably, it is not any "invasion of personal privacy" which is exempt from disclosure, but an unwarranted one, defined as "what would be offensive and objectionable to a reasonable [person] of ordinary sensibilities." *Thomas v. New York City Dep't of Educ.*, 103 A.D.3d 495, 497 (1st Dep't 2013) (alteration in original). Just because something which could be construed as "personal" is present in records responsive to this Request does not mean that disclosure would be "offensive and objectionable to a reasonable person."

Finally, the Denial notes with respect to Request D that "records connected with the pending criminal prosecution under *People v. Trump*, New York County Indictment Number 71543/2023 are subject to a protective order issued by the New York County Supreme Court and



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may not be disclosed, pursuant to that order.” Ex. A at 2–3. The Denial does not specify any types of documents which are subject to the purported protective order, merely referencing a general exemption for “records.” I have been unable to locate such a broadly worded protective order entered in that prosecution, as opposed to certain other, more narrowly tailored, protective orders. See, e.g., [Decision and Order on People’s Motion for a Protective Order Regulating Disclosure of Juror Information, dated March 7, 2024, Ind. No. 71543/2023](#). Thus, AFL takes issue with the DA’s Office’s Denial of this Request to the extent that it is refused to disclose records that did not fall within the scope of the protective order in question. To the extent that the DA’s Office maintains that such a broad protective order has been entered and appropriately warrants exempting responsive records from disclosure, I request a copy of such Order to ascertain whether the exemption is properly asserted.

#### V. Request E: All records relating to the processing of these items

The Denial claims that Request E “is necessarily denied” because “a FOIL request may not be submitted for records that have not yet been created as of the date the FOIL is submitted.” Ex. A at 3. However, as the Denial noted, the date range of the search for responsive documents was through the time of AFL’s third FOIL Request on April 20, 2023. Thus, to the extent that responsive records existed prior to the third Request due to AFL’s first two requests, such records were extant as of the time the request was made and should have been disclosed.

To the extent that the DA’s Office finds this rationale lacking, or records were created in response to AFL’s third FOIL Request, please also accept this letter as a FOIL request for all records of the DA’s Office relating to the processing of FOIL Requests 23F0204, 23F0236, and 23F0273.

#### VI. Conclusion

For all of the aforementioned reasons, I respectfully, but urgently, request that you reverse the Denial’s near wholesale refusal to disclose records responsive to AFL’s FOIL Requests. As fulsomely discussed *supra*, the blanket assertions of exemptions are incongruous with the public policy aims of FOIL. See *Cap. Newspapers, Div. of Hearst Corp. v. Whalen*, 69 N.Y.2d 246, 252 (1987) (“FOIL is to be liberally construed **and its exemptions narrowly interpreted** so that the public is granted maximum access to the records of government.”) (emphasis added). Notwithstanding the claimed presence of *some* exempt material in the responsive records, it defies logic that the DA’s Office possesses no non-exempt records (or records that can be made non-exempt through proper redaction) responsive to the Requests aside from a lone email from the New York Times.





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I thank you for your prompt attention to this matter. Please do not hesitate to contact me should you have any questions or concerns.

Respectfully submitted,

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**ALVIN L. BRAGG, JR.**  
DISTRICT ATTORNEY

June 25, 2024

[VIA E-MAIL: [edward@bochner.law](mailto:edward@bochner.law), [avery@bochner.law](mailto:avery@bochner.law) ]

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Re: Appeal of FOIL Requests: 23F0204, 23F0236, 23F0273  
*Communications Re: Donald J. Trump*

The New York County District Attorney's Office has received your Freedom of Information Law (FOIL) appeal in connection with the above-captioned requests. As the FOIL Appeals Officer, having reviewed the FOIL file, procedural history, and consulted with the Records Access Officer (RAO), I am prepared to rule on this matter.

As an initial matter, the general public's right to obtain records pursuant to FOIL is not limitless. The Legislature, in recognizing the need to keep certain matters confidential, carved out exemptions when information will not be subject to disclosure under FOIL. *See generally*, Public Officers Law (POL) §87(2); *M. Farbman & Sons, Inc., v NYC Health & Hospitals Corp.*, 62 NY2d 75 (1984); *Fink v Lefkowitz*, 47 NY2d 567 (1979); *Johnson v NYPD*, 257 AD2d 343 (1st Dept 1999). "While agency records are presumptively available for public inspection and disclosure under FOIL..., an agency may deny access to records which "fall within one of the listed exemptions. *Matter of Capital Newspapers Div. of Hearst Corp. v City of Albany*, 63 AD3d 1336, 1337 (3d Dept 2009), *aff'd as mod* 15 NY3d 759 (2010). For example, FOIL specifically exempts from public disclosure statutorily protected work product and internal communications of attorneys. POL §87(2)(a); CPLR §4503(a)(1); *In Matter of Appellate Advocates v NYS Dep't. of Corr. & Comm. Supervision*, 2023 NY Slip Op 06466, \*\*2 (Ct App 2023); *Matter of Woods v Kings County D.A's Office*, 234 AD2d 555 (2d Dept 1996); *Bennett v Girgenti*, 226 AD2d 792 (3d Dept 1996).

The requirement that a FOIL request be reasonably described applies equally to physical as well as electronic data/records. POL §§86(4) and 89(3); *Matter of Konigsberg v Coughlin*, 68 NY2d 245, 251 (1986); *see also Reclaim the Records v NYS Dept. of Health*, 185 AD3d 1268 (3d Dept 2020), *lv denied* 36 NY3d 910 (2021). With these principles in mind, my decision is outlined below.

By letters dated June 10 and 11, 2024, you appeal the determination<sup>1</sup> by Records Access Officer (RAO) Madeleine Guilmain, denying three FOIL requests seeking the same material, i.e., any and all communications from a total of 16 named custodians, as overly broad as to one request, as subject to statutory and privilege exemptions as to three requests and, as to three domain names for which no responsive records were identified or located.

As to request B(1), B(3), and B(5) for which no record was identified or located based upon the terms/custodians provided, I find that the RAO provided an appropriate certification that records could not be located. *See* POL §89(3); *Empire Ctr. for Public Policy v NYC Office of Payroll Admin.*, 187 AD3d 435, *lv denied* 36 NY 3d 906 (2021); *Moore v Santucci*, 151 AD2d 677 (2d Dept 1989); *see also Matter of Jewish Press, Inc. v NYS Police*, 207 AD3d 971, 972 (3d Dept 2022); *Asian Am. Legal Defense & Educ. Fund v NYPD*, 56 AD3d 321 (1st Dept 2008), *lv denied* 26 NY3d 919 (2016); *Rattley v NYPD*, 97 NY2d 873, 875 (2001) (FOIL does not require a “detailed description of the search nor a personal statement from the person who actually conducted the search.”).

As to request C, on the record before me and under the circumstances of the three FOIL requests—which broadly seeks without any limitations, “all SMS texts...or similar communications” with *any* persons appointed or employed at three different federal agencies (Biden Administration, DOJ, U.S. Dep’t. of Homeland Security), a newspaper and a litigation group—I find that this request seeks texts with anyone at the aforementioned entities, without reference to a case/docket number or employee name/phone number, thereby constraining this Office’s ability to reasonably conduct a search of such electronic communications within the designated time period. I conclude that, even on its face, such a blanket request is palpably improper, vague, and overbroad to the extent it fails to specify the records to be disclosed with reasonable particularity.<sup>2</sup> POL §89(3). Moreover, “FOIL does not require that an agency engage in herculean efforts in attempting to locate. . . needles in the haystack.” FOIL-AO-18863. Even though “the needles” may be there, somewhere, “FOIL [does] not require that an agency go through the haystack in an effort to locate the needles.” *Id.*; *see also Konigsberg v. Coughlin*, 68 NY2d at 250. In this case, the only way to answer item C would be to engage in colossal efforts of individually searching and reviewing every SMS text communication between each of the entities and custodians listed. This is not countenanced by FOIL. *Matter of Data Tree LLC v Romaine*, 9 NY3d 454, 461 (2007) (right to access of public records “has not been construed to ‘require extraordinary efforts by the agency to provide records...’”).

Rather, the Public Officers Law requires the requestor in the first instance to describe records sufficiently so that a search can be made by the agency to identify responsive records with reasonable effort; this principle applies particularly to request C which contains no names, phone numbers, or subject or case references. POL §89(3); *Matter of Brown v DiFiore*, 139 AD3d 1048 (2d Dept 2016); *Roque v Kings Co DA’s Office*, 12 AD3d 374 (2d Dept 2004); *M. Farbman & Sons, Inc. v NYC HHC*, 62 NY2d 75, 83 (1984). I also note that at no time during the pendency of this FOIL request have you sought to narrow this request by refining your search

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<sup>1</sup> You were granted access to a single communication that was responsive to request B(4).

<sup>2</sup> By acknowledging in your letter that requests calling for “searches for the agencies or organizations in question could *very possibly turn up* responsive records,” you implicitly concede you are fishing for possible records rather than requesting specific records (emphasis added).



terms/criteria/scope or by identifying specific persons at any of the entities listed. *See Matter of Wagner v NYC Dept. of Educ.*, 222 AD3d 420 (1st Dept 2023).

As aptly noted by the RAO, this Office does not keep a centralized system of text messages or generally maintain records of communications in a way that they can reasonably be located, extracted or segregated without an employee name, a case name or a case number. Nor does this Office maintain employee rosters of other agencies or entities or political appointees. I find that, as worded, request C “by any measure...was an open-ended ‘fishing expedition,’” such that any effort to respond to it would be unduly burdensome. *Jewish Press, Inc. v NYPD*, 2021 NY Misc LEXIS 45807 (Sup Ct NY Co 2021); *see Matter of Madden v Village of Tuxedo Park*, 192 AD3d 802 (2d Dept 2021) citing POL 89(3)(a) and *Matter of Data Tree*, 9 NY3d at 466. The law is clear that an agency is only required to disclose electronically maintained records that are “retrievable with reasonable effort.”<sup>3</sup> *Id.* at 464 *see also Matter of NY Civil Liberties Union v NYS Office Of Ct. Admin.*, 224 AD3d 458, 459 (1st Dept 2024) (sufficient showing made that any attempt to comply with the broad request would be impracticable); *Cuddy Law Firm, PLLC v NYC Dept. of Education*, 2023 NY Misc LEXIS 724 (Sup Ct NY Co 2023) (FOIL request amounting to a “fishing expedition” found to unduly burdensome).

I also find unavailing your argument that the RAO inappropriately relied on an insufficient staffing basis in denying item C, when in fact she did not mention staffing at all. Rather, the RAO stated the request as worded is overly broad. I agree. I also find on this record, particularly because of the excessively broad nature of the request and the way in which this Office maintains its records, that an outside service cannot be utilized to comply with this request. *In re NY Civil Liberties Union v NY State Police*, 2023 NY Slip Op 32079(U), at \*\*14, 17 (Sup Ct Albany Co 2023) (demand for records pertaining to all employees) citing *Matter of Time Warner Cable News 1 v NYPD*, 53 Misc3d 657, 670 (Sup Ct NY Co 2016); *see also Matter of Wagner*, 222 AD3d at 421-422.

As to requests A, B(2), and D, you claim, without any support or cited authority, that the RAO’s categorical denials were insufficient such that each portion of each record must be accounted for in the FOIL determination. There are no such exacting requirements under FOIL. When denying a FOIL request, an agency must “state, in writing, the reason for the denial of the access.” *Matter of West Harlem Bus. Group v Empire State Dev. Corp.*, 13 NY3d 882, 884 (2009). Public Officers Law §§89(3)(a) and (4)(a) simply require sufficient description of records subject to and applicable grounds for denial, so that they can be reviewed on appeal. *Id.* However, an agency is not required to disclose in its description of records contained therein in order to establish applicability of a specific FOIL exemption. *Nalo v Sullivan*, 125 AD2d 311 (2d Dept 1986); *see also D’Alessandro v Unemployment Ins. Appeal Board*, 56 AD2d 762 (1st Dept 1977).

Upon review, I find that the RAO met her burden in identifying, in writing, generic categories of communications or attachments and/or the nature of or subject matter thereof, and the exemption relied upon as well as the number of records it applied to. *Asian American Legal*

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<sup>3</sup> Nor is a RAO required to engage in analysis and judgments of content in responding to FOIL requests. *Matter of Lebron v Smith*, 40 AD3d 515 (1st Dept 2007); *Mitchell v Slade*, 173 AD2d 226 (1st Dept 1991), *lv denied* 863 (1991); *Konigsberg v Coughlin*, *supra*.

