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COURT OF APPEALS
STATE OF NEW YORK

MATTER OF NYCLU,

Appellant,

-against-

OCA,

Respondent.

NO. 74

20 Eagle Street
Albany, New York
September 09, 2025

Before:

ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUDGE CAITLIN J. HALLIGAN
JUSTICE MARK L. POWERS

Appearances:

TERRY DING, ESQ.
AMERICAN CIVIL LIBERTIES UNION
Attorney for Appellant
125 Broad Street
New York, NY 10004

ROBYN L. ROTHMAN, ESQ.
OFFICE OF COURT ADMINISTRATION
Attorney for Respondent
25 Beaver Street
Suite 8
New York, NY 10004

Brandon Deshawn
Official Court Transcriber

1 JUDGE RIVERA: All right. Last case on today's
2 calendar, Matter of NYCLU v. the Office of Court
3 Administration, Number 74. Counsel?

4 MR. DING: Good afternoon, Your Honors. Terry
5 Ding, for the New York Civil Liberties Union. I'd like to
6 reserve three minutes for rebuttal, please.

7 JUDGE RIVERA: Okay. Sir, you have it.

8 MR. DING: The memos at issue in this case
9 contain OCA's opinions on how judges should apply the law
10 in certain cases that they decide. These memos affect how
11 New Yorkers' rights are adjudicated. So they go to the
12 heart of FOIL's promise of open government and public
13 accountability. Yet OCA argues that it should be allowed
14 to conceal these memos from the public, that New Yorkers
15 have no right to see them.

16 JUDGE SINGAS: Well, can we talk about your
17 requests - - -

18 MR. DING: Yes.

19 JUDGE SINGAS: - - - specifically? And do you
20 think they were reasonably described giving them an
21 opportunity to find the documents that you were looking
22 for?

23 MR. DING: We do. And this obviously goes to the
24 conversations the court was having in the earlier case.
25 But OCA knows exactly what documents were - - -

1 JUSTICE POWERS: But that would include the
2 clarification, right?

3 MR. DING: The - - -

4 JUSTICE POWERS: In order to say that you could
5 adequately find them adequately described?

6 MR. DING: That's right, Justice Powers. Yeah.
7 So the request that is sort of operative is our clarified
8 request, which we provided in our administrative appeal.
9 And if it helps, I can just quote that request which is on
10 - - -

11 JUDGE HALLIGAN: But if we were to conclude that
12 the clarification on the administrative appeal would be
13 properly brought as a new request and not something that
14 amends the initial request, what about the initial request?
15 Could you start with that?

16 MR. DING: Sure. I would just note, though,
17 Judge Halligan, that if you're saying that we have to
18 submit a new request and we're not allowed to clarify
19 request in the administrative process, that would be a
20 significant departure from regulations and case law and
21 sort of how FOIL practice in New Yorkers has always gone.

22 So we do think it is our clarified request that
23 is at issue. But with respect to our original request, we
24 think that is also clear enough that OCA knows what
25 documents we're looking for because we specified the

1 subject matter of the documents we're looking for. We
2 specified the author, the recipient, the time period, and
3 we included the Crawford memo as an exhibit - - - or as an
4 attachment to that request.

5 JUSTICE POWERS: Again, this is - - -

6 JUDGE HALLIGAN: So you could think about that -
7 - - sorry. You could think about that one of two ways,
8 right?

9 MR. DING: Uh-huh.

10 JUDGE HALLIGAN: You could think about the
11 Crawford memo as essentially narrowing the request by way
12 of saying, we want documents like this, but the words of
13 the request could be understood to sweep much more broadly,
14 and to include any number of memos or documents which
15 happen to reference some federal or state statute or
16 regulation. So are you - - - is your argument contingent
17 upon thinking about Crawford as narrowing or simply one of
18 potentially many, many examples?

19 MR. DING: Well, I think if you read our request
20 in context, you know, that it - - - with the Crawford memo
21 and with the - - - sort of the other information we
22 provided about why we were making the request, it does show
23 that we're not looking for any documents sort of radically
24 different from the Crawford memo, that that is exactly the
25 kind of document we're looking for.

1 JUDGE HALLIGAN: So we would have to understand
2 it as effectively narrowed by the reference to Crawford
3 memo, it sounds like what you're saying. So Crawford memo
4 and other documents like that, which provide some guidance
5 or instruction on questions that might come before a court.

6 MR. DING: That's right, Your Honor. And as I
7 understand it, you're still referring to our original
8 request?

9 JUDGE HALLIGAN: Yeah.

10 MR. DING: Yeah. That's right. And we said from
11 the beginning we're making this request because of the
12 reporting about the Crawford memo. This is exactly what
13 we're looking for.

14 JUDGE CANNATARO: Why is it so clear that the
15 attachment of the Crawford memo makes it clear that - - -
16 makes it some form of limitation? Because it seems to me
17 like that could be interpreted as, this is one example of
18 what we're looking for, but there are so many more.

19 MR. DING: Because we explained - - - we didn't
20 just attach the memo, Your Honor. We explained, even in
21 our original request, this is the - - - this memo is the
22 reason we're submitting this request. This is sort of our
23 rationale - - - impetus for making this request. And so we
24 are interested in learning more about, you know, OCA's
25 practice of issuing memos like this. And we know what OCA

1 means by that because their spokesperson said publicly, it
2 is our normal practice to issue memos like the Crawford
3 memo. So I think that just illustrates that everyone knows
4 what memos we're referring to here.

5 JUDGE RIVERA: Does the record indicate when that
6 practice commenced?

7 MR. DING: It does not, Your Honor. And I think
8 that illustrates why it's so important for the public to be
9 able to see these documents. Because unless, you know,
10 they can be disclosed via FOIL, no one has any way of
11 knowing sort of the - - - the extent of this practice as -
12 - - as OCA's spokesperson has described it.

13 JUDGE CANNATARO: So if an OCA document
14 summarized but didn't analyze, interpret, construe,
15 explain, clarify, or apply a court decision - - - state or
16 federal court decision, or federal or state statute or
17 regulation or ordinance, would that fall within the
18 original FOIL request or not? Because that, you know - - -
19 because I think you would agree, or at least you would
20 allege here that the Crawford memo did more than just
21 summarize, right?

22 MR. DING: That's right, yes. And the Crawford
23 memo - - - but the Crawford memo does summarize the
24 decision itself.

25 JUDGE CANNATARO: But it goes on to do other



1 things that, I think, arguably, you might care about more
2 than summarizing it.

3 MR. DING: That's right.

4 JUDGE CANNATARO: So what happens if there's an
5 OCA document that simply summarizes a decision or a statute
6 or an ordinance or a code or whatever?

7 MR. DING: Yeah. I would agree with Your Honor,
8 that I think that would fall within the language of our
9 original request, but you know - - - and that's why our
10 clarification in the administrative appeal was - - - is so
11 important because when we submitted the original request -
12 - -

13 JUDGE TROUTMAN: So how did you narrow it?

14 MR. DING: We made two important clarifications,
15 Your Honor. And actually, one of them goes to what Judge
16 Cannataro was asking about. So we said we're not looking
17 for any document that merely sort of summarizes or cites,
18 you know, a decisional law or statutory law. We're looking
19 for substantive sort of opinions that purport to be
20 instructions or guidance to judges on how to interpret or
21 apply the law.

