

**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; 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, 15th 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), *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) 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.¹ *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); *Leshner v Hynes*, 19 NY3d 57 (2012);

¹ 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,

A handwritten signature in blue ink that reads "Robin McCabe". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

Robin McCabe
Assistant District Attorney
Chief, Civil Litigation Unit

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