*Defense Fund v NYPD*, 41 Misc3d 471, 481 (Sup Ct NY Co 2013), *aff'd* 125 AD3d 531 (1st Dept 2015). I also note that the RAO referenced several categories of records under all applicable exemptions, including intra-agency deliberative material and other statutory exemptions, such as matters attending a grand jury investigation, attorney work product, and on privacy grounds.

Furthermore, as to request D, seeking communications with “Lanny Davis,” I am informed by the RAO that based on the search criteria provided in your three FOIL requests, a single record was identified, reviewed and found not to be responsive in the first instance. And, to the extent it represents a communication related to a grand jury investigation and pending prosecution of Donald J. Trump, was properly denied on the alternative statutory grounds provided, as set forth below.

As to this record, I uphold denial on an additional ground, pursuant to POL §87(2)(f)—endangering the life or safety of any person—where the information sought could, by its inherent nature, give rise to the implication that its release could endanger the life and safety of a witness or have a chilling effect on future witness cooperation. *Matter of Bellamy v NYPD*, 87 AD3d 874 (1st Dept 2011), *aff'd* 20 NY3d 1028 (2013); *Matter of Johnson v NYPD*, 257 AD2d 343, 349 (1st Dept 1999), *lv dsmd* 94 NY2d 791 (1999). Nor does application of exemption on this ground require redaction under the FOIL statute. *Matter of Judicial Watch, Inc. v City of New York*, 178 AD3d 540, 541 (1st Dept 2019) (redactions sought available only under personal privacy exemption).

I uphold the RAO’s determination and legal authority relied upon as to internal communications related to a pending case or appeal and on statutory grounds pursuant to POL §87(2)(a), as follows:

As to requests A, D, and the 36 items<sup>4</sup> the RAO found to be responsive to request B(2), consisting of communications attending a grand jury proceeding, are exempt from disclosure under FOIL. POL §87(2)(a); CPL §190.25(4)(a); Penal Law §215.70. This Office is bound by the dictates of Criminal Procedure Law §190.25(4)(a), which prohibits public disclosure of matters attending a grand jury proceeding, which necessarily encompasses the investigation stage before a prosecutorial decision is made and evidence presented to the grand jury. *See Matter of James v Donovan*, 130 AD3d 1032 (2d Dept 2015), *lv denied* 26 NY3d 1048 (2015). It is a felony to disclose information concerning a grand jury investigation and proceeding absent a written order of the court.<sup>5</sup> Penal Law §215.70; *Matter of Bridgewater v Johnson*, 44 AD3d 549 (1st Dept 2007); *Allen v Strojnowski*, 129 AD2d 700 (2d Dept), *app dismissed and denied* 70 NY2d

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<sup>4</sup> I am informed by the RAO that the description “36 responsive records” does not refer to a page number calculation, but rather refers to the number of responsive items tagged, each of which may consist of a series of email chains and/or duplicates.

<sup>5</sup> A FOIL appeal under the Public Officers Law is not the proper forum to make an application to establish a need for access to grand jury material. Only a court with authority over the grand jury can authorize the release of grand jury material; and only after a compelling and particularized need is presented. *People v Fetcho*, 91 NY2d 765, 769 (1998); *Matter of Lungen v Kane*, 217 AD2d 849, 850 (3d Dept 1995), *aff'd* 88 NY2d 861 (1996); *see e.g.* *People v Robinson*, 98 NY2d 755 (2002); *Matter of District Attorney of Suffolk County*, 58 NY2d 436 (1983); *In re Xiao He Lu v NYPD*, 143 AD3d 616 (1st Dept 2016); *Vellon v Cyrus R. Vance*, 2017 NY Slip Op 50313(U) (Sup Ct NY Co 2017).

871 (1987). Such protected material encompasses not only grand jury minutes, confidential material and information received (regardless of source), but also communications relating thereto. *See Matter of James v Donovan, supra; Matter of Aiani v Donovan*, 98 AD3d 972 (2d Dept 2012).

I further find that your request for “all communications” necessarily includes privileged communications pertaining to criminal investigations and prosecutions. Internal attorney correspondence “mentioning or regarding” the investigation and prosecution of “Donald J. Trump,” describes material that squarely falls within privileged work product.<sup>6</sup> *Matter of Legal Aid Society v NY County Dist. Attorney’s Off.*, 2022 NY Slip Op 034362(U), \*6 (Sup Ct NY Co 2022); *see also John Blair Communications, Inc. v Reliance Capital Group*, 182 AD2d 578 (1st Dept 1992); *Corcoran v Peat Marwick*, 151 AD2d 443 (1st Dept 1989); *Smith v City of New York*, 49 AD3d 400, 401 (1st Dept 2008).

It also calls for deliberative intra-agency correspondence that is specifically exempt from FOIL. POL §§87(2)(a)+(g)(i-iii); *Matter of Correction Officers’ Benevolent Ass’n. v NYC Dep’t of Corrections*, 157 AD3d 643 (1st Dept 2018); *NYS Joint Comm. On Public Ethics v Campaign for One NY, Inc.*, 53 Misc3d 983 (Sup Ct Albany Co 2016); *Lenchner v NYPD*, 52 Misc 3d 1206(A)(Sup Ct NY Co 2016); *Asian American Legal Defense Fund v NYPD*, 41 Misc 3d at 481; *Matter of Woods v Kings County DA’s Office*, 234 AD2d 555 (2d Dept 1996); *Bennett v Girgenti*, 226 AD2d 792 (3d Dept 1996). The deliberative process privilege protects from disclosure communications reflecting advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated, based on the rationale that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decision-making process. *E.B. v. New York City Bd. of Education*, 233 FRD 289, 291-92 (EDNY 2005). Typically, the privilege protects “memoranda, drafts, recommendations, proposals, and other documents that reflect the opinions of their authors, rather than those of the agency.” *Fox News Network, LLC. v United States Dep’t. of Treasury*, 911 F Supp. 2d 261, 272 (SDNY 2012); *see also Tigue v U.S. Dep’t of Justice*, 312 F3d 70, 76 (2d Cir 2002) (opinions, recommendations, and deliberations).

Moreover, as noted by the RAO, the Trump Organization is currently appealing its conviction and Donald J. Trump is awaiting sentence in his pending prosecution. I therefore uphold denial of communications relating to both criminal cases and incorporate by reference the RAO’s analysis and legal support on the ground that disclosure of communications would interfere with a pending judicial proceeding. POL §87(2)(e)(i); *Abdur-Rasbi v NYPD*, 31 NY3d 217, 227 (2018); *Lesher v Hynes*, 19 NY3d 57 (2012); *Whitley v NY Co. DA’s Office*, 101 AD3d 455 (1st Dept 2012); *see also Figueroa v Gonzalez*, 64 Misc3d 959 (Sup Ct Kings Co 2019). FOIL exempts from disclosure documents compiled for law enforcement purposes which, if disclosed, would interfere with a judicial proceeding. *See id.* Moreover, an agency—in this case a prosecutor’s office—does not have to make a particularized showing as to how requested records may interfere with the pending judicial proceeding. A generic determination is sufficient to show that disclosure under FOIL would interfere with said proceedings, thereby exempting disclosure during the pending sentence and appellate proceedings. *See Legal Aid*

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<sup>6</sup> Work product encompasses mental impressions, opinions, legal theories, and communications of an attorney. Civil Practice Law & Rules §3101; *John Blair Communications, Inc. v Reliance Capital Group*, 182 AD2d 578 (1st Dept 1992); *Corcoran v Peat Marwick*, 151 AD2d 443 (1st Dept 1989).

*Society v NYPD*, 274 AD2d 207 (1st Dept 2000), *lv denied* 95 NY2d 956 (2000); *Pittari v Pirro*, 258 AD2d 202 (2d Dept 1999), *lv denied* 94 NY2d 755 (1999); *Sideri v Off. Of District Atty., New York County*, 243 AD2d 423 (1st Dept 1997), *lv denied* 91 NY2d 808 (1998); *Moreno v New York County Dist. Attorney's Off.*, 38 Ad3d 358 (1st Dept 2007); *see also Latta v Morgenthau*, 2010 NY Slip Op 31682(U) (Sup Ct NY Co 2010). I find that the RAO has met the requirement articulated in *Lesher v Hynes* (19 NY3d 57 [2012]) “by noting that there is a pending appeal” in one case and a pending prosecution (awaiting sentence) in the other. *Center for Appellate Litigation, Matthew Bova v New York Co. District Attorney's Off.*, Index No. 451799/2023 (Sup Ct NY Co 2023)

I also note that the 36 communications responsive to request B(2), to the extent they include communications connected with the pending criminal prosecution under *People v. Trump*, New York County Indictment No. 71543/2023, are subject to a protective order issued by the trial court, and therefore may not be disclosed pursuant to that order. POL §87(2)(a); *see Rondot v. All Season Protection of N.Y. LLC*, 69 Misc3d 1218(A), \*6 (Sup Ct Bronx Co 2020) (protective order for discovery materials given to criminal defendant rendered those materials exempt from non-party subpoena in civil action). I uphold denial of these communications on this additional ground.

As to request E, because the FOIL statute limits public access to records which are currently in an agency's possession, a request which calls for the compiling of data or creation of a new record that does not yet exist is not the proper subject of FOIL. POL §86(4) and §89(3); *see Matter of Data Tree LLC v Romaine*, 9 NY3d at 464; *Matter of Jewish Press, Inc., v NYC Dept of Corr.*, 200 AD3d 1038 (2d Dept 2021); *N.Y. Comm. For Occupational Safety & Health v Bloomberg*, 72 AD3d 153 (1st Dept 2010); *Matter of Jones v Goord*, 35 AD3d 951 (3d Dept 2006), *app denied* 8 NY3d 808, *cert denied* 128 S Ct 488 (US 2007); *see also DiRose v NYS Dept of Correctional Servs.*, 216 AD2d 691 (3d Dept 1995); *Matter of Reubens v Murray*, 194 AD2d 492 (1st Dept 1993). Such is the case with each FOIL request seeking FOIL processing records related thereto.

Nor is an administrative appeal the proper forum to make a new FOIL request. The purpose of an administrative appeal from a denial of a FOIL request is to challenge the correctness thereof. POL §89(4)(a). As such, a new request for processing records which may have been created since receipt of the FOIL requests, provided for the first time in an administrative appeal, will not be considered here, since they are “not pertinent to the correctness of the original denial.” *Matter of Reclaim the Records*, 185 AD3d at 1272.

Finally, as to your second point, that some records should be made available in redacted form, irrespective of the ground for denial, is not an accurate statement of the requirements under FOIL. For example, under FOIL, redacted records generally “are available only under the personal privacy exemption” pursuant to POL §§87(2)(b) and 89(2).<sup>7</sup> *Matter of Judicial Watch, Inc., supra.*; *In Matter of Appellate Advocates v NYS Dep't. of Corr. & Comm. Supervision*, 2023 NY Slip Op 06466, \*\*2 (Ct App 2023) (nonprivileged information included in privileged communications “does not destroy the immunity”); *Matter of Stengel v Vance*, 198 AD3d 434

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<sup>7</sup> The case you cite in support, *Schenectady Cnty. Soc'y for Prevention of Cruelty to Animals, Inc. v Mills* (18 NY3d 42, 45 [2011]) is distinguishable on its facts. In *Schenectady*, the issue was whether home addresses could be reasonably redacted from a list of “business” addresses on privacy grounds, i.e. POL §87(2)(b).

(1st Dept 2021) (attorney work product); *see also Matter of Queensrail Corp. v Metropolitan Transp. Authority*, 2023 NY Slip Op 06458 (1st Dept 2023) citing *Matter of Judicial Watch, Inc., supra*.

In accordance with the above discussion, your appeal as to each FOIL request is denied.

Sincerely,



Robin McCabe  
Assistant District Attorney  
Chief, Civil Litigation Unit

cc: Committee on Open Government  
Department of State  
41 State Street, Albany, NY 12231





June 3, 2024

**Via Electronic Mail:** FOIL@dany.nyc.gov  
Office of the General Counsel, Civil Litigation Unit  
New York County District Attorney's Office  
One Hogan Place, New York, NY 10013  
Attn: Records Access Officer

**Freedom of Information Law Request: Communications Referencing  
Judge Merchan**

Dear Sir/Madam:

America First Legal Foundation is a national, nonprofit organization working to promote the rule of law in the United States, prevent executive overreach, and ensure due process and equal protection for all Americans, all to promote public knowledge and understanding of the law and individual rights guaranteed under the Constitution and laws of the United States. To that end, we file Freedom of Information Act (FOIA) requests on issues of pressing public concern, then disseminate the information we obtain, making documents broadly available to the public, scholars, and the media. Using our editorial skills to turn raw materials into distinct work, we distribute that work to a national audience through traditional and social media platforms. AFL has over 222,000 followers on Facebook, 230,000 followers on X, and our Founder and President has over 635,000 followers.