22 JUDGE HALLIGAN: Well, if we look at the language
23 of your - - - I take it you're referring to the letter at
24 page 46, which is - - -

25 MR. DING: 46 and 47.



1 JUDGE HALLIGAN: Yeah. Right. Okay. So what
2 you say is, we're not seeking documents that merely, quote,
3 "implicate" a federal court or a state court decision, et
4 cetera. Rather, we're seeking documents in which such
5 decisions, et cetera, are quote, "summarized, analyzed,
6 interpreted, construed." So that language is very broad
7 still. And then you go on to say, the scope is apparent by
8 way of further explanation. They cover documents such as -
9 - - I'll paraphrase here - - - the Crawford memorandum. So
10 I guess what I'm trying to understand is, why is that not
11 still broad in the way that I took Judge Cannataro to be
12 asking?

13 MR. DING: Yeah. Because - - -

14 JUDGE HALLIGAN: Because it uses the word
15 summarize, for example.

16 MR. DING: That's right. But, Your Honor, I
17 think sort of glossed over some of the specific sentence we
18 said after, you know - - - by way of clarification, we
19 said, quote, "Documents created by OCA that contain
20 instructions or guidance as to how judges should interpret
21 and/or apply the law."

22 JUDGE HALLIGAN: So cover is - - - is intended to
23 mean only cover not include?

24 MR. DING: That's right. I think we use it in -
25 - - if you read it in context, we use it in the sense of,

1 this is what a request covers and this is what a request
2 doesn't cover. And I think we - - -

3 JUDGE HALLIGAN: But where does it say what it
4 doesn't cover?

5 MR. DING: Also - - - so for example, you know,
6 we said we're not looking for any documents that merely
7 cite or mention, you know, a law, which is - - -

8 JUDGE HALLIGAN: Wait, wait. I'm sorry. Just to
9 make sure I see what you're reading from.

10 MR. DING: Yeah.

11 JUDGE HALLIGAN: It says that you're not seeking
12 documents that, quote, "merely implicate." But I don't see
13 something that says you're not seeking documents that cite,
14 et cetera, but maybe it's further down in the letter?

15 MR. DING: I think that's all part of that
16 clarification, Your Honor. I - - - I think because it is
17 implicit in response - - -

18 JUDGE CANNATARO: Is it implicitly part of the
19 clarification or explicitly part of the clarification?

20 MR. DING: Well, I think we do - - - there's no
21 sort of burden on us to include every possible synonym for,
22 you know, implicate or cite because this was all in
23 response to OCA asking with respect to our original
24 request, you know, whether it includes documents that, you
25 know, merely implicate, mention, or cite. And so we said

1 very explicitly, that's not what we're looking for. And -
2 - - and the second - - -

3 JUSTICE POWERS: And then it - - -

4 JUDGE RIVERA: So you mean there's some mutual
5 understanding between when they responded in that way
6 between you and them as to the - - - you use those three
7 terms - - - those three terms and what they meant?

8 MR. DING: Yeah. And we would like to think so
9 because I think it's notable here that, in their briefing,
10 OCA doesn't seriously argue that our clarified request is
11 not reasonably described. If you look at their arguments,
12 they're all focused on the language of our original request
13 without taking into account the clarifications.

14 JUSTICE POWERS: Let's assume that a reasonable
15 person could find the initial request a little overbroad,
16 but that if we take into account the clarification, it
17 becomes clearer as to what you want. And if the search is
18 conducted, let's say, on that basis, you rely heavily on
19 the authority of - - - or your - - - I should say, the
20 respondents rely heavily on the authority of appellate
21 advocates. And you say, well, that's misplaced that - - -
22 that authority because in Appellate Advocates, the issue
23 was not whether an attorney-client relationship was
24 created. In fact, there was one - - - here, we're saying -
25 - - well, excuse me, I have it wrong. Here, we're saying

1 there was no attorney-client relationship created.

2 In Appellate Advocates you're saying that was
3 never the argument because it was assumed there was an
4 attorney-client relationship, and the argument was around
5 the content of the memo. Here, it seems to be just the
6 opposite. So are you saying that the Office of Court
7 Administration cannot act as counsel to the judiciary when
8 they do a memorandum, say, criticizing a case or - - - or
9 indicating how it should be interpreted?

10 MR. DING: So let me articulate specifically the
11 - - - the, I think, very narrow rule that we are offering
12 here, which is that documents from OCA to judges containing
13 OCA's opinion on legal issues that arise in cases that the
14 judges are adjudicating cannot be privileged.

15 JUDGE HALLIGAN: How do we know what the scope of
16 the of the privilege that's being claimed here as the memo
17 is addressed to two or three deputy administrative judges,
18 right?

19 MR. DING: That's right. Generally, yes.

20 JUDGE HALLIGAN: Okay. And I take it you agree,
21 but tell me if you don't, that OCA could establish and
22 demonstrate an attorney-client relationship with a
23 particular judge, for example, whom they're representing?

24 MR. DING: That's right, Your Honor.

25 JUDGE HALLIGAN: And also that OCA would still be



1 able to go through the typical process of document-by-
2 document review to assert privileges on a one-by-one basis.
3 So how do we know here, given that the memo is addressed to
4 two individuals, that the - - - the privilege goes beyond
5 that? Because I don't take you to be arguing that they
6 couldn't establish a privilege with simply two deputy
7 administrative judges.

8 MR. DING: That's right. Two points there, Your
9 Honor. The first is that, how do we know these memos were
10 distributed beyond those initial sort of labeled
11 recipients? One is that, if you look at the second memo,
12 we submitted the Chrysafis memo. I think that starts on
13 page 70 of the record. It says at the end, please
14 distribute as appropriate to, you know, judges in the
15 unified court system. And we also have a - - - a
16 transcript from a Crawford hearing that happened after the
17 Crawford memo was sort of publicly revealed, in which a
18 judge acknowledges that he has a copy of the memo and knows
19 what it is referring to.

20 JUDGE HALLIGAN: So you would take the scope of
21 the asserted privilege - - - obviously, they can speak for
22 themselves - - - but to be all judges in the court system?

23 MR. DING: That's how we understand OCA to be
24 asserting this privilege as to the entire judiciary. And I
25 think that illustrates what a sweeping and far-reaching

1 claim it is. We're aware of no court that has recognized a
2 privilege claim that sweeping in - - - in a context like
3 this, where an administrative agency is purporting to
4 provide legal positions on issues that the judges are
5 adjudicating in their cases. But Judge Halligan, to - - -

6 JUDGE RIVERA: Can I just because your red light
7 is on? So there are sessions, let's call them continuing
8 judicial education for the moment - - -

9 MR. DING: Yeah.

10 JUDGE RIVERA: - - - that might be provided to
11 judges, judges generally or judges at a particular level,
12 appellate or trial. Are you saying that those - - - that
13 kind of perhaps training information is inappropriate or
14 cannot be prepared by OCA?

15 MR. DING: Not at - - - not at all, Your Honor.
16 We think, actually, this helpfully illustrates the
17 difference between your example and what we're talking
18 about here. Judiciary Law 212 expressly gives OCA the
19 authority to provide educational programs exactly as Your
20 Honor is describing. That's subsection (1)(r). But it
21 does not say that OCA can provide legal advice - - - much
22 less privileged legal advice on legal issues - - -

23 JUDGE RIVERA: So where's the line? Where's the
24 line? If you're doing judicial education, let's say you're
25 describing recent decisions of the court of appeals, where

1 we set out rules and resolve - - -

2 JUDGE CANNATARO: And maybe even - - -

3 JUDGE RIVERA: - - - open questions?

4 JUDGE CANNATARO: And maybe even interpreting
5 them for the judges.

6 MR. DING: So - - - so we think if it - - - when
7 it comes to OCA providing its own interpretations about,
8 you know, what the law might be or how it should be
9 applied, there is no attorney-client privilege there. And
10 I think it's helpful - - -

11 JUDGE RIVERA: Without taking a position whether
12 or not they could? This is just whether or not - - - for
13 FOIL purposes, this is - - - right? You're not at this
14 point - - -

15 MR. DING: That exactly right.

16 JUDGE RIVERA: - - - you're arguing, you know,
17 OCA has exceeded its authority if it's doing that. This is
18 just a question of whether or not you'd be entitled to the
19 materials used for that educational seminar. It's called a
20 seminar.

