



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
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/s/ Edward Andrew Paltzik

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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]
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,

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

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

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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