**I. Custodians**

- A. Alvin Bragg
- B. Matthew Colangelo
- C. Joshua Steinglass
- D. Meg Reiss
- E. Joyce Smith
- F. Leslie Dubeck
- G. Sherene Crawford

611 Pennsylvania Ave SE #231  
Washington, DC 20003

320 South Madison Avenue  
Monroe, Georgia 30655

## II. Requested Records

Pursuant to the New York Freedom of Information Law, N.Y. Pub. Off. Law § 86 et seq., AFL requests disclosure of the following records:

- A. Records of all communications containing the term “Merchan.”

## III. Processing and Production

AFL, as a news media requestor, seeks a waiver of all search and duplication fees. The requested documents will be posted in their entirety on our website and made freely available to the public, and this request is not being made for commercial purposes.

Processing should occur in strict compliance with applicable state laws and regulations. Among other requirements, you must search the custodians’ personal emails and devices. Encrypted messaging does not shield disclosable records from public view.

If you have any questions about our request or believe further discussions regarding search and processing would facilitate more efficient production, then please contact me at FOIA@aflegal.org. Also, if AFL’s fee waiver request is not granted in full, please contact us immediately upon making that determination.

To accelerate your release of responsive records, AFL welcomes production on an agreed rolling basis. Please provide responsive records in an electronic format by email. Alternatively, please provide responsive records in native format or in PDF format on a USB drive to America First Legal Foundation, 611 Pennsylvania Ave SE #231, Washington, DC 20003.

Thank you in advance for your cooperation.

Sincerely,

/s/ Jacob Meckler

America First Legal Foundation

**DISTRICT ATTORNEY**  
**COUNTY OF NEW YORK**  
ONE HOGAN PLACE  
New York, N. Y. 10013  
(212) 335-9000



ALVIN L. BRAGG, JR.  
DISTRICT ATTORNEY

June 7, 2024

[VIA EMAIL: [foia@aflegal.org](mailto:foia@aflegal.org)]  
Jacob Meckler  
America First Legal Foundation  
611 Pennsylvania Ave. SE #231  
Washington, DC 20003

Re: 24F0358 – FOIL #7 dated June 3, 2024  
Communications Referencing Judge Merchan

To Jacob Meckler:

I am an Assistant District Attorney in New York County assigned to be the Records Access Officer in connection with your request under the Freedom of Information Law (FOIL). The request was received by this office via email on June 3, 2024. Your request is denied in its entirety.

Your FOIL request is denied as overbroad, and for failing to reasonably describe the records you seek. See *Asian Am. Legal Defense Education Fund, supra*, *Matter of Madden v. Village of Tuxedo Park*, 192 AD3d 802 (2d Dept 2021) citing POL § 89(3)(a) and *Matter of Data Tree, LLC v. Romaine*, 9 NY3d 454, 466 (2007). First, you have not provided a date range for your request, thus suggesting we should search records for each of the custodians for the entire duration of their employment at this office—in some cases as far back as 25 years. Moreover, your request for “all communications” is not limited to any particular type of communications, and therefore necessarily encompasses not only electronic communications such as emails and text messages, but also documents such as letters and notes, thus requiring we search not only through our current electronic email system, but also through all files of cases handled by each of the listed attorneys. In addition, your search is for all communications “containing the term ‘Merchan,’” a sitting Justice in New York County Supreme Court, Criminal Term, who has been on that bench since 2009. This office routinely prosecutes cases in front of Justice Merchan, thus, hundreds—if not thousands—of case files necessarily will contain his name on records in those



files. FOIL requires that the records sought be “reasonably described” by the requestor. POL §89(3)(a); *M. Farbman & Sons, Inc. v NYC HHC*, 62 NY2d 75 (1984); *Matter of Urban Justice Center v NYPD*, 2010 NY Slip Op 32400(U)(Sup Ct NY Co 2010); see also *Asian American Legal Defense Fund v NYPD*, 41 Misc 3d 471 (NY Sup Ct 2013), affirmed 125 AD3d 531 (1st Dept 2015); *Matter of Pflaum v Grattan*, 116 AD3d 1103 (3d Dept 2014); *Bader v Bove*, 273 AD2d 466 (2d Dept 2000). Your request fails to meet this standard.

The Freedom of Information Law Appeals Officer is Robin McCabe, Chief, Civil Litigation Unit, New York County District Attorney’s Office, One Hogan Place, New York, New York 10013.

Sincerely,



Madeleine Guilmain  
Assistant District Attorney  
Records Access Officer



June 18, 2024

**Via E-mail:**

Robin McCabe  
Chief, Civil Litigation Unit  
New York County District Attorney Office One Hogan Place  
New York, New York 10013

**Freedom of Information Law Request 24F0358-FOIL #7: Appeal of Denial**

This letter is an appeal of the denial by the District Attorney's Records Access Officer, Madeleine Guilmain (the "Records Access Officer"), of the June 7, 2024, Freedom of Information Law ("FOIL") Request, 24F0358-FOIL #7, by America First Legal Foundation ("AFL"), regarding records of communications containing the term "Merchan." The Records Access Officer denied the request because it was "overbroad" and "fail[ed] to reasonably describe the records" sought. Exhibit 1. For the following reasons, the denial should be reversed, and all documents requested should be released.

**I. Standard of Review**

"To promote open government and public accountability, FOIL imposes a broad duty on government agencies to make their records available to the public." Pub. Off. Law § 84; *Gould v. New York City Police Dep't*, 89 N.Y.2d 267, 274, 675 N.E.2d 808 (1996).

[A] free society is maintained when government is responsive and responsible to the public, and when the public is aware of governmental actions. . . . The people's right to know the process of government decision-making and to review the documents . . . is basic to our society. Access to such information should not be thwarted by shrouding it with the cloak of secrecy or confidentiality.

N.Y. Pub. Off. Law § 84. An agency must respond to reasonably described requests within five business days of receipt and shall "make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request . . ." N.Y. Pub. Off. Law § 89(3)(a). Furthermore, "an agency shall not deny a request on the basis that the request is voluminous or . . . burdensome

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because the agency lacks sufficient staffing or on any other basis if the agency may engage an outside professional service to provide copying, programming, or other services to retrieve or extract a record or data maintained in a computer storage system with reasonable effort, it shall be required to do so.” *Id.*

## II. The Records Access Officer Unlawfully Denied AFL’s Request

On June 3, 2024, AFL requested that the Office of the General Counsel, Civil Litigation Unit of the District Attorney’s Office disclose “all communications containing the term ‘Merchan’ sent to and from seven custodians: Alvin Bragg, Matthew Colangelo, Joshua Steinglass, Meg Reiss, Joyce Smith, Leslie Dubeck, and Sherene Crawford. Exhibit 2.

On June 7, 2024, the Records Access Officer denied the request because it was “overbroad” and “fail[ed] to reasonably describe the records.” Exhibit 1. The Officer supported their denial with three points: (1) AFL failed to include a date range; (2) AFL failed to specify which particular types of communications desired; and (3) the search term “Merchan” would yield too many results. This reasoning is unpersuasive for multiple reasons.

First, AFL will agree to narrow the date range to March 30, 2023 to April 14, 2024. Accordingly, the objection by the Records Access Officer about a lack of date range is moot. We hereby request that you explicitly advise whether this date range will resolve the issue concerning the date range in a manner satisfactory to the District Attorney’s Office.

Second, “in order for an agency to deny a FOIL request for overbreadth, the agency must demonstrate that the description is insufficient for the purpose of *locating and identifying* the documents sought.” *Jewish Press, Inc. v. New York City Dep’t of Educ.*, 183 A.D.3d 731, 732, 122 N.Y.S.3d 679 (2020) (emphasis added). The Office of the Attorney General cites no issue with identifying and locating which documents AFL requested. Indeed, AFL’s request is extraordinarily clear. It simply requests all communications connected to seven specific individuals containing the word “Merchan.” As long as an agency has sufficient information required to identify the records in question, there can be no proper overbreadth argument. *M. Farbman & Sons, Inc. v. New York City Health & Hosps. Corp.*, 62 N.Y.2d 75, 83 (1984).

Similarly, “Public Officers Law § 89(3)(a) requires that documents requested pursuant to FOIL be ‘reasonably described’ in order to enable the agency to locate the records in question.” *Jewish Press*, 183 A.D.3d at 732. The Records Access Officer does not assert that she is unable to locate the files based on AFL’s request. Rather, her response indicates they know exactly where to search: “emails and text messages . . . letters and notes . . . our current electronic email system . . . [and] files of cases handled by each of the listed attorneys.” Exhibit 1.

The Records Access Officer's reasons for the denial indicate that the volume of the request—as opposed to the lack of specificity—is the reason behind the denial. The Officer is unwilling to grant the request because there would be “hundreds— if not thousands” of responsive records. Exhibit 1. In other words, AFL's request is too burdensome. But, the Officer has “conflated the requirement of reasonable description with the related, but separate, consideration as to whether it would be unduly burdensome . . . to comply with the . . . request.” *Jewish Press*, 183 A.D.3d at 731. A burdensome, high-volume request is not a valid reason for denial. As stated above, “an agency shall not deny a request on the basis that the request is voluminous or that locating or reviewing the requested records or providing the requested copies is burdensome” if the agency “may engage an outside professional service” to assist them. N.Y. Pub. Off. Law § 89(3)(a). It remains unclear why the Records Access Officer could not employ an outside professional service to assist in locating and transmitting the requested records to AFL. Therefore, the District Attorney's Office must grant the request.

The cardinal purpose of FOIL is to facilitate government transparency and enable citizens to access records and gain an understanding of governmental actions. N.Y. Pub. Off. Law § 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.”). In alignment with FOIL's legislative purpose, “FOIL is to be liberally construed and its *exceptions construed narrowly* so that the public is granted *maximum* access to the records of government.” *Cap. Newspapers, Div. of Hearst Corp. v. Whalen*, 69 N.Y.2d 246, 252 (1987) (emphasis added). The Records Access Officer's denial is antithetical to the purpose of FOIL and “shroud[s] . . . with [a] cloak of secrecy” records pertaining to the judge who recently presided over a case of immense national interest and historic consequence. N.Y. Pub. Off. Law § 84.

For the reasons above, we appeal this denial under N.Y. Pub. Off. Law § 89(4)(a) and respectfully request that the records be released.

### III. Conclusion

As required by the Freedom of Information Law, the head or governing body of an agency, or whomever is designated to determine appeals, must respond within ten business days of the receipt of an appeal. If the records are denied on appeal, please explain the reasons for the denial fully in writing as required by law.

In addition, please be advised that the Freedom of Information Law directs agencies to send all appeals and the determinations that follow to the Committee on Open Government, Department of State, One Commerce Plaza, 99 Washington Ave., Albany, New York 12231.

Sincerely,

/s/ Michael Ding

Michael Ding  
America First Legal Foundation  
611 Pennsylvania Avenue SE #231  
Washington, D.C. 20003  
Michael.Ding@aflegal.org  
(202) 964-3721

/s/ Edward Andrew Paltzik

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*Outside Counsel to  
America First Legal Foundation*

# EXHIBIT 1

**DISTRICT ATTORNEY**  
**COUNTY OF NEW YORK**  
ONE HOGAN PLACE  
New York, N. Y. 10013  
(212) 335-9000



**ALVIN L. BRAGG, JR.**  
DISTRICT ATTORNEY

June 7, 2024

[VIA EMAIL: [foia@aflegal.org](mailto:foia@aflegal.org)]  
Jacob Meckler  
America First Legal Foundation  
611 Pennsylvania Ave. SE #231  
Washington, DC 20003

Re: 24F0358 – FOIL #7 dated June 3, 2024  
Communications Referencing Judge Merchan

To Jacob Meckler:

I am an Assistant District Attorney in New York County assigned to be the Records Access Officer in connection with your request under the Freedom of Information Law (FOIL). The request was received by this office via email on June 3, 2024. Your request is denied in its entirety.