21 MR. DING: That's exactly right. And I would
22 reiterate that our position here is a narrow one because it
23 doesn't extend to internal judicial deliberations, right?
24 So bench memos, for example, would obviously be off limits.
25 FOIL expressly exempts the judiciary from, you know, its

1 disclosure obligations.

2 JUDGE CANNATARO: Counsel, I know you say it's
3 narrow, but I think you just responded to Judge Rivera's
4 question by saying interpretive material that's distributed
5 during judicial education seminars would be covered under
6 your FOIL request. Or did I misunderstand - - -

7 MR. DING: Oh, no. I'm sorry. I'm - - -

8 JUDGE CANNATARO: - - - your answer?

9 MR. DING: I apologize. I - - - that wouldn't
10 fall under the language of our request because we asked
11 for, you know - - -

12 JUDGE GARCIA: Could someone FOIL that - - -

13 MR. DING: - - - certain documents set forth.

14 JUDGE GARCIA: Could someone FOIL that material?

15 MR. DING: You know, to the extent they're set
16 forth in a producible record as FOIL defines it - - -

17 JUDGE GARCIA: Took a video of a judge presenting
18 at one of these continuing legal education for judges?

19 MR. DING: So I think it would be very different
20 if it were a judge presenting to other judges because
21 that's, you know, purely internal to the - - - to the
22 judiciary.

23 JUDGE CANNATARO: It's - - - it's sponsored by
24 OCA. That's a - - - it's together.

25 JUDGE HALLIGAN: Why would that be different?

1 MR. DING: Because FOIL carves out that
2 distinction. In Section 86 of the Public Officers Law,
3 FOIL defines agency to exclude the judiciary.

4 JUDGE HALLIGAN: So - - - okay.

5 JUDGE GARCIA: So if this memo - - - OCA asked a
6 judge to write this memo, then it wouldn't be FOIL?

7 MR. DING: And if it was only exchanged between
8 judges, we think that would be squarely - - -

9 JUDGE RIVERA: Well, would - - -

10 MS. ROTHMAN: - - - off limits.

11 JUDGE RIVERA: I thought some of the memos were
12 from the chief AJ.

13 MR. DING: I - - -

14 JUDGE RIVERA: Chief administrative AJ, who is a
15 judge.

16 MR. DING: I - - - I think that's right. But the
17 - - - you know, the chief administrative judge oversees the
18 Office of - - - of Court Administration. That's why we
19 think that is the - - -

20 JUDGE RIVERA: They're in the role of the
21 administrator as opposed to in the role of a presiding
22 member of the bench?

23 MR. DING: That's exactly right, Judge Rivera.

24 JUSTICE POWERS: So if I could understand, the -
25 - - the Crawford memo in particular here goes to three

1 supervising judges and the administrative judges, I think,
2 is what's indicated there. Would that be fair? The
3 administrative judges for each district, and it seems to go
4 to the three supervising judges.

5 MR. DING: That's right. That's what's on one of
6 the memos that we've seen, yes.

7 JUSTICE POWERS: All right. And if that's so,
8 are you saying that had it not gone to a larger group, it
9 would be subject to the privilege, but because it's a
10 larger group, it's not?

11 MR. DING: I think that's right, again, sort of
12 assuming that if it was only exchanged between that small
13 number of judges and it was within all of their capacities
14 as court administrative judges as opposed to adjudicative -
15 - - their adjudicative roles as judges overseeing cases.
16 That's right.

17 JUDGE SINGAS: Do you have any authority for that
18 proposition?

19 MR. DING: Well, I think it - - - it, again,
20 comes from FOIL, which excludes, you know, the judiciary
21 acting in its adjudicatory role.

22 JUDGE HALLIGAN: But wouldn't that also just be -
23 - -

24 MR. DING: And - - -

25 JUDGE HALLIGAN: - - - classic, you know, type of

1 advice that counsel provides in-house? I mean, if what you
2 have is, for example, OCA advising a deputy administrative
3 judge about the implications of a decision, right? That
4 strikes me as perhaps within the heartland of what we think
5 of as protected in any in-house setting. Do you you have a
6 different view?

7 MR. DING: I would generally agree with you
8 there, Your Honor. And I think the key, again, is that
9 that's exchange between an OCA attorney and an
10 administrative judge acting in their capacity as a court
11 administrator.

12 JUDGE TROUTMAN: So if you had an administrative
13 judge in a judicial district giving - - - and the memo went
14 to the judges in that district, is that different?

15 MR. DING: I think - - - I think that is
16 different if we're saying the administrative judge in their
17 administrative role is sending it to judges in their
18 adjudicatory role. And I think, to Judge Halligan's
19 question, this turns on the meaning of - - - in a sense of
20 in-house counsel, which is the sort of analogy that OCA is
21 basing its entire privilege argument on.

22 But that argument fails on its own terms because
23 if you look at OCA's briefing, this is on page 333 of the
24 record, they define the in-house relationship as between
25 employees of an agency and attorneys of that agency. And

1 everyone acknowledges that judges - - - adjudicatory - - -
2 adjudicatory judges are not employees of OCA. So again,
3 even by OCA's own definition - - -

4 JUDGE RIVERA: What about the - - -

5 MR. DING: - - - that doesn't work.

6 JUDGE RIVERA: - - - a deputy administrative
7 judge? Are they an OCA employee?

8 MR. DING: I think if they're acting in their
9 capacity as an administrative - - - sort of an
10 administrator, yes, but not when they are - - - if they are
11 presiding over cases.

12 JUDGE GARCIA: That would be the same for the
13 chief judge of New York, right? Chief judge of New York.

14 MR. DING: I think that's right.

15 JUDGE GARCIA: So if the chief judge of New York
16 sends something as - - - he or she has to make very clear,
17 I'm acting in my capacity as the chief administrative judge
18 here or acting in my capacity as the chief judge of New
19 York?

20 MR. DING: That's right. And I want to emphasize
21 here that - - -

22 JUDGE RIVERA: Well, let's go through this
23 hypothetical.

24 MR. DING: Uh-huh.

25 JUDGE RIVERA: Say the chief administrative

1 judge, Crawford comes down, goes to OCA - - - OCA counsel,
2 and says, I want your opinion as to what this hearing would
3 look like. I want to get a sense of the resources the
4 judiciary is going to need, right? We're getting a
5 courtroom, some more funding so I know what to do with my
6 budget; I know what to do with my staffing. Counsel comes
7 up with that memo. Chief AJ reads it, maybe agrees with
8 it, maybe not, have a further conversation, et cetera, et
9 cetera, and decides, okay, now I need to let the judges
10 know what they are supposed to provide. It sounds like
11 you're saying the - - - the communication between the chief
12 AJ and counsel for OCA is privileged. Am I getting that
13 right? That initial request - - -

14 MR. DING: First step, yes.

15 JUDGE RIVERA: Yes.

16 MR. DING: That's right.

17 JUDGE RIVERA: Because that's about the impact on
18 the administrative - - -

19 MR. DING: That's right.

20 JUDGE RIVERA: - - - part of the way the judicial
21 branch works. But if the chief AJ then decides to send,
22 whether it's through the deputy AJs or directly to all
23 judges through an email blast, a memo describing how - - -
24 describing the decision, here's what the decision held,
25 this is our understanding of how those hearings proceed,

1 that would be FOIL-able, or is that also privileged?

2 MR. DING: That's right. We don't think that
3 what you're just describing, the second step of sending it
4 to every judge in a way that informs how they're
5 adjudicating cases - - -

6 JUDGE RIVERA: Even though the purpose of that -
7 - -

8 MR. DING: - - - is privileged.

9 JUDGE GARCIA: - - - might be, if not completely
10 in part, because the chief AJ needed to understand the
11 impact - - - administrative impact on the judicial branch
12 of that decision?

13 MR. DING: Yes. And I think that's actually
14 really helpful here because this court has said, when you
15 apply the privilege, it must be consistent with the purpose
16 of the privilege.

17 JUDGE RIVERA: Okay.

18 MR. DING: And it would be inconsistent with the
19 purpose of the attorney-client privilege to apply it to the
20 memos here, to the extent they - - - you know, when they
21 have been circulated to judges throughout the court system.
22 Because the attorney-client privilege is for, you know,
23 preserving the integrity of the adversarial system, and
24 it's to allow, you know, clients to assess, for example,
25 potential liability, legal exposure, things in their

1 personal interest. I think we can all agree that when
 2 judges are ruling on cases, they have no personal interest
 3 in how those cases turn out, and they're not adversaries
 4 within that proceeding. They're neutral arbiters of the
 5 dispute. So I think that's why, in this very specific
 6 context, we think it's clear that there is no privilege.
 7 And again, OCA has cited no case recognizing that.

8 JUDGE TROUTMAN: So if OCA counsel were
 9 representing an individual judge in a civil suit, it would
 10 be different?

11 MR. DING: Absolutely, Your Honor. And I would
 12 also say to that that our clarified request would not cover
 13 memos of that nature because our clarified request talks
 14 about, you know, guidance or sort of - - - or instructions
 15 about how judges should interpret or apply the law. When
 16 the judge is a party in a proceeding, you know, that's not
 17 what they would be doing. So I think that would be clearly
 18 out of the scope of our request and not implicated here.

19 JUDGE RIVERA: Okay. Thank you. You have your -
 20 - -

21 MR. DING: Thank you.

22 JUDGE RIVERA: - - - rebuttal. Thank you.

23 MS. ROTHMAN: Good afternoon - - - good
 24 afternoon, Your Honors. May it please the court. Robyn
 25 Rothman, Office of Court Administration, on behalf of the



1 respondent.

2 JUDGE HALLIGAN: Can I ask you about what we can
3 properly consider? It looked to me that in your Appellate
4 Division brief, you agreed that the requester can clarify
5 the FOIL request with the agency during the administrative
6 process. And so I read that as agreeing that a
7 clarification made during the administrative appeal, but
8 not during an Article 78 proceeding is - - - is something
9 that we should take into account; is that right?

10 MS. ROTHMAN: I would generally agree with that
11 statement in that, yes, there - - - there can be
12 clarifications that are made. If the agency comes back to
13 tell you or to tell the requester, we cannot divine the
14 universe of documents based upon this particular FOIL
15 request, then certainly, the - - -

16 JUDGE HALLIGAN: So do you agree with your
17 adversary's view that we should look at not just the
18 initial request, but also the clarification to the extent
19 that's how he characterizes it, but that letter from
20 November as part of the administrative appeal?

21 MS. ROTHMAN: Well, I think my adversary or my
22 friends to my left really believe that they've sort of
23 disclaimed the original request, and they really want to
24 take the operative request as - - -

25 JUDGE HALLIGAN: Sorry. I'm just asking - - -

1 MS. ROTHMAN: Sure.

2 JUDGE HALLIGAN: - - - is the letter from
3 November part of what we should look at in understanding
4 the nature of the request, or is your position that we're
5 confined only to looking at the initial request and nothing
6 further?

7 MS. ROTHMAN: Well, I think we are certainly
8 confined, in a sense, to the original request as it is in
9 this case because even though there was some language that
10 was added or offered to say this is a type of document we
11 do want, there was never any express mention or express - -
12 -

13 JUDGE HALLIGAN: So - - - so your view, as I
14 understand it, but correct me if I'm wrong, is that a
15 requester can clarify during the administrative appeal, but
16 in your view, this particular letter doesn't meaningfully
17 narrow the request. Is that - - -

18 MS. ROTHMAN: Correct.

19 JUDGE HALLIGAN: Okay. Thank you.

20 MS. ROTHMAN: Correct, Your Honor.

21 JUDGE CANNATARO: And that's because it doesn't
22 limit the scope of the request?

23 MS. ROTHMAN: Correct. And - - - and even though
24 their clarified request says it has to be instructions to
25 judges, there was never any determinant - - - or there was

1 never any express language in that request to say, well, we
2 now don't want documents that are circulated within OCA.
3 We only want them circulated between OCA and judges. We
4 want, essentially, the entire universe and - - -

5 JUSTICE POWERS: Between counsel's office for OCA
6 and the judges, right?

7 MS. ROTHMAN: Between counsel's office for OCA,
8 but that was included. There was no - - -

9 JUDGE RIVERA: But that's - - - you just
10 described it.

11 MS. ROTHMAN: Well, I don't think the - - -

12 JUDGE RIVERA: You just described it. I actually
13 don't even understand how you can invoke a privilege if you
14 don't know what - - - I mean, you'd have to review
15 documents, right?

16 MS. ROTHMAN: Well, certainly - - -

17 JUDGE RIVERA: If you don't know what they're
18 asking for.

19 MS. ROTHMAN: Well, certainly, Your Honor. They
20 did mention, including counsel's office.

21 JUDGE RIVERA: Okay.

22 MS. ROTHMAN: So that universe of documents - - -

23 JUDGE RIVERA: Okay.

24 MS. ROTHMAN: - - - for counsel's office
25 specifically. Of course, we could - - - I could agree with

1 you that, with just respect to those particular documents,
2 yes. However, they - - -

3 JUDGE RIVERA: So we could render a decision on
4 that?

5 MS. ROTHMAN: You could essentially render a
6 decision on that. However - - -

7 JUDGE RIVERA: You agree that that's not - - -
8 that's reasonably described?

9 MS. ROTHMAN: I would agree that that's
10 reasonably - - - reasonably described. However, that
11 really wasn't discerned until the Article 78 stage. And I
12 bring this up also too, because even in the Article 78 - -
13 -

14 JUSTICE POWERS: I thought it was discerned at
15 the administrative hearing.

16 MS. ROTHMAN: Well, it was not - - -

17 JUSTICE POWERS: That's when it came up the
18 clarification was in the administrative hearing, didn't it?

19 MS. ROTHMAN: It was not fully discerned at that
20 point because, again, they wanted to include counsel's
21 office, but they - - - they didn't want it exclusive to
22 counsel's office. And that's not how we - - - we read the
23 request to be sure we're - - - we're asking for counsel's
24 office records, but we're not asking exclusively for
25 counsel - - -



1 JUDGE RIVERA: Yeah. But FOIL doesn't permit you
2 to deny entirely because part of it cannot - - - is not
3 reasonably described or part of it is not - - - you can't
4 respond to part of it. Whatever you can actually respond
5 to, unless there's a valid reason under FOIL to exempt it,
6 you're supposed to turn it over.

7 MS. ROTHMAN: And we did. Well, we didn't turn
8 it over. What I'm saying is, as to the counsel's office
9 specific documents, we did a denial based upon privilege as
10 well as the attorney work product - - -

11 JUDGE HALLIGAN: What's the scope of the
12 privilege you're claiming? I take it it's a privilege that
13 you posit runs to all judges in the unified court system;
14 is that right?