Your FOIL request is denied as overbroad, and for failing to reasonably describe the records you seek. See *Asian Am. Legal Defense Education Fund, supra, Matter of Madden v. Village of Tuxedo Park*, 192 AD3d 802 (2d Dept 2021) citing POL § 89(3)(a) and *Matter of Data Tree, LLC v. Romaine*, 9 NY3d 454, 466 (2007). First, you have not provided a date range for your request, thus suggesting we should search records for each of the custodians for the entire duration of their employment at this office—in some cases as far back as 25 years. Moreover, your request for “all communications” is not limited to any particular type of communications, and therefore necessarily encompasses not only electronic communications such as emails and text messages, but also documents such as letters and notes, thus requiring we search not only through our current electronic email system, but also through all files of cases handled by each of the listed attorneys. In addition, your search is for all communications “containing the term ‘Merchan,’” a sitting Justice in New York County Supreme Court, Criminal Term, who has been on that bench since 2009. This office routinely prosecutes cases in front of Justice Merchan, thus, hundreds—if not thousands—of case files necessarily will contain his name on records in those



files. FOIL requires that the records sought be “reasonably described” by the requestor. POL §89(3)(a); *M. Farbman & Sons, Inc. v NYC HHC*, 62 NY2d 75 (1984); *Matter of Urban Justice Center v NYPD*, 2010 NY Slip Op 32400(U)(Sup Ct NY Co 2010); see also *Asian American Legal Defense Fund v NYPD*, 41 Misc 3d 471 (NY Sup Ct 2013), affirmed 125 AD3d 531 (1st Dept 2015); *Matter of Pflaum v Grattan*, 116 AD3d 1103 (3d Dept 2014); *Bader v Bove*, 273 AD2d 466 (2d Dept 2000). Your request fails to meet this standard.

The Freedom of Information Law Appeals Officer is Robin McCabe, Chief, Civil Litigation Unit, New York County District Attorney’s Office, One Hogan Place, New York, New York 10013.

Sincerely,



Madeleine Guilmain  
Assistant District Attorney  
Records Access Officer



# EXHIBIT 2



June 3, 2024

**Via Electronic Mail:** FOIL@dany.nyc.gov  
Office of the General Counsel, Civil Litigation Unit  
New York County District Attorney's Office  
One Hogan Place, New York, NY 10013  
Attn: Records Access Officer

**Freedom of Information Law Request: Communications Referencing  
Judge Merchan**

Dear Sir/Madam:

America First Legal Foundation is a national, nonprofit organization working to promote the rule of law in the United States, prevent executive overreach, and ensure due process and equal protection for all Americans, all to promote public knowledge and understanding of the law and individual rights guaranteed under the Constitution and laws of the United States. To that end, we file Freedom of Information Act (FOIA) requests on issues of pressing public concern, then disseminate the information we obtain, making documents broadly available to the public, scholars, and the media. Using our editorial skills to turn raw materials into distinct work, we distribute that work to a national audience through traditional and social media platforms. AFL has over 222,000 followers on Facebook, 230,000 followers on X, and our Founder and President has over 635,000 followers.

**I. Custodians**

- A. Alvin Bragg
- B. Matthew Colangelo
- C. Joshua Steinglass
- D. Meg Reiss
- E. Joyce Smith
- F. Leslie Dubeck
- G. Sherene Crawford

611 Pennsylvania Ave SE #231  
Washington, DC 20003

320 South Madison Avenue  
Monroe, Georgia 30655

## II. Requested Records

Pursuant to the New York Freedom of Information Law, N.Y. Pub. Off. Law § 86 et seq., AFL requests disclosure of the following records:

- A. Records of all communications containing the term “Merchan.”

## III. Processing and Production

AFL, as a news media requestor, seeks a waiver of all search and duplication fees. The requested documents will be posted in their entirety on our website and made freely available to the public, and this request is not being made for commercial purposes.

Processing should occur in strict compliance with applicable state laws and regulations. Among other requirements, you must search the custodians’ personal emails and devices. Encrypted messaging does not shield disclosable records from public view.

If you have any questions about our request or believe further discussions regarding search and processing would facilitate more efficient production, then please contact me at FOIA@aflegal.org. Also, if AFL’s fee waiver request is not granted in full, please contact us immediately upon making that determination.

To accelerate your release of responsive records, AFL welcomes production on an agreed rolling basis. Please provide responsive records in an electronic format by email. Alternatively, please provide responsive records in native format or in PDF format on a USB drive to America First Legal Foundation, 611 Pennsylvania Ave SE #231, Washington, DC 20003.

Thank you in advance for your cooperation.

Sincerely,

/s/ Jacob Meckler

America First Legal Foundation

**DISTRICT ATTORNEY  
COUNTY OF NEW YORK**  
ONE HOGAN PLACE  
New York, N. Y. 10013  
(212) 335-9000



**ALVIN L. BRAGG, JR.**  
DISTRICT ATTORNEY

July 2, 2024

[VIA E-MAIL: [michael.ding@aflegal.org](mailto:michael.ding@aflegal.org); [edward@bochner.law](mailto:edward@bochner.law) ]

Michael Ding  
America First Legal Foundation  
611 Pennsylvania Ave. SE #231  
Washington DC 20003

Edward A. Palzik, Esq.  
Bochner PLLC  
1040 Avenue of the Americas, 15<sup>th</sup> Floor  
New York, NY 10018

Re: Appeal of FOIL Request: 24F0358  
*Communications Re: Merchan*

The New York County District Attorney's Office has received your Freedom of Information Law (FOIL) appeal of the denial by this Office's Records Access Officer (RAO) of your above-referenced FOIL request dated June 3, 2024. As the FOIL Appeals Officer, having reviewed the FOIL file, procedural history, and consulted with the RAO, I am prepared to rule on this matter.

As an initial matter, the general public's right to obtain records pursuant to FOIL is not limitless. The New York State Legislature, in recognizing the need to keep certain matters confidential, carved out exemptions when information will not be subject to disclosure under FOIL. *See generally*, Public Officers Law (POL) §87(2); *M. Farbman & Sons, Inc., v NYC Health & Hospitals Corp.*, 62 NY2d 75 (1984); *Fink v Lefkowitz*, 47 NY2d 567 (1979); *Johnson v NYPD*, 257 AD2d 343 (1st Dept 1999). "While agency records are presumptively available for public inspection and disclosure under FOIL..., an agency may deny access to records which 'are specifically exempted from disclosure by state or federal statute.'" *Matter of Capital Newspapers Div. of Hearst Corp. v City of Albany*, 63 AD3d 1336, 1337 (3d Dept 2009) (internal citations omitted), *affd as mod* 15 NY3d 759 (2010). For example, FOIL specifically exempts from public disclosure statutorily protected work product and internal communications of attorneys. POL §§87(2)(a) and (e); CPLR §4503(a)(1); *In Matter of Appellate Advocates v NYS Dept of Corr. & Comm. Supervision*, 40 NY3d 547, 552 (2023); *Matter of Judicial Watch, Inc. v City of New York*, 178 AD3d 540, 541 (1st Dept 2019); *Matter of Tuck-It-Away Assoc., LP v Empire State Dev. Corp.*, 54 AD3d 154, 163 (1st Dept 2008); *Smith v City of New York*, 49 AD3d 400, 401 (1st Dept 2008); *Matter of Woods v Kings County Dist. Attorney's Off.*, 234 AD2d 555 (2d Dept 1996); *Bennett v Girgenti*, 226 AD2d 792 (3d Dept 1996); *John Blair Communications, Inc. v Reliance Capital Group*, 182 AD2d 578 (1st Dept 1992); *Corcoran v Peat Marwick*, 151 AD2d 443 (1st Dept 1989); *see*

*also Matter of Legal Aid Society v NY County Dist. Attorney's Off.*, 2022 NY Slip Op 034362(U), \*6 (Sup Ct NY Co. 2022).

Furthermore, the requirement that a FOIL request be reasonably described applies equally to physical as well as electronic data/records. POL §§86(4) and 89(3); *Matter of Konigsberg v Coughlin*, 68 NY2d 245, 251 (1986); *see also Reclaim the Records v NYS Dept of Health*, 185 AD3d 1268 (3d Dept 2020), *lv denied* 36 NY3d 910 (2021). With these principles in mind, my decision is outlined below.

By letter dated June 18, 2024, you appeal the determination by RAO Madeleine Guilmain, denying your FOIL request dated June 3, 2024 (seeking “all communications containing the term ‘Merchan’” from seven different custodians in this Office) as overbroad and for failing to reasonably describe the records sought. On the record before me and under the circumstances of your June 3 FOIL request—which broadly seeks “all communications” containing the name of an active New York County Supreme Court justice who has been on the bench over 15 years—I find that this request seeks communications in any form and without any date limitations or reference to any case names or numbers, thereby constraining this Office’s ability to reasonably conduct a search of various physical and electronic forms of communications which might be found in emails, records and files maintained by each of the custodians during their employment in this Office.

“FOIL does not require that an agency engage in herculean efforts in attempting to locate. . . needles in the haystack.” FOIL-AO-18863. Even though “the needles” may be there, somewhere, “FOIL [does] not require that an agency go through the haystack in an effort to locate the needles.” *Id.*; *see also Konigsberg v. Coughlin*, 68 NY2d at 250; *Aron Law v. NYC Dept of Educ.*, 192 A.D.3d 552, 553 (1st Dept 2021)(“agency staff are not required to engage in herculean or unreasonable efforts in locating records to accommodate a person seeking records”)(internal quotations marks and citation omitted). In this case, the only way for this Office to have attempted to identify and locate the records you sought in your June 3 FOIL request would have been to engage in colossal efforts of individually searching and reviewing every electronic and physical record of communication maintained by the named custodians during their entire tenure in this Office, one of whom has been employed by the Office for over 20 years. Conducting such an expansive and arduous search is neither required nor countenanced by FOIL. *Matter of Data Tree LLC v Romaine*, 9 NY3d 454, 461 (2007) (right to access of public records “has not been construed to ‘require extraordinary efforts by the agency to provide records...”).

Rather, the Public Officers Law requires the requestor in the first instance to describe records sufficiently so that a search can be made by the agency to identify and locate responsive records with reasonable effort. POL §89(3); *M. Farbman & Sons, Inc. v NYC Health & Hospital Corp*, 62 NY2d at 83; *Matter of Brown v DiFiore*, 139 AD3d 1048 (2d Dept 2016); *Roque v Kings County Dist. Attorney's Off.*, 12 AD3d 374 (2d Dept 2004). I also note that at no time prior to the RAO’s determination did you attempt to narrow your FOIL request by refining the type of communications you were seeking or the scope of your search. *See Matter of Wagner v NYC Dept of Educ.*, 222 AD3d 420 (1st Dept 2023).

This Office does not keep a centralized system of all communications regardless of type or format, nor does it generally maintain records of communications in a way that they can

reasonably be located, extracted or segregated without a case name or a case number. I find that, as worded, your June 3 FOIL request, “by any measure...was an open-ended ‘fishing expedition,’” such that any effort by this Office to respond to it would have been unduly burdensome. *Jewish Press, Inc. v NYPD*, 2021 NY Misc LEXIS 45807 (Sup Ct NY Co 2021); see *Matter of Madden v Village of Tuxedo Park*, 192 AD3d 802 (2d Dept 2021) citing POL 89(3)(a) and *Matter of Data Tree*, 9 NY3d at 466. The law is clear that an agency is only required to disclose non-exempt records it maintains that are “retrievable with reasonable effort.” *Id.* at 464 see also *Matter of NY Civil Liberties Union v NYS Office Of Ct. Admin.*, 224 AD3d 458, 459 (1st Dept 2024) (sufficient showing made that any attempt to comply with the broad FOIL request would be impracticable); *Cuddy Law Firm, PLLC v NYC Dept of Educ.*, 2023 NY Misc LEXIS 724 (Sup Ct NY Co 2023) (FOIL request amounting to a “fishing expedition” found to unduly burdensome). I also find on this record, particularly because of the excessively broad nature of the request and the way in which this Office maintains its records, that an outside service cannot be utilized to comply with this request. *In re NY Civil Liberties Union v NY State Police*, 2023 NY Slip Op 32079(U), at \*\*14, 17 (Sup Ct Albany Co 2023) (demand for records pertaining to all employees) citing *Matter of Time Warner Cable News 1 v NYPD*, 53 Misc3d 657, 670 (Sup Ct NY Co 2016); see also *Matter of Wagner*, 222 AD3d at 421-422.