15 MS. ROTHMAN: That is correct. Because we are
16 counsel - - - yes, OCA - - -

17 JUDGE HALLIGAN: And how is that? I mean, that
18 seems distinct to me from an example where you - - - either
19 you would represent a judge in the course of a litigation
20 against the judge, or you would, for example, advise a
21 specific AJ on the consequences of a decision, but not for
22 distribution throughout the court system. I'm not - - -
23 I'm not aware of any examples where privilege on the front
24 end stretches so broadly, particularly given that - - - you
25 know what? Is your view that the judges are employees in

1 the classic sense of the word?

2 MS. ROTHMAN: Well, our view is that we are part
3 and parcel with the judiciary, and that there is no - - -
4 OCA does not have a separate existence outside of the
5 judiciary. We are there for - - -

6 JUDGE TROUTMAN: But what about the fact that
7 judges are independently elected and have adjudicatory
8 responsibilities outside of the - - - of OCA?

9 MS. ROTHMAN: Of course. But OCA as, you know -
10 - - as our brief states, OCA is the administrative arm. We
11 have no separate existence. Our sole purpose is to provide
12 operational and administrative support - - -

13 JUDGE HALLIGAN: But not legal advice,
14 specifically. I'm just looking for an example, and maybe
15 you have one, but I haven't been able to identify one where
16 there is a blanket privilege claimed like this - - - a
17 blanket in-house counsel, which I think is the analogy
18 you're using. And perhaps you have that with respect to
19 much more specific relationships, but with all of the
20 individuals, particularly given that, as Judge Troutman
21 says, they're not employees. So what's the best analogy in
22 another case you can point us to where - - - where an
23 attorney-client privilege sweeps so broadly?

24 MS. ROTHMAN: Well, I think - - - you know, I - -
25 - I do think that the Spectrum case, and as - - - really

1 talks about this too, because the Spectrum case really
2 looks at not just - - -

3 JUDGE HALLIGAN: I thought that was a much more
4 specific relationship, but maybe I'm remembering it wrong.

5 MS. ROTHMAN: Well, the Spectrum case talks about
6 in-house counsel to a company. And we believe that because
7 we are part of the judicial - - - the judicial branch, and
8 we are authorized by the office of the chief administrative
9 judge under the Constitution, under the judiciary law - - -

10 JUDGE RIVERA: Yes. But I don't think judges
11 think you're their counsel other than if they are sued and
12 OCA and the AG's office perhaps are representing them.

13 JUDGE CANNATARO: And then you have to ask for
14 the representation. It's not automatic.

15 JUDGE HALLIGAN: I mean, to the extent you're
16 providing guidance on how to resolve adjudicative
17 questions, shouldn't we have some question about whether
18 that guidance should be publicly available so that counsel
19 can test it - - -

20 MS. ROTHMAN: Well - - -

21 JUDGE HALLIGAN: - - - and counter it? And
22 maybe, you know, a judge will agree with you, maybe they
23 won't, but at least understand that it's something that's
24 in play?

25 MS. ROTHMAN: Well, I think, actually, the

1 transcript that was annexed to the Article 78 by my friends
2 is - - - actually demonstrates that because the judge in
3 that case, in the Bronx case, once the memo was brought up,
4 the judge in that case understood that memo to be a
5 confidential memo, to have been a confidential
6 communication between OCA and he as a judge.

7 JUDGE HALLIGAN: I guess that's what I'm asking.
8 I mean, to the extent that there's guidance to judges on
9 adjudicative questions, usually that, I think, is something
10 that is public. It's public because parties raise
11 arguments in briefs before the court, and so your adversary
12 can examine it and test it and respond to it. And by
13 treating it as confidential and asserting a privilege, I -
14 - - I think that's a different approach. So why not any
15 concern on our part about that process?

16 MS. ROTHMAN: Well, but - - - and I think that
17 also goes back - - - and if you'll excuse me, that goes
18 back to the Spectrum case because, again - - -

19 JUSTICE POWERS: But why is it necessary for you
20 to even give these memos of advice to judges? And if you
21 do so, what would be the harm in making it public, I guess,
22 since it was unsolicited to begin with and arguably won't
23 have an impact on their decision-making?

24 MS. ROTHMAN: Well, certainly, it's - - - the
25 documents are generated to ensure that judges, or at least

1 the judiciary, is acting within both its legal scope and
2 its constitutional scope. So the - - - this - - -

3 JUDGE HALLIGAN: That's the question in any
4 particular case, right? Is - - - is what does a statute or
5 the Constitution require? That's the adjudicative
6 question, I think, before a judge. And so I think the
7 question is, why shouldn't any views about that be public
8 so they can be fully aired? I think a number - - - a
9 couple of other states do provide that kind of guidance,
10 but my understanding is that that's accessible to the
11 public.

12 MS. ROTHMAN: Well - - -

13 JUDGE RIVERA: By the way, the Appellate Division
14 rejected this view. They were very clear that judges
15 decide for themselves the issues in a case.

16 MS. ROTHMAN: Well, Judge Rivera, they did reject
17 it in the sense that OCA cannot tell a judge what to do.

18 JUDGE RIVERA: Correct. Correct.

19 MS. ROTHMAN: But they - - - they - - -

20 JUDGE RIVERA: Correct.

21 MS. ROTHMAN: - - - did determine that in the
22 sense of counsel's office records, that those are actually
23 - - -

24 JUDGE RIVERA: I understand. But what's the
25 point of creating the record that you can't actually bind

1 anyone to?

2 MS. ROTHMAN: Well, but I - - - this is - - - and
3 I think it goes back - - - I think we understand. Listen,
4 I've worked in private practice. I've worked in the public
5 sector. I've certainly provided advice to clients, and
6 they may not have taken it. So it doesn't hinge - - -

7 JUDGE TROUTMAN: But with respect to individual
8 judges and their adjudicatory responsibilities, it's a very
9 special, distinct responsibility, separate and distinct
10 from the administrative body. OCA was an apparatus that
11 was created to allow the courts to function, but not to
12 command how judges decide cases.

13 MS. ROTHMAN: Well, there was never any
14 commandment within these documents. And these documents,
15 despite the analysis that are provided in them, they still
16 allow for - - -

17 JUDGE TROUTMAN: Then why - - -

18 MS. ROTHMAN: - - - judicial discretion.

19 JUDGE TROUTMAN: Why not release them? Normally,
20 judges can - - - do you agree that judges cannot consider
21 ex parte communications?

22 MS. ROTHMAN: They can't consider ex parte
23 communications.

24 JUDGE TROUTMAN: And do you agree that if I am
25 sitting as a trial judge and I have two parties in front of

1 me, the other has the right to know what I'm - - - what's
2 on the table, what's been argued? They have the right to
3 that information, correct?

4 MS. ROTHMAN: I agree that if it's an ex parte
5 communication in terms of an actual court case in front of
6 the judge. However, I would like to take a step back
7 because we have all - - - and as was discussed during my
8 friend's argument, is that there is also the Judicial
9 Institute. Those records - - - you know, the - - - those -
10 - - there's never been a determinant or - - - and
11 actually, as my friends determine, those records wouldn't
12 be FOIL-able because those are training memos that are
13 judge - - - either judge to judge. These are akin to the
14 training memos.

15 JUDGE GARCIA: I think the point was it - - - it
16 would depend. But could I ask you a record question?

17 MS. ROTHMAN: Sure.

18 JUDGE GARCIA: We're talking about documents from
19 counsel's office to judges, right?

20 MS. ROTHMAN: I would - - -

21 JUDGE GARCIA: Just note - - -

22 MS. ROTHMAN: Sure.

23 JUDGE GARCIA: - - - for now just - - -

24 MS. ROTHMAN: Yes.

25 JUDGE GARCIA: - - - that universe. And you

1 said, yes, we understood those. And that's something we
2 could find the way they've described it, but we don't have
3 to turn it over, right? It's a claim of privilege. Have
4 you identified specific documents that are responsive?

5 MS. ROTHMAN: In terms of just the counsel's
6 office - - -

7 JUDGE GARCIA: Yes.

8 MS. ROTHMAN: - - - memoranda? There has
9 certainly been discussions within my office to look for
10 these records, and there are certainly identifiable records
11 that we could essentially make a search for. But again, we
12 don't - - -

13 JUDGE GARCIA: Would the process then be, it
14 seems to me, that you identify a universe of documents that
15 you can from the request. You claim privilege as to those,
16 let's say it's twenty-five documents. They dispute it.
17 You could submit those to a judge for an in-camera review.
18 But we're talking about such a generalization, like
19 anything from the counsel's office to a judge. How do you
20 - - - how are you supposed to make that determination? It
21 seems to me that's not the way privilege works.

22 MS. ROTHMAN: Well, I think that determination
23 was also based upon the exemplar document from counsel's
24 office's Crawford memo. So to the extent that the request,
25 which we don't concede was limited to specifically

1 counsel's office records exactly like the Crawford memo,
2 those specific documents, because they were generated by an
3 OCA attorney for that specific purpose - - -

4 JUDGE GARCIA: But how do we know that's all you
5 would find given that request if you haven't identified the
6 universe of documents you believe are responsible?

7 MS. ROTHMAN: Well, but then that goes to the
8 issue of whether the request in itself was reasonably
9 described because - - -

10 JUDGE GARCIA: But that part which it seems
11 you've now further limited to documents just like that, or
12 is it a more general description they've given of what
13 comes from counsel's office? For what purpose? To whom?
14 Have you identified those documents? Are there documents
15 that aren't like that - - - specifically, like that memo
16 that fall within that category? And what would be the
17 claim of privilege as to each of those documents?

18 MS. ROTHMAN: Well, certainly, if it's generated
19 by counsel's office because counsel's office does a number
20 of different things aside from - - -

21 JUDGE GARCIA: Right.

22 MS. ROTHMAN: - - - whatever these - - - you
23 know, these memos. Counsel's office handles litigation.
24 Counsel's office handles advising on legislation that
25 affects the court system. So there's a number of

1 documents, certainly - - -

2 JUDGE HALLIGAN: So if there's a universe of
3 documents like the Crawford memo, by which I mean providing
4 some, I'll call it guidance, to judges with regard to an
5 adjudicative question that might come before them, why
6 isn't the process to identify those claim privilege over
7 those, and with respect to other documents either say the
8 search terms are too broad for us to locate them, and it's
9 not reasonably described? Or to - - - as Judge Garcia's, I
10 think, was asking, to do a document-by-document privilege
11 assertion.

12 So for example, if you are representing a judge
13 in the course of litigation, I would guess that that
14 document is privileged, right? And that's a claim that
15 strikes me as perhaps different from the type of privilege
16 claim you're asserting here. But it seems to me that what
17 we have instead is sort of a wholesale assertion on
18 reasonable description and on privilege.

19 MS. ROTHMAN: Well, I want to take that in two
20 separate parts. And I acknowledge that my red light is on,
21 but if you will indulge me just a little bit. That's sort
22 of like a two-part issue, right? Because if we can't
23 discern universe documents. And let's take out just the
24 counsel's office records, right? The portion that states
25 counsel's office records. Let's take the other part of the



1 request saying from OCA within - - - documents generated by
2 OCA, distributed within OCA, and/or to judges that analyze,
3 summarize, construe any statute - - - federal, state case
4 or statutory law, I mean, as the administrative arm of the
5 judiciary, that type of work is done extensively.

6 JUDGE HALLIGAN: But I don't take you to be
7 disagreeing that you can or have, I'm not clear which one,
8 identify memoranda like the Crawford memoranda as distinct
9 from the broader universe that you're just describing.

10 MS. ROTHMAN: Correct.

11 JUDGE HALLIGAN: And so why not move forward with
12 that subset? And you know, you've asserted privilege over
13 those sort of in toto, I take it. Perhaps you would have
14 more specific privilege claims over them one by one. I
15 don't know. But why not take those as reasonably described
16 and move on to the privilege question with that subset?

17 MS. ROTHMAN: Because we don't believe that the
18 request, as it was written and even as it was attempted to
19 be clarified - - -

20 JUDGE HALLIGAN: But you agree that some
21 documents - - - I think you agree, anyway, that some
22 documents have been reasonably described, to wit, memos
23 like Crawford.

24 MS. ROTHMAN: I believe, based upon only the
25 Crawford memoranda as an exemplar example that was provided

1 within the FOIL request, could be construed to say, okay,
2 these - - - these are some type of documents you want.

3 JUDGE RIVERA: Yes.

4 MS. ROTHMAN: But we don't concede that that was
5 the exclusive nature of the request itself.

6 JUDGE RIVERA: But again, you're back to once - -
7 - once you say that that is clearly what you were seeking -
8 - - what they were seeking, you have to make a decision.

9 MS. ROTHMAN: We don't concede - - -

10 JUDGE RIVERA: As far as I know, what you did was
11 you invoked a privilege.

12 MS. ROTHMAN: Well, that's not - - -

13 JUDGE RIVERA: Right?

14 MS. ROTHMAN: I - - -

15 JUDGE RIVERA: I just want to be clear.

16 MS. ROTHMAN: Sure. I agree that we invoked the
17 privilege based upon those documents. But again, Judge
18 Rivera, we don't concede that the full nature of the
19 request was specific or reasonably described. And I just
20 want to point to the - - -

21 JUDGE RIVERA: I'm not - - - I wasn't talking
22 about that. My point was, as it was before, if you concede
23 that part of the request is clear and you can identify the
24 documents, then you're bound by your obligations under
25 FOIL. I take it you completely understood that because you

1 invoked a privilege. You can't invoke a privilege if you
2 do not know what the document is.

3 MS. ROTHMAN: Well, correct. And that's why our
4 FOIL response, our denial not only said as to the other
5 universe - - -

6 JUDGE RIVERA: Right.

7 MS. ROTHMAN: - - - of documents that might be
8 out there that might be responsive to this request, it's
9 not reasonably described. But if you're only asking for
10 counsel's office - - -

11 JUDGE RIVERA: It's not reasonably described
12 because what? It's a red light, but I think this is an
13 important clarification for us.

14 MS. ROTHMAN: Sure. It's not reasonably
15 described because, one, the nature of the agency and what
16 it does - - -

17 JUDGE RIVERA: Yeah.

18 MS. ROTHMAN: - - - as the administrative arm of
19 the judiciary, most - - - a majority of the work that we do
20 has to construe or describe or clarify or summarize whether
21 it be - - -

22 JUDGE RIVERA: Well, that might go to its
23 voluminous - - -

24 MS. ROTHMAN: I - - -

25 JUDGE RIVERA: - - - and burdensome.



1 MS. ROTHMAN: And I - - -

2 JUDGE RIVERA: But that doesn't go to whether or
3 not it's reasonably described.

4 MS. ROTHMAN: Well, no, because if you look at -
5 - - also, they say document. And they use the word
6 document, and they use a very broad example - - - a broad
7 definition of document. If you, again, just indulge me - -
8 -

9 JUDGE RIVERA: Well, they - - - they gave you a
10 definition. Again, it may be voluminous, but they've given
11 you a definition.