I further uphold the RAO’s denial of your June 3 FOIL request on the additional ground that your request for “all communications” necessarily includes privileged communications pertaining to criminal investigations and prosecutions.<sup>1</sup> *Matter of Legal Aid Society v NY County Dist. Attorney’s Off.*, 2022 NY Slip Op 034362(U), \*6 (Sup Ct NY Co 2022); see also *John Blair Communications, Inc. v Reliance Capital Group*, 182 AD2d 578 (1st Dept 1992); *Corcoran v Peat Marwick*, 151 AD2d 443 (1st Dept 1989); *Smith v City of New York*, 49 AD3d 400, 401 (1st Dept 2008). It also calls for deliberative intra-agency correspondence that is specifically exempt from FOIL. POL §§87(2)(a)+(g)(i-iii); *Matter of Correction Officers’ Benevolent Ass’n. v NYC Dept of Corrections*, 157 AD3d 643 (1st Dept 2018); *NYS Joint Comm. On Public Ethics v Campaign for One NY, Inc.*, 53 Misc3d 983 (Sup Ct Albany Co 2016); *Lenchner v NYPD*, 52 Misc 3d 1206(A)(Sup Ct NY Co 2016); *Asian American Legal Defense Fund v NYPD*, 41 Misc 3d at 481; *Matter of Woods v Kings County Dist. Attorney’s Off.*, 234 AD2d 555 (2d Dept 1996); *Bennett v Girgenti*, 226 AD2d 792 (3d Dept 1996). The deliberative process privilege protects from disclosure communications reflecting advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated, based on the rationale that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the government decision-making process. *E.B. v. NYC Bd. of Educ.*, 233 FRD 289, 291-92 (EDNY 2005). Typically, the privilege protects “memoranda, drafts, recommendations, proposals, and other documents that reflect the opinions of their authors, rather than those of the agency.” *Fox News Network, LLC. v U.S. Dept of Treasury*, 911 F Supp. 2d 261, 272 (SDNY 2012); see also *Tigue v U.S. Dept of Justice*, 312 F3d 70, 76 (2d Cir 2002) (opinions, recommendations, and deliberations).

And to the extent communications containing “Merchan” relate to pending criminal cases, disclosure of such communications would interfere with a pending judicial proceeding. POL §87(2)(e)(i); *Abdur-Rashi v NYPD*, 31 NY3d 217, 227 (2018); *Lesher v Hynes*, 19 NY3d 57 (2012);

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<sup>1</sup> Privileged communications such as work product encompasses mental impressions, opinions, legal theories, and communications of an attorney. Civil Practice Law & Rules §3101; *John Blair Communications, Inc. v Reliance Capital Group*, 182 AD2d 578 (1st Dept 1992); *Corcoran v Peat Marwick*, 151 AD2d 443 (1st Dept 1989).



*Whitley v NY County Dist. Attorney's Off.*, 101 AD3d 455 (1st Dept 2012); *see also Figueroa v Gonzalez*, 64 Misc3d 959 (Sup Ct Kings Co 2019). FOIL exempts from disclosure documents compiled for law enforcement purposes which, if disclosed, would interfere with an ongoing judicial proceeding. *See id.* I also note that communications connected with the pending criminal prosecution under *People v. Trump*, New York County Indictment No. 71543/2023, may be subject to a protective order issued by the trial court in that case, Justice Merchan, and therefore would be prohibited from disclosure pursuant to that order. POL §87(2)(a); *see Rondot v. All Season Protection of N.Y. LLC*, 69 Misc3d 1218(A), \*6 (Sup Ct Bronx Co 2020) (protective order for discovery materials given to criminal defendant rendered those materials exempt from non-party subpoena in civil action). Similarly, any communications containing “Merchan” relating to a sealed case would not be publicly available under FOIL. POL §87(2)(a); CPL §160.50.

For the first time, in this administrative appeal, you have agreed to narrow the date range of your June 3 FOIL request to March 30, 2023 to April 14, 2024. Because “[t]he purpose of an administrative appeal from a denial of a FOIL request is to challenge the correctness of ‘such denial,’” *Matter of Reclaim the Records*, 185 AD3d at 1272; POL §89(4)(a), your provision of this date range for the first time on appeal does not render moot “the correctness of the original denial” of your FOIL request by RAO Guilmain on the basis, *inter alia*, that you had failed to include a date range. *See id.* Accordingly, for the reasons stated above, I uphold the RAO’s determination that she was unable to comply with your June 3 FOIL request because it was overbroad and failed to reasonably describe the records sought.

I recognize that, on the same day you emailed the instant appeal to this Office, you also emailed a new FOIL request dated June 18, 2024 (assigned number 24F0387), which is identical to your June 3, 2024 FOIL request, except that the new request has narrowed the date range to March 30, 2023 to April 14, 2024. In light of your new FOIL request, there is no need to remand the instant matter to RAO Guilmain for further consideration. *United Prob. Officers Ass’n v City of New York*, 187 AD3d 456 (1st Dept 2020) (the law does not allow an individual to circumvent a proper FOIL denial by filing a new and identical request). Instead, as Todd Fitch, the RAO assigned to your June 18 FOIL request, informed you in his June 21, 2024 letter, you can expect a determination or an update on that FOIL request on or before July 20, 2024.

In accordance with the above discussion, your appeal of your June 3, 2024 FOIL request 24F0358 is denied.

Sincerely,



Robin McCabe  
Assistant District Attorney  
Chief, Civil Litigation Unit

cc: Committee on Open Government  
Department of State  
41 State Street, Albany, NY 12231



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

In the Matter of

AMERICA FIRST LEGAL FOUNDATION,

*Petitioner,*

For a judgment pursuant to Article 78 of the  
Civil Practice Law and Rules,

v.

ALVIN BRAGG, in his official capacity as  
DISTRICT ATTORNEY OF THE COUNTY  
OF NEW YORK, and NEW YORK  
COUNTY DISTRICT ATTORNEY'S  
OFFICE

*Respondents.*

Index Number: \_\_\_\_\_

**MEMORANDUM OF LAW IN SUPPORT OF VERIFIED PETITION**

**TABLE OF CONTENTS**

***I. INTRODUCTION..... 1***

***II. BACKGROUND ..... 2***

***III. STANDARD OF REVIEW..... 2***

***IV. ARGUMENT..... 3***

**A. The DA’s Office Improperly Asserted Blanket Exemptions to Disclosure..... 3**

**B. The DA’s Office Did Not Carry Its Burden Establishing Exemptions to Disclosure 5**

1. Interference with Judicial Proceedings (POL § 87(2)(e)(i)) ..... 6

2. Grand Jury Secrecy (POL § 87(2)(a), CPL § 190.25(4)(a))..... 9

3. Intra-Agency Material (POL § 87(2)(g))..... 12

4. Attorney Work Product (POL § 87(2)(a), CPLR § 3101)..... 13

5. Overbreadth (POL § 89(3)) ..... 15

6. Protective Order (POL § 87(2)(a)) ..... 18

**C. The DA’s Office Failed to Consider Whether Redaction Could Render Partially Exempt Records Disclosable ..... 19**

***V. CONCLUSION ..... 22***

**TABLE OF AUTHORITIES**

<b>Cases</b>	<b>Page(s)</b>
<i>Abdur-Rashid v. New York City Police Dep't</i> , 31 N.Y.3d 217 (2018).....	7, 9
<i>Andryeyeva v. New York Health Care, Inc.</i> , 33 N.Y.3d 152 (2019).....	8
<i>Bent-Anderson v. Singh</i> , 209 A.D.3d 710 (2d Dep't 2022).....	14
<i>Buffalo Broad. Co. Inc. v. New York State Dep't of Corr. Servs.</i> , 174 A.D.2d 212 (1992).....	4
<i>Competitive Enter. Inst. v. Att'y Gen. of New York</i> , 161 A.D.3d 1283 (3d Dep't 2018).....	14
<i>Data Tree, LLC v. Romaine</i> , 9 N.Y.3d 454 (2007).....	3, 17
<i>Doyle v. Browning</i> , 194 A.D.3d 775 (2021).....	8
<i>Fink v. Lefkowitz</i> , 47 N.Y.2d 567 (1979).....	20, 22
<i>Friedman v. Rice</i> , 30 N.Y.3d 461 (2017).....	3
<i>Gartner v. New York State Att'y Gen.'s Off.</i> , 160 A.D.3d 1087 (3d Dep't 2018).....	14
<i>Geffner v. Mercy Med. Ctr.</i> , 125 A.D.3d 802 (2d Dep't 2015).....	14
<i>Gould v. New York City Police Dep't</i> , 89 N.Y.2d 267 (1996).....	4, 20
<i>In New York C.L. Union v. New York City Police Dep't</i> , 32 N.Y.3d 556 (2018).....	21
<i>James v. Donovan</i> , 130 A.D.3d 1032 (2d Dep't 2015).....	11
<i>John Blair Commc'ns, Inc. v. Reliance Cap. Grp., L.P.</i> , 182 A.D.2d 578 (1st Dep't 1992).....	14

<i>Leshner v. Hynes</i> , 19 N.Y.3d 57 (2012).....	6, 7, 8
<i>Loevy &amp; Loevy v. New York City Police Dep't</i> , 38 Misc. 3d 950 (Sup. Ct. N.Y. Cty. 2013).....	4, 7
<i>M. Farbman &amp; Sons, Inc. v. New York City Health &amp; Hosps. Corp.</i> , 62 N.Y.2d 75 (1984).....	12, 13, 16
<i>Matter of Konigsberg v. Couglin</i> , 68 N.Y.2d 245 (1986).....	16, 17
<i>Mazza v. Vill. of Croton-on-Hudson</i> , 140 A.D.3d 878 (2d Dep't 2016).....	4, 10
<i>McGhee v. New York City Police Dep't</i> , 52 Misc. 3d 1211(A) (Sup. Ct. N.Y. Cty. 2016) .....	7
<i>New York Times Co. v. Dist. Att'y of Kings Cnty.</i> , 179 A.D.3d 115 (2d Dep't 2019).....	15
<i>Newsday, LLC v. Nassau Cnty. Police Dep't</i> , 222 A.D.3d 85 (2023).....	2, 3, 5, 13
<i>Newspapers Div. of Hearst Corp. v. Burns</i> , 67 N.Y.2d 562 (1986).....	2
<i>Salzer v. Farm Family Life Ins. Co.</i> , 280 A.D.2d 844 (3d Dep't 2001).....	14
<i>Schenectady Cnty. Soc'y for Prevention of Cruelty to Animals, Inc. v. Mills</i> , 18 N.Y.3d 42 (2011).....	19
<i>Sears v. Gottschalk</i> , 502 F.2d 122 (4th Cir. 1974).....	17
<i>W. Harlem Bus. Group, v. Empire State Dev. Corp.</i> , 13 N.Y.3d 882 (2009).....	3, 5, 12
<i>Weisshaus v. Port Auth. of New York &amp; New Jersey</i> , 49 Misc. 3d 550 (Sup. Ct. Kings Cty. 2015) .....	3
<i>Xerox Corp. v. Town of Webster</i> , 65 N.Y.2d 131 (1985).....	20, 21, 22

**Statutes**

CPL § 190.25 ..... 9, 11

CPLR § 3101..... 13, 14

CPLR § 7803..... 1

PEN § 215.70..... 9, 11, 21

POL § 87 ..... *passim*

POL § 89..... *passim*

**Regulations**

22 N.Y.C.R.R. 202.8-b(c)..... 24

## I. INTRODUCTION

Petitioner America First Legal Foundation (“AFL”) respectfully submits this memorandum of law in support of its Petition which seeks, pursuant to Article 78 of the New York State Civil Practice Law and Rules (“CPLR”) and Public Officer Law (“POL”) § 89(4)(b), a judgment directing Respondents ALVIN BRAGG, in his official capacity as DISTRICT ATTORNEY OF THE COUNTY OF NEW YORK (“Bragg”), and NEW YORK COUNTY DISTRICT ATTORNEY’S OFFICE (the “DA’s Office”) (each a “Respondent” and together, “Respondents”) to provide AFL with document responsive to its several Freedom of Information Law (“FOIL”) requests.

As relevant to the instant proceeding, AFL filed four FOIL requests (each a “Request,” and collectively the “Requests”) between March 27, 2023, and June 3, 2024, seeking access to the DA’s Office’s records regarding specified classes of documents. The DA’s Office has essentially denied all of the Requests, turning over just one single-page redacted record in response to the Requests. Although the DA’s Office has provided purported bases upon which to deny the Requests, it has failed to carry its burden in demonstrating that all responsive documents that exist are exempt from disclosure. The DA’s Office’s refusal to turn over records subject to disclosure under FOIL is a “fail[ure] to perform a duty enjoined upon it by law.” CPLR § 7803(1). The DA’s Office’s attempt to defend this failure is based on its determination which “was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion.” *Id.* § 7803(3). As such, and as argued at greater length *infra*, this Court should grant a Judgment to AFL compelling the Respondents to disclose all documents responsive to the Requests.