12 MS. ROTHMAN: But they've given me - - - us a
13 definition saying we want memoranda, directive, orders,
14 instructions - - -

15 JUDGE RIVERA: Right.

16 MS. ROTHMAN: - - - guys. But I will also just -
17 - -

18 JUDGE RIVERA: Right. It might be - - - you
19 might want to argue it's voluminous. It's a - - - it's a
20 burdensome. You can litigate that. But how is it un - - -

21 MS. ROTHMAN: We didn't litigate that.

22 JUDGE RIVERA: How is it not a reasonable
23 description?

24 MS. ROTHMAN: Because it invokes - - -

25 JUDGE RIVERA: You all know what a memo is

1 because you have it at the top of the document.

2 MS. ROTHMAN: But it invokes a major - - - almost
3 all of the documents. Again, we - - - the agency, has to
4 look at this request and be able to discern - - -

5 JUDGE RIVERA: Right.

6 MS. ROTHMAN: - - - a subset of documents - - -

7 JUDGE RIVERA: Right.

8 MS. ROTHMAN: - - - that would be responsive to
9 this request. And I will say this - - -

10 JUDGE RIVERA: Right.

11 MS. ROTHMAN: - - - within their Article 78, they
12 added four - - - or I'm sorry, three other examples of what
13 they deemed to be responsive to the request. And I want to
14 turn this court's attention specifically to the operational
15 directive that was authored by - - -

16 JUDGE HALLIGAN: Before - - - before you do, just
17 one clarification. If we were to - - - with respect to the
18 Crawford memoranda and whatever universe you have
19 identified as, like the Crawford memoranda, would you agree
20 that if we disagreed with your invocation of privilege,
21 that the next step would be with respect to those documents
22 specifically, setting to the side whether they've
23 reasonably described anything else, the next step would be
24 to proceed and allow you to, if you chose, invoke document-
25 by-document privileges that might be more specific?

1 MS. ROTHMAN: Yes. But I think that would have
2 to be kicked back to the trial court for a - - - a - - -

3 JUDGE HALLIGAN: But you're not arguing that if
4 there is some universe that is reasonably described and
5 some universe that is not reasonably described, that you're
6 allowed to do nothing further. You're invoking the
7 privilege with regard to the Crawford memo and any - - -
8 any likewise reasonably described memorandum.

9 MS. ROTHMAN: Correct.

10 JUDGE HALLIGAN: Is that - - -

11 MS. ROTHMAN: We are invoking - - -

12 JUDGE HALLIGAN: Okay.

13 MS. ROTHMAN: - - - the privilege as that.

14 JUDGE HALLIGAN: Thank you.

15 MS. ROTHMAN: And again, I - - -

16 JUDGE RIVERA: Okay. But then what's the point
17 of sending it back? If you're saying it's a document like
18 the Crawford memo, it's that ilk, and here's the privilege
19 that we're invoking, don't we just decide, as a matter of
20 law, whether or not the privilege can be invoked?

21 MS. ROTHMAN: Well, certainly, the - - -

22 JUDGE RIVERA: Why is it going back?

23 MS. ROTHMAN: Well, certainly, this court does
24 have the power to make that determination and make that
25 determination based upon the record. So if you want to

1 look at that - - - that document specifically, and then the
2 - - -

3 JUDGE RIVERA: Did you produce those documents at
4 any point - - -

5 JUDGE CANNATARO: Is that - - -

6 MS. ROTHMAN: We did not produce - - -

7 JUDGE RIVERA: - - - in time to a lower court?

8 MS. ROTHMAN: We didn't produce that document
9 because, again, we're asserting the privilege over that doc
10 - - -

11 JUDGE RIVERA: Right. So if we disagree that the
12 privilege applies, or I guess perhaps the court might say
13 it - - - without the document, we cannot discern. It has
14 to go back, to the extent that the lower courts might have
15 accepted the blanket, right? The blanket privilege the
16 court might - - - I don't know - - - I have - - - we
17 haven't decided yet, might decide you can't do a blanket
18 privilege, but you have to do a document-by-document and
19 send it back for that purpose.

20 MS. ROTHMAN: Certainly, Your Honor. That could
21 be a decision - - - that certainly could be an avenue to
22 take. Again - - -

23 JUDGE HALLIGAN: If we disagreed with you on the
24 blanket privilege, would you want an opportunity to review
25 the documents for some other privilege?

1 MS. ROTHMAN: Of course, Your Honor. But - - -

2 JUDGE TROUTMAN: Why would you have not done that
3 in the first instance? Why are you different from others
4 who claim privilege when they normally provide a privilege
5 log and give the trial court the opportunity to go through
6 it?

7 MS. ROTHMAN: Well, certainly, Your Honor.

8 JUDGE RIVERA: By the way, as I recall, under our
9 jurisprudence, if you didn't assert a different privilege,
10 you don't get to do that later.

11 MS. ROTHMAN: I understand that, Your Honor. I
12 will say this. The privilege - - - the invocation of the
13 privilege would be based - - - would be solely on attorney-
14 client privilege or attorney work product privilege, which
15 were both asserted in the denials. So again - - -

16 JUDGE TROUTMAN: Work product applies to
17 litigation. How is that applicable?

18 MS. ROTHMAN: It does not necessarily apply to
19 litigation. That would be materials in anticipation of
20 litigation, but that would not necessarily be solely for
21 work product.

22 JUDGE HALLIGAN: Are you claiming work product
23 privilege on the theory that there will be judges sued for
24 not comporting with whatever the requirements are in
25 Crawford? What is your work product theory here?

1 MS. ROTHMAN: Well, they - - - they're based upon
2 just documents that are authored with the learned skill of
3 an attorney for hire - - - who was hired in the agency for
4 that purpose.

5 JUDGE HALLIGAN: But where is the in anticipation
6 of litigation piece of it?

7 MS. ROTHMAN: Well, we didn't rely upon the
8 anticipation of litigation privilege, and that's separate
9 and apart from the work product privilege.

10 JUDGE CANNATARO: Is it not a work product?

11 JUDGE RIVERA: Can it be work product if it's
12 unsolicited? No judge asked you for it.

13 MS. ROTHMAN: Well, this court has never accepted
14 that privilege doesn't apply simply because a client didn't
15 ask for legal advice or for the attorney to perform work
16 that - - -

17 JUDGE RIVERA: It's very hard to understand a
18 judge asking for legal advice on how to decide a case. So
19 I mean, I think - - -

20 MS. ROTHMAN: Sure. But, Your Honor, I just - -
21 -

22 JUDGE RIVERA: - - - we have a problem with that
23 argument.

24 MS. ROTHMAN: - - - I just would like to end on
25 this note. Is that - - -

1 JUDGE RIVERA: Yes.

2 MS. ROTHMAN: And again, I know that I've run out
3 of my time - - -

4 JUDGE RIVERA: Yes.

5 MS. ROTHMAN: - - - quite some time ago. I'd
6 like to end on this note. This court must review the
7 administrative proceedings and any clarifications that came
8 in the Article 78 such as senior OCA officials or senior
9 OCA attorneys. That was too little too late. That should
10 have been provided in the administrative proceedings. And
11 under Article 78, a reviewing court must review only what
12 is done in the administrative proceedings and what is
13 offered in the administrative record. Here, there was
14 never any attempt by NYCLU to expressly state they only
15 wanted it from senior OCA officials or senior OCA
16 attorneys. They very much use broad sense of the word and
17 the broadest sense of the word OCA - - -

18 JUDGE RIVERA: Even if those are the only
19 individuals who could produce such a document?

20 MS. ROTHMAN: Well, again, we could not
21 reasonably - - - aside from counsel's office, aside from
22 when they specifically say it's counsel's office, we could
23 not make a determination that, based upon just the use of
24 OCA, especially since they use the quantifier - - -

25 JUDGE RIVERA: The - - - this would mean - - -

1 yes, you have your red light, but it would be my last
2 question. This would mean that OCA is arguing now that
3 there are staff at perhaps some very rudimentary level that
4 are producing memos that would go to judges providing
5 instruction on how to decide and apply the law?