## II. BACKGROUND

For a more thorough recitation of the facts relevant to this proceeding, the Court is respectfully directed to AFL's Verified Petition filed herewith, which is incorporated herein by reference.

## III. STANDARD OF REVIEW

FOIL's legislative declaration is an important interpretive tool in construing FOIL. That declaration recognizes the importance of the People's access to government records as a primary tool for the "understanding and participation of the public in government" and keeping the government accountable to the People. POL § 84. The legislature was unequivocal that

Access to such information should not be thwarted by shrouding it with the cloak of secrecy or confidentiality. The legislature therefore 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.

*Id.* (emphasis added). As such, FOIL requires that "[e]ach agency **shall . . . make available for public inspection and copying all records**, except those records or portions thereof that may be withheld pursuant to the exceptions of rights of access appearing in this subdivision." POL § 87(2) (emphasis added); *see also Cap. Newspapers Div. of Hearst Corp. v. Burns*, 67 N.Y.2d 562, 566 (1986) ("FOIL provides that **all records of a public agency are presumptively open to public inspection** and copying unless otherwise specifically exempted.") (emphasis added); *Newsday, LLC v. Nassau Cnty. Police Dep't*, 222 A.D.3d 85, 89 (2023) (same).

When an agency invokes an exemption to disclosure enumerated in POL § 87(2), it is the agency's burden to prove that the sought record is covered by the statutory exemption. POL § 89(4)(b) ("In the event that access to any record is denied pursuant to the provisions of subdivision two of section eighty-seven of this article, the agency involved shall have the burden



of proving that such record falls within the provisions of such subdivision two.”). An agency must “meet this burden in more than just a ‘plausible fashion.’ In order to deny disclosure, the [agency] must show that the requested information falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access.” *Data Tree, LLC v. Romaine*, 9 N.Y.3d 454, 462–63 (2007) (internal quotation marks omitted). The Court of Appeals has held that an agency fails to satisfy this burden when it merely “parrot[s]” the statutory language of the claimed exemption or provides “‘conclusory characterizations’ of the records sought.” *W. Harlem Bus. Group, v. Empire State Dev. Corp.*, 13 N.Y.3d 882, 884–85 (2009); *see also Weisshaus v. Port Auth. of New York & New Jersey*, 49 Misc. 3d 550, 558 (Sup. Ct. Kings Cty. 2015) (“[U]nder FOIL, an agency cannot simply quote the language of an exception without enumerating or describing the documents.”). Additionally, such statutory exemptions are to be narrowly construed. *Newsday*, 222 A.D.3d at 92 (“Consistent with the policy of broad public access, **the exemptions are to be narrowly construed**, and the burden rests on the agency to demonstrate that the requested material qualifies for exemption.”) (citing POL § 89(4)(b), *Matter of Friedman v. Rice*, 30 N.Y.3d 461, 475 (2017)) (emphasis added).

As argued at length *infra*, FOIL’s presumption that records are subject to disclosure, coupled with the heavy burden imposed on an agency seeking to oppose disclosure, requires the DA’s Office’s disclosure of records responsive to the Requests.

#### IV. **ARGUMENT**

##### A. **The DA’s Office Improperly Asserted Blanket Exemptions to Disclosure**

POL § 89(4)(b) makes clear that the statutory exemptions to disclosure enumerated in POL § 87(2) are to be applied on a record-by-record basis. POL § 89(4)(b) (“In the event that access to **any record** is denied pursuant to the provisions of subdivision two of section eighty-

seven of this article, the agency involved shall have the burden of proving **that such record** falls within the provisions of such subdivision two.”) (emphasis added). Accordingly, the Court of Appeals has frequently recognized that “blanket exemptions for particular types of documents are inimical to FOIL’s policy of open government.” *Gould v. New York City Police Dep’t*, 89 N.Y.2d 267, 275 (1996); *see also Mazza v. Vill. of Croton-on-Hudson*, 140 A.D.3d 878, 880 (2d Dep’t 2016) (“The agency must make a particularized showing that the statutory exemption from disclosure . . . applies to **all the records** that the petitioner seeks. Here, the Supreme Court should have conducted an in camera inspection to determine whether **the entire case file** falls within the exemption from disclosure.”) (emphasis added) (internal citation omitted); *Buffalo Broad. Co. Inc. v. New York State Dep’t of Corr. Servs.*, 174 A.D.2d 212, 215–16 (1992) (“The burden is on the governmental agency to establish that the material requested falls squarely within the ambit of one of [the] statutory exemptions. **The burden of establishing a blanket exemption covering all of the records requested is especially heavy.**”) (alteration in original) (internal citation and quotation marks omitted); *Loevy & Loevy v. New York City Police Dep’t*, 38 Misc. 3d 950, 953 (Sup. Ct. N.Y. Cty. 2013) (“An agency that seeks to withhold documents, pursuant to one or another of the statutory exemptions, **must make a particularized showing that each such document falls within that exemption.** A conclusory contention that an entire category of documents is exempt will not suffice.”) (emphasis added).

Thus, even to the extent that an asserted exemption may be relevant to certain records responsive to the Requests, it does not follow that the DA’s Office is relieved of the burden of searching for and disclosing responsive records that do not fall within the purview of the asserted exemption.

**B. The DA's Office Did Not Carry its Burden Establishing Exemptions to Disclosure**

The DA's Office relied on several exemptions enumerated in POL § 87(2) and elsewhere. As noted *supra*, pursuant to POL § 89(4)(b), the DA's Office has the burden of proving that records responsive to the Requests fall within an enumerated exemption. Moreover, in assessing whether records fall within a given exemption, said exemption must be narrowly construed. *See Newsday*, 222 A.D.3d at 92. The DA's Office's invocation of these exemptions stretched the acceptable scope of these exemptions far beyond what is appropriate so that it could rationalize what was essentially a complete denial of the Requests.

This Court should not credit the DA's Office's conclusory assertions of exemption. In almost every instance, the DA's Office refused to produce responsive documents because, according to the DA's Office, the Requests "necessarily include[]" documents that it claims are covered by statutory exemptions. *See, e.g.*, Ex. 19 at 5 ("I further find that your request for 'all communications' necessarily includes privileged communications pertaining to criminal investigations and prosecutions."). But an agency cannot invoke an exemption by "parrot[ing]" the statutory language of the claimed exemption or providing "'conclusory characterizations' of the records sought." *W. Harlem Bus. Group*, 13 N.Y.3d at 884–85. From the denials of the Requests issued by the DA's Office there is a question whether the DA's Office even reviewed the responsive records; the language of the denials appears to only speculate as to what kind of document could be covered by the Requests. Thus, not only has the DA's Office stonewalled AFL from receiving essentially any responsive documents, but it has, in almost all instances, not even provided AFL with the factual basis upon which to dispute its claims of exemption. This posture is entirely unwarranted, particularly upon a thorough analysis of each of the exemptions asserted

by the DA's Office which makes clear that legitimate factual issues can arise from the assertion of such exemptions.

1. Interference with Judicial Proceedings (POL § 87(2)(e)(i))<sup>1</sup>

In the June 3 Determination Letter,<sup>2</sup> the DA's Office claimed that the Requests were denied, *inter alia*, pursuant to POL § 87(2)(e)(i) due to records being "connected to pending criminal litigation." Ex. 17 at 2. AFL's June 11 Appeal noted that the exemption does not apply to records that are merely "connected" to pending criminal litigation. Ex. 18 at 2. Rather, POL § 87(2)(e)(i) only exempts from disclosure records that "are compiled for law enforcement purposes only to the extent that disclosure would interfere with law enforcement investigations or judicial proceedings." (Emphasis added). The DA's Office seems to have implicitly recognized the improper standard it utilized in denying the Requests because its denial of AFL's appeal quoted the correct standard when it stated it upheld the denial and "incorporate[d] by reference the RAO's analysis and legal support on the ground that disclosure of communications would interfere with a pending judicial proceeding." Ex. 19 at 5. But even though the June 25 Appeal Denial noted the correct standard, the June 25 Appeal Denial, and the analysis of the June 3 Determination Letter it relied upon and incorporated by reference, failed to prove that the sought "record[s] fall within the provisions" of the exemption. POL § 89(4)(b).

The DA's Office recognized, *see* Ex. 19 at 6, that the Court of Appeals announced the standard for when an agency can withhold documents pursuant to POL § 87(2)(e)(i) in *Leshner v. Hynes*, 19 N.Y.3d 57, 67 (2012). The DA claimed that "[a] generic determination is sufficient to show that disclosure under FOIL would interfere with said proceedings, thereby exempting

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<sup>1</sup> This exemption was invoked by the DA's Office at Exhibit 19 at 5–6 and Exhibit 23 at 3–4.

<sup>2</sup> Capitalized terms not defined herein have the meaning ascribed to them in the Verified Petition.

disclosure,”<sup>3</sup> and upheld its prior determination that the subject communications were properly exempt from disclosure by “find[ing] that the RAO has met the requirement articulated in *Leshner v Hynes* (19 N.Y.3d 57 [2012]) ‘by noting that there is a pending appeal’ in one case and a pending prosecution (awaiting sentence) in the other.” Ex. 19 at 6. But *Leshner* does not permit such a perfunctory “finding” to warrant exemption from disclosure.

*Leshner* was explicit that even when invoking POL § 87(2)(e)(i) “the agency must still fulfill its burden under Public Officers Law § 89(4)(b) to articulate a factual basis for the exemption.” *Leshner*, 19 N.Y.3d at 67. To do so, the “agency must identify the generic kinds of documents for which the exemption is claimed, and the generic risks posed by disclosure of these categories of documents.” *Id.*; see also *Abdur-Rashid v. New York City Police Dep’t*, 31 N.Y.3d 217, 235 (2018) (“Under *Leshner*, the agency could meet its obligation to provide a factual basis for the exemptions by identifying the generic kind of records for which the exemption was claimed and the generic risks posed by disclosure of those types of records.”). This Court has recognized that an agency must satisfy **both** elements—identifying the kinds of responsive documents and the risks posed by disclosure—to make this showing and appropriately withhold records responsive to a FOIL request. See, e.g., *McGhee v. New York City Police Dep’t*, 52 Misc. 3d 1211(A) (Sup. Ct. N.Y. Cty. 2016) (“[A]lthough respondents describe generic categories of records, they do not identify, even generically, the attendant risks that disclosure would pose to any future proceedings.”); *Loevy & Loevy v. New York City Police Dep’t*, 38 Misc. 3d 950, 954 (Sup. Ct. N.Y. Cty. 2013) (“While NYPD has claimed a blanket exception to all the records requested in the FOIL Request, it has

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<sup>3</sup> It is noteworthy that every single case the DA’s Office cited as support for this proposition predates *Leshner*. See Ex. 19 at 5–6. To the extent that prior cases held that a “generic determination,” standing alone, warranted exemption from disclosure pursuant to POL § 87(2)(e)(i), those cases have been overruled by *Leshner* and its progeny which, as discussed *infra*, require an agency to provide a factual basis for such a determination.

failed to provide any information on the generic types of documents, or categories of documents, which are allegedly exempt.”).

The DA’s Office did not state facts to meet either of those elements. The DA’s Office’s claim that a “generic determination is sufficient” based on finding that a proceeding is ongoing not only ignores the Court of Appeals’ holding in *Leshner*, but it also ignores the statutory text of POL § 87(2)(e)(i). The statute specifically limits the scope of the exemption by stating that disclosure is exempted where the sought records “are compiled for law enforcement purposes only to the extent that disclosure would interfere with law enforcement investigations or judicial proceedings.” (Emphasis added). By merely stating that disclosure is exempted based on the *existence* of a judicial proceeding, the DA’s Office has failed to carry its burden “to articulate a factual basis” that disclosure would *interfere* with the proceedings. *Leshner*, 19 N.Y.3d at 67. If the mere existence of a related judicial proceeding, standing alone, was sufficient to exempt responsive documents from disclosure, it would render the language of POL § 87(2)(e)(i) regarding interference with a proceeding surplusage. Such an interpretation runs afoul of elementary canons of statutory construction which do not permit such a reading. *See, e.g., Doyle v. Browning*, 194 A.D.3d 775, 777 (2021) (“In construing a statute, ‘words must be “harmonize[d]” and read together to avoid surplusage.’”) (quoting *Andryeyeva v. New York Health Care, Inc.*, 33 N.Y.3d 152, 176 (2019)).

Although the DA’s Office failed to even attempt to make the factual showing required of it under *Leshner*, even if it had attempted to make such a showing its burden would be heavier than a typical case related to POL § 87(2)(e)(i). This is so because, although sentencing and an appeal may constitute “judicial proceedings” under the statute, it would be considerably more difficult to establish that disclosure could somehow interfere with such proceedings. The Court of Appeals

has recognized that the danger of interfering in judicial proceedings is significantly higher earlier in the investigative process. *See Abdur-Rashid*, 31 N.Y.3d at 227 (“Before criminal proceedings have commenced, the inherent dangers of premature disclosure are even greater.”). In sharp contrast, the records in the proceedings identified by the DA’s Office are essentially closed. It is difficult to imagine how disclosure of communications about cases where guilt has already been adjudicated could possibly interfere with a sentencing and appeal moving forward.

For all of the foregoing reasons, the DA’s Office’s conclusory assertion that disclosure of unidentified—not even generically identified—documents would interfere with ongoing judicial proceedings is insufficient to carry its burden in invoking the POL § 87(2)(e)(i) exemption to disclosure under FOIL.

2. Grand Jury Secrecy (POL § 87(2)(a), CPL § 190.25(4)(a))<sup>4</sup>

In the June 3 Determination Letter responding to AFL’s FOIL Requests, the Respondents stated that certain portions of the Requests “[we]re denied in their entirety” finding that “[i]nternal communications about” the criminal cases in which President Trump and the Trump Organization are defendant “are exempt from disclosure under FOIL on numerous grounds, including . . . grand jury secrecy.” Ex. 17 at 2. The Respondents further asserted that “[a]ccess is also denied on grand jury secrecy grounds for 36 responsive records identified as a result of a search pursuant to section B(2) of your FOIL requests.” *Id.* at 3. Yet the Respondents fail to carry their burden of establishing such an exemption to disclosure applies to the documents responsive to AFL’s Requests.

In properly framing the analysis for exemption, it is important to note that the relevant state statute governing grand jury secrecy—CPL § 190.25(4)(a), incorporating by reference Penal Law § 215.70—only precludes “disclos[ing] the nature or substance of any grand jury testimony,

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<sup>4</sup> This exemption was invoked by the DA’s Office at Exhibit 19 at 4–5.



evidence, or any decision, result or other matter attending a grand jury proceeding.” Thus, the universe of documents affected by this law is relatively small, limited to those relating to the grand jury proceeding itself—not to those which either predate or followed the grand jury proceedings. It is particularly unlikely that all 36 responsive records identified in the search responsive to Request B(2) referenced in the June 3 Determination Letter exist in the relatively small universe of communications affected by this law, as outlined *supra*. Notably, in the June 3 Determination Letter, Respondents failed to disclose which specific protected categories of grand jury materials exempt disclosure with respect to each of the 36 responsive records identified. Therefore, it is unclear whether all 36 records identified consist of “the nature and substance” of grand jury testimony, evidence, decisions, results or another matter related to “attending a grand jury proceeding.”

As noted *supra*, conclusory assertions that records identified pursuant to a FOIL request fall within a statutory exemption to the FOIL are insufficient; rather, the agency in receipt of the request must provide evidentiary support that the stated exemption applies. *See, e.g., Mazza*, 140 A.D.3d 878, 879 (2d Dep’t 2016) (“[i]n a proceeding pursuant to CPLR article 78 to compel the production of material pursuant to FOIL, the agency denying access has the burden of demonstrating that the material requested falls within a statutory exemption, **which exemptions are narrowly construed**”) (internal citations omitted). Moreover, “[c]onclusory assertions that certain records fall within a statutory exemption are not sufficient; evidentiary support is needed.” *Id.* In the June 25 Appeal Denial, the Respondents assert in conclusory fashion that all 36 responsive records consist of “communications attending a grand jury proceeding” and are “exempt from disclosure under FOIL” without identifying any evidence to support this finding. The mere characterization of said records as “attending a grand jury proceeding” is merely a

“[c]onclusory assertion[] that certain records fall within a statutory exemption,” which is insufficient to resist disclosure. In the instant proceeding, the Respondents must set forth such evidentiary support or, if it cannot file responsive records due to its concern that doing so would be felonious, submit them to this Court for in camera review.

Ultimately, in the absence of any evidence to confirm otherwise, it appears that Respondents are applying the Grand Jury Secrecy exemption in an overbroad manner, which does not accord with the statutory considerations of CPL § 190.25(4)(a), Penal Law § 215.70, and the relevant case law. In fact, the case law relied upon by the Respondents in the June 25 Denial of Appeal is explicitly limited to the issue of disclosing “the **grand jury minutes** to [Petitioners] and to the general public, **including transcripts of testimony, exhibits, information about certain grand jurors, and legal instructions.**” *James v. Donovan*, 130 A.D.3d 1032, 1033 (2d Dep’t 2015) (emphasis added). In contrast, here, AFL only seeks disclosure of information related to communications that by definition would have occurred outside the scope of a grand jury proceeding itself, and accordingly falls outside the scope of the elements considered in *Donovan*. AFL is specifically seeking any and all information that discloses the nature and extent of communications between the DA’s Office and the United States Department of Justice, which is certainly not categorized as information protected by the statute. The information that AFL is seeking is of immeasurable public interest: the public certainly has a right to know whether the Manhattan District Attorney’s Office acted in concert with the United States Department of Justice to engage in a politically motivated prosecution against the 45th President of the United States, Donald J. Trump, despite repeated assurances from both agencies that this did not occur. Where the DA’s Office seems to have now confirmed that some such communications have occurred, the

DA's Office cannot now be heard to argue that in some attenuated sense those communications were "attending a grand jury proceeding." Ex. 19 at 4.

3. Intra-Agency Material (POL § 87(2)(g))<sup>5</sup>

Pursuant to POL § 87(2)(g), records which "are inter-agency or intra-agency materials" are exempt from disclosure. However, this exemption is circumscribed by the statute which removes from the exemption any records which are "i. statistical or factual tabulations or data; ii. instructions to staff that affect the public; [or] iii. final agency policy or determinations."

In invoking this exemption, the DA's Office stated in the June 25 Appeal Denial that AFL's "request for 'all communications' necessarily ... calls for deliberative intra-agency correspondence that is specifically exempt from FOIL." Ex. 19 at 5. But in finding that this request calls for certain material that the DA's Office assumed would be exempt from disclosure, the DA's Office has admitted that it did not consider whether individual responsive records were, in fact, covered by the intra-agency material exemption. This is merely a "conclusory characterization[]" of the records sought," which is insufficient to establish an exemption. *W. Harlem Bus. Group*, 13 N.Y.3d at 884–85.

This is precisely the kind of response that the Court of Appeals has recognized to be insufficient in *M. Farbman & Sons, Inc. v. New York City Health & Hosps. Corp.*, 62 N.Y.2d 75, 83 (1984). In *M. Farbman*, the respondents argued "that the five remaining items of appellant's FOIL request are exempt from production under section 87 (subd 2, par [g]), which protects inter-agency or intra-agency materials." *Id.* But the Court of Appeals, noting that "the burden lies with the agency 'to articulate particularized and specific justification', and to establish that 'the material requested falls squarely within the ambit of [the] statutory exemptions,'" found the "Respondents

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<sup>5</sup> This exemption was invoked by the DA's Office at Exhibit 19 at 5, Exhibit 23 at 3.

have not demonstrated as a matter of law that all of the records requested by appellant **are in fact** inter-agency or intra-agency materials or, even if so, that they are not statistical or factual tabulations, or instructions to staff that affect the public, or final agency policy or determinations.” *Id.* (emphasis added). Instead, the Court stated that “[t]he proper procedure for reaching a determination is the in camera inspection ordered by Special Term.” *Id.*

Even in a situation where an agency asserted a factual basis for asserting the intra-agency exemption to disclosure, the several statutory carveouts therefrom would require nuanced arguments regarding whether the exemption applies. But the analysis here is much simpler. The DA’s Office’s “conclusory assertions that the intra-agency exemption applies, with no factual support, w[as] insufficient to meet its burden of demonstrating that the exemption applied to any of the requested material. . . . Thus, the subject records were not properly withheld or redacted pursuant to the intra-agency exemption.” *Newsday*, 222 A.D.3d at 96.

4. Attorney Work Product (POL § 87(2)(a), CPLR § 3101)<sup>6</sup>

In similar fashion to other blanket exemptions imprecisely applied throughout the June 3 Determination Letter, the Respondents invoke a cursory reference to the attorney work product exception to FOIL pursuant to CPLR § 3101, stating that “some” of the 36 responsive records identified are “exempt from disclosure under FOIL as attorney work product.” Ex. 17 at 3. However, once again, the Respondents failed to specify which specific records are protected, and how the responsive records, in their entirety, are appropriately denied as attorney work product.

Similar to courts’ construction of the exemptions enshrined in the POL, “[b]ecause of the absolute nature of the privilege, **the attorney work product doctrine is narrowly applied** to materials prepared by an attorney, acting as an attorney, which contain his or her analysis and trial

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<sup>6</sup> This exemption was invoked by the DA’s Office at Exhibit 19 at 6 and Exhibit 23 at 3.

strategy.” *Competitive Enter. Inst. v. Att’y Gen. of New York*, 161 A.D.3d 1283, 1286 (3d Dep’t 2018) (emphasis added) (internal quotation marks omitted). Thus, it must be noted that any communication within the DA’s Office that was not issued by an attorney cannot fall within the attorney work product doctrine. Similarly, even communications issued by an attorney may only fall within the attorney work product doctrine if they are issued for the purpose of providing legal advice. “Attorney work product under CPLR § 3101(c), which is subject to an absolute privilege, is generally limited to materials prepared by an attorney, **while acting as an attorney.**” *Geffner v. Mercy Med. Ctr.*, 125 A.D.3d 802, 802 (2d Dep’t 2015) (emphasis added) (internal citations omitted). Accordingly, “[m]aterials or documents that could have been prepared by a layperson do not fall within the attorney work product exception.” *Bent-Anderson v. Singh*, 209 A.D.3d 710, 711 (2d Dep’t 2022) (citing *Salzer v. Farm Family Life Ins. Co.*, 280 A.D.2d 844, 846 (3d Dep’t 2001)).

Thus, it is axiomatic that “not every word written by a lawyer enjoys the absolute immunity of work product. The exemption should be limited to those materials which are uniquely the product of a lawyer’s learning and professional skills, such as materials which reflect his or her legal research, analysis, conclusions, legal theory or strategy.” *Gartner v. New York State Att’y Gen.’s Off.*, 160 A.D.3d 1087, 1091–92 (3d Dep’t 2018).

Additionally, the DA’s Office carries the burden to establish non-waiver of an applicable attorney client or work product privilege. *John Blair Commc’ns, Inc. v. Reliance Cap. Grp., L.P.*, 182 A.D.2d 578, 579 (1st Dep’t 1992) (“It is also the burden of the proponent of the privilege to prove non-waiver.”). Accordingly, to the extent the contents of any such communications have been disclosed, such as during the trial of President Trump, those communications can no longer be withheld on the alleged basis of an attorney work product exemption and are subject to

disclosure under FOIL. And courts have likewise recognized that redaction is appropriate as a means to excise exempt information when it comes to the attorney work product doctrine. *See New York Times Co. v. Dist. Att’y of Kings Cnty.*, 179 A.D.3d 115, 125 (2d Dep’t 2019) (noting the “aforementioned grounds,” including attorney work product, “are valid bases to redact material sought by FOIL request”).

5. Overbreadth (POL § 89(3))<sup>7</sup>

In the June 3 Determination Letter, the Respondents denied AFL’s Request C<sup>8</sup> on the basis that it was “overly broad.” Ex. 17 at 3. Subsequently, in the June 25 Appeal Denial, the DA’s Office concluded that Request C, which seeks “all SMS texts ... or similar communications” with any persons appointed or employed by the Biden White House, the DOJ, and the U.S. Dep’t of Homeland Security, should be denied because, “on its face, such a blanket request is palpably improper, vague, and overbroad to the extent it fails to specify the records to be disclosed with reasonable particularity” pursuant to POL §89(3). Ex. 19 at 2. The Respondents also denied FOIL Request 7 (regarding communications referencing the term “Merchan”) in the June 3 Determination based on the same reasoning. Ex. 23 at 2.

As an initial matter, the Respondents’ suggestion that the “only way to answer” these requests would be to “engage in colossal efforts of individual searching and reviewing every SMS text communication between each of the entities and custodians listed,” Ex. 19 at 2, is inaccurate. There is no reason to believe that Respondents were unable to conduct a more basic, high-level search for records responsive to these Requests by other means, such as issuing a department-wide memorandum requesting any custodian in possession of said records to present them for purposes

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<sup>7</sup> This exemption was invoked by the DA’s Office at Exhibit 19 at 2–3 and Exhibit 23 at 2–3.

<sup>8</sup> Request C was made as to several different custodians identified in FOIL 1, FOIL 2 and FOIL 3. *See* Exhibit 1 at 2, Exhibit 4 at 2, Exhibit 6 at 2.

of satisfying AFL's legitimate Requests. The Respondents also seem to rely entirely on this mistaken assumption that any search conducted in an attempt to satisfy Request 7 would require too much effort. While the Respondents' assertion that "FOIL does not require that an agency engage in herculean efforts in attempting to locate . . . needles in the haystack," Ex. 23 at 2, may be accurate in a general sense, it is irrelevant as applied to these facts; at no point have Respondents provided any evidence to suggest that the bare minimum—a basic search as described above—was conducted.

The case law cited by the Respondents in their Denial actually supports the legitimacy of AFL's Requests. The DA's Office cites to *Matter of Konigsberg v. Coughlin*, 68 N.Y.2d 245, 251 (1986), in support of their contention that "FOIL [does] not require that an agency go through the haystack in an effort to locate the needles." Yet, they seemingly ignore the Court's ultimate conclusion in this analogous matter, where the petitioner had requested all documents regarding an identified individual, himself: "[w]e are satisfied that the present FOIL request meets the standard set forth in *Farbman*, and conclude, accordingly, that **respondents cannot evade the broad disclosure provisions of that statute upon the naked allegation that the request will require review of thousands of records.**" *Konigsberg v. Coughlin*, 68 N.Y.2d at 249 (citing *Matter of Farbman & Sons v. New York City Health & Hosps. Corp.*, 62 N.Y.2d 75, 83 (1984)) (emphasis added).

Here too, with regard to Request 7 wherein AFL requested all documents referencing a specified individual, the Respondents should be precluded from evading disclosure of responsive records based upon their unsupported blanket contention that AFL's Requests represent "an open ended fishing expedition" which would be "unduly burdensome" to respond to. Ex. 23 at 3. It is black letter law that "FOIL does not require the party requesting the information to show any



particular need or purpose.” *Data Tree*, 9 N.Y.3d at 463 (2007). Notwithstanding that point, there is a clear rationale with understanding whether the DA’s Office had a different pattern of communication with a New York Supreme Court justice’s chambers during President Trump’s trial as opposed to any other defendant. Accordingly, the Respondents’ protest that Request 7 as constructed would require a review of 25 years’ worth of records is equally irrelevant, as the law makes clear: “[i]f otherwise locatable equitable considerations of the costs, in time and money of making records available for examination do not supply an excuse for non-production[.]” *Konigsberg*, 68 N.Y.2d at 250 (quoting *Sears v. Gottschalk*, 502 F.2d 122, 126 (4th Cir. 1974)).

Additionally, it is important to highlight that the Respondents’ denials of the aforementioned Requests failed to establish that they were insufficient for purposes of locating and identifying the requested documents. The DA’s Office claims that the agency “does not have a centralized system for searching text messages.” Ex. 19 at 3. However, the DA’s Office had earlier cited to POL § 89(3)(a), which states “[a]n agency shall not deny a request on the basis that the request is voluminous or that locating or reviewing the requested records or providing the requested copies is burdensome because the agency lacks sufficient staffing or on any other basis if the agency may engage an outside professional service to provide copying, programming or other services required to provide the copy.” The DA’s Office should not be able to shield its otherwise disclosable communications by specifically using a medium that it will subsequently claim it cannot search, notwithstanding that text messages are certainly capable of being searched. The DA’s Office must consider whether using an outside vendor will enable it to respond to these Requests. The DA’s Office’s reasoning that it need not conduct a search for responsive records regarding the name of a long-serving judge because of the voluminous nature of responsive records is unavailing for the same reason. *See* Ex. 23 at 2–3.

Finally, the June 3 Determination states that the Office does not have a way of tracking the documents sought in Request C. It is certainly not accurate to state that there is no way of searching for responsive records regarding these Requests, which were broken up into subparts (and which the DA's Office performed such searches with respect to Request B). Searches for the agencies or organizations in question could very possibly turn up responsive records. To suggest that these Requests were overly broad ignores that reasonable search terms could easily uncover responsive documents and reflects further unwillingness to engage in a basic search effort to provide the responsive records requested by AFL.

6. Protective Order (POL § 87(2)(a))<sup>9</sup>

In both the June 25 Appeal Denial and July 2 Denial of Appeal, the DA's Office claimed, both with respect to 36 identified responsive documents and to all other potentially responsive documents, that "to the extent they include communications connected with the pending criminal prosecution under *People v. Trump*, New York County Indictment No. 71543/2023, are subject to a protective order issued by the trial court." Exs. 19 at 6, 23 at 4. The DA's Office has not identified the specific protective order in question, so AFL cannot know the proper scope of such order. As discussed *supra*, it is the DA's Office's burden to establish that responsive documents are exempt from disclosure. cursory reference to an order without describing both the responsive documents at issue and how they fall within the scope of the protective order is insufficient to establish the DA's Office's claim of exemption. As a purely logical matter, it is difficult to comprehend how the DA's Office's internal or external communications can fall within the scope of the protective order allegedly at issue filed specifically with respect to a criminal trial. Without such a showing

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<sup>9</sup> This exemption was invoked by the DA's Office at Exhibit 19 at 6 and Exhibit 23 at 4.

by the DA's Office, this Court should not permit the DA's Office to hide behind an unsupported claim that the order requires that responsive records be deemed exempt from disclosure.

**C. The DA's Office Failed to Consider Whether Redaction Could Render Partially Exempt Records Disclosable**

Even assuming, *arguendo*, that certain portions of records responsive to the Requests contain information which fall within FOIL's exemption to disclosure, the DA's Office erred in refusing to either redact the exempt information or to only produce the portions of the records without exempt information in them, as argued by AFL in its June 11 Appeal. *See* Ex. 18 at 1–2. As noted by the Court of Appeals, “[c]ourts deciding FOIL issues often order redaction when a record contains both exempt and nonexempt information.” *Schenectady Cnty. Soc’y for Prevention of Cruelty to Animals, Inc. v. Mills*, 18 N.Y.3d 42, 46 (2011).

The DA's Office asserts that redaction or partial disclosure of a record is only available to excise exempt material where a record is withheld on the personal privacy exemption of POL § 87(2)(b) and claims that the case cited by AFL in its appeal, *Schenectady*, is distinguishable precisely because it dealt with the privacy exemption. Ex. 19 at 6–7 & n.6. This is not so. Initially, the plain language of *Schenectady* imposes no such limitation on the availability of redaction. It is difficult to understand how the DA's Office found otherwise where the Court of Appeal's holding was unambiguous in the very first line of its opinion: “We hold that an agency responding to a demand under the Freedom of Information Law (FOIL) may not withhold a record solely because some of the information in that record may be exempt from disclosure.” *Schenectady*, 18 N.Y.3d at 45. The Court of Appeals again utilized broad language later in its opinion, referencing “FOIL issues . . . when a record contains both exempt and nonexempt information.” *Schenectady*, 18 N.Y.3d at 46. It is illogical to assume that the Court of Appeals made general reference to “exempt and nonexempt information” when, in reality, it supposedly meant specifically private and non-

private information as it relates to the invasion of privacy exemption. These general assertions of the relevance of redactions—as opposed to cases that specifically deal with the invasion of privacy exemption—are ubiquitous through the Court of Appeal’s FOIL jurisprudence. *See, e.g., Gould v. New York City Police Dep’t*, 89 N.Y.2d 267, 275 (1996) (“If the court is unable to determine whether withheld documents fall entirely within the scope of the asserted exemption, it should conduct an *in camera* inspection of representative documents and order disclosure of all nonexempt, appropriately redacted material.”).

But the DA’s Office’s argument is further undermined because the Court of Appeals has explicitly recognized that partial disclosure of records is appropriate where only portions of a given record implicate an exemption under POL § 87(2) that is *not* the invasion of personal privacy ground of POL § 87(2)(b). For instance, in *Fink v. Lefkowitz*, the Court of Appeals summarized “[t]he issue posed [a]s whether certain portions of the manual that reveal confidential methods used for investigating nursing home fraud are exempt from disclosure pursuant to [POL § 87(2)(e)(iv)].” 47 N.Y.2d 567, 569 (1979) (emphasis added). The invasion of privacy exemption was not implicated. The Court, after *in camera* review of the document as issue—apparently well over 400 pages long—ultimately modified the Appellate Division’s order in reversing the portion of the order which ordered certain pages disclosed, while specifically noting regarding other pages that “there is no reason why these pages should not be disclosed.” *Id.* at 573–74. Similarly, in *Xerox Corp. v. Town of Webster*, the Court of Appeals considered whether material was subject to the “intra-agency materials” exemption to disclosure of POL § 87(2)(g)—not the invasion of privacy exemption. The Court found “[t]o the extent the reports contain ‘statistical or factual tabulations or data’ (Public Officers Law § 87 [2] [g] [i]), or other material subject to production, they should be redacted and made available to appellant.” 65 N.Y.2d 131, 133 (1985). As such,

the Court held “the matter must be remitted to permit an in camera inspection” to “determine whether the documents in fact fall wholly within the scope of FOIL’s exemption.” *Id.* (emphasis added).

Although both *Fink* and *Xerox Corp.* are decades old, the Court of Appeals has addressed the availability of redaction to records that fall within FOIL’s statutory exemptions as recently as 2018. In *New York C.L. Union v. New York City Police Dep’t*, 32 N.Y.3d 556, 570 (2018), the Court of Appeals held that there is “no statutory authorization for redaction” where “records are exempt from disclosure under Public Officers Law § 87 (2) (a),” the exemption for records specifically exempted from disclosure by state or federal statute. As such, AFL would concede that, for instance, any records properly exempted from disclosure as unlawful grand jury disclosure pursuant to Penal Law §215.70<sup>10</sup> cannot be rehabilitated by redaction. However, the Court of Appeals was explicit that its holding regarding the unavailability of redaction was strictly confined to documents exempt from disclosure pursuant to POL § 87(2)(a), but *not* the other statutory exemptions to FOIL contained in the rest of POL § 87(2). *See New York C.L. Union*, 32 N.Y.3d at 570 n.5 (“[T]he holdings of *Short* and *Karlin*—and our holding today—**apply only to Public Officers Law § 87 (2) (a)**, the FOIL exemption at issue. To the extent another FOIL exemption might authorize redaction as a means of separating ‘exempt’ from ‘non-exempt’ material within a record (*see Matter of Xerox Corp. v Town of Webster*, 65 N.Y.2d 131, 133 [1985]), that issue is not before us.”) (emphasis added). The Court of Appeals recognized that *Xerox Corp.*, permitting redaction when it comes to FOIL exemptions aside from POL § 87(2)(a), remains good law.

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<sup>10</sup> As explained at length *supra*, AFL contests the wide net that the DA’s Office seeks to cast in exempting documents from disclosure which do not actually fall within the scope of Penal Law §215.70.

FOIL's presumption that records are subject to disclosure would be hamstrung by a rule that entire records can be withheld where only a portion of them contain exempt information. Where holding otherwise would impede the legislature's intent in enacting FOIL, the Court of Appeals has clearly held that redaction, *see Xerox Corp.* 65 N.Y.2d at 133, or partial production, *see Fink*, 47 N.Y.2d at 573-74, is appropriate where only portions of a record contain exempt information. Thus, to the extent this Court, upon in camera review, finds that portions of records responsive to the Requests are exempt from disclosure, the Court should nonetheless order that Respondents should produce either redacted version of the responsive records or the portions of the records which contain nonexempt information.

#### V. CONCLUSION

For the reasons stated above, AFL respectfully requests that the Court grant its Petition and award all relief sought therein.

Dated: August 12, 2024  
New York, New York

Respectfully submitted,

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**CERTIFICATION OF COUNSEL**

Edward Andrew Paltzik, Esq., an attorney duly admitted to the practice of law in the Courts of the State of New York, does hereby affirm, pursuant to the Uniform Civil Rules for the Supreme Court & the County Court, 22 N.Y.C.R.R. 202.8-b(c), that the word count of the processing system used to prepare the aforesaid document indicates that the document contains no more than 6,906 words, exclusive of the caption and signature block.

/s/ Edward Andrew Paltzik

Edward Andrew Paltzik, Esq.