6 MS. ROTHMAN: We don't believe that that
7 clarification that came in the administrative appeal
8 narrowed the scope of the request.

9 JUDGE RIVERA: okay.

10 MS. ROTHMAN: And that was our - - - in our
11 administrative denial, we very clearly stated, this is not
12 something that we believe to be a narrowing of this
13 request. We can - - - again, you've not disclaimed the
14 rest of the language of your request to say, generated by
15 OCA, distributed within OCA and/or to judges when they - -
16 - when they did not explain the portion of the request
17 saying that the documents themselves had to have been
18 distributed within OCA too, that significantly broadens the
19 request.

20 And by virtue of them not specifically
21 disclaiming that or specifically narrowing down document
22 type, it remained the same broad descriptive FOIL request
23 that the agency, again, on the administrative appeal, said,
24 we still cannot discern the universe of documents that this
25 invokes.

1 And this court is only empowered to determine
2 whether OCA was in error of law when it made the
3 determination that this request was not reasonably
4 described based upon its record keeping practices, its - -
5 - the language of the request, and the context in which the
6 agency does. And Your Honors, I rest on my brief. I thank
7 you very much.

8 JUDGE RIVERA: Thank you.

9 MR. DING: Just three quick points in reply, Your
10 Honors. The first is just, aside from all the issues on
11 the merits, OCA has definitively - - - definitively
12 forfeited its work product privilege claim. They raised
13 that from the beginning of the administrative proceedings.
14 They briefed it in the First Department. But in this
15 court, they have - - - they have abandoned it fully. We
16 pointed that out in our opening brief, and they have not
17 responded to that.

18 JUDGE RIVERA: I mean, that was not a ground
19 articulated for the denial. Is that what you mean?

20 MR. DING: It - - - they - - - they had - - -

21 JUDGE RIVERA: Originally, when - - - when was it
22 raised?

23 MR. DING: They've raised it from the beginning,
24 but they've abandoned it by the time this case reached this
25 court. We've explained below why it didn't apply. We

1 explained it in our opening brief to this court why it
2 doesn't apply. And they offered no response. They only
3 invoke the attorney-client privilege now. My second point
4 is, as multiple of Your Honors have pointed out - - -

5 JUDGE GARCIA: If we're not going - - - if we're
6 not going to get to that issue as has been discussed, if we
7 decide to do that and send it back where they now would
8 identify documents and potentially litigate a privilege,
9 why would we say they can't raise a privilege they
10 originally raised?

11 MR. DING: Because they've had the opportunity to
12 raise it, and they've abandoned it at some point - - -

13 JUDGE GARCIA: We're not deciding it.

14 MR. DING: - - - in the proceedings.

15 JUDGE GARCIA: They haven't raised it to us, but
16 we're not, you know - - - wouldn't be in that scenario in a
17 position to decide it anyway. So why would we insist that
18 they raise it here when they asserted it below, and we're
19 sending it back?

20 MR. DING: Because I think whenever you abandon
21 any argument during a proceeding, you can't reraise it
22 later on. It would be different if this was, you know,
23 starting from - - - from a blank slate. But they've had
24 the opportunity to raise it. They have.

25 JUDGE GARCIA: Yeah.



1 MR. DING: They've abandoned it at some point at
2 the - - - before this court.

3 JUDGE GARCIA: And I agree with you. If we were
4 deciding it here, they would have abandoned it. But if
5 we're sending it back for a determination in a venue where
6 they did raise it, why couldn't they assert it again?

7 MR. DING: You know, we think that would be
8 giving them a second bite at the apple and that would be
9 inconsistent with how the law works, but regardless - - -

10 JUDGE RIVERA: Well, except that if they had
11 raised it, you had your opportunity, right? You had an
12 opportunity to respond to it.

13 MR. DING: I'm sorry, Your Honor?

14 JUDGE RIVERA: The - - - if they raised it, you
15 had an opportunity to respond to it. You're on notice that
16 they're taking this position, right?

17 MR. DING: Oh, sure. And we pointed out in our
18 opening brief to this court why that argument fails on the
19 merits. And they had the opportunity to respond to that.
20 And they haven't at all. They - - - they've abandoned it.
21 But that - - - but Judge Garcia's question gets to my
22 second point, which is, I think everyone agrees now that
23 there is at least a core of documents that everyone
24 understands is responsive to our request that can be
25 produced.

1 JUDGE GARCIA: And what would you describe those
2 documents as?

3 MR. DING: So documents sent from OCA to judges
4 containing OCA's opinions about how judges should interpret
5 or apply the law in adjudicating cases, and are - - - we've
6 always limited the time request to, you know, 2011 and
7 after and - - -

8 JUDGE HALLIGAN: Which, I take it, just to
9 clarify, is the way you describe it in the administrative
10 appeal letter almost verbatim?

11 MR. DING: That's exactly right. That - - -

12 JUDGE HALLIGAN: Yes.

13 MR. DING: So we've stuck to that all the way
14 through these proceedings.

15 JUDGE SINGAS: And do you think that two FOIL
16 officers could look at one document and come up with
17 different conclusions? And if so, does that inform at all
18 the reasonably described, like the subjective nature of it,
19 or do you think it's not - - - there's no subjective
20 nature?

21 MR. DING: We think our request is objectively
22 clear. And I think the discussion we've had today sort of
23 illustrates that everyone understands what we're talking
24 about. And you know, we agree with the court that the
25 proper course - - -

1 JUDGE RIVERA: But this is not all you want,
2 going to her other point, right?

3 MR. DING: That is actually - - - that's all we
4 want.

5 JUDGE CANNATARO: Do you really think - - -

6 JUDGE RIVERA: It's all you want now? This is
7 it?

8 MR. DING: It is, Your Honor. So - - -

9 JUDGE RIVERA: What - - - what you just
10 described?

11 JUDGE HALLIGAN: So you would be happy, I take
12 it, if we looked at that subset alone, assuming we were to
13 conclude that the way you described it is - - - is
14 reasonable, and decided the privilege question that's been
15 invoked, and not allow you to pursue any additional
16 documents, but allow them to do a document-by-document
17 review and - - - and invoke any additional privileges that
18 they might think would be relevant?

19 MR. DING: So I think that is exactly what we're
20 asking for here, Your Honor, with - - - with sort of one
21 amendment, which is that, we think to the extent you order
22 a remand for a document-by-document review, that remand
23 need not cover these documents that purport to advise
24 judges on their adjudicatory duties because, as Judge
25 Rivera pointed out, as a matter of law, that cannot be

1 privileged in any instance. You know, to the extent that
2 there are other hypothetical documents that might fall
3 within our request that could be privileged, then sure, we
4 would be amenable to a remand for an in-camera review of
5 those documents.

6 JUDGE CANNATARO: No. But I think the more - - -
7 to me, the more significant part of that colloquy in your
8 concession is that OCA, having identified the documents
9 that they think do fit within that subset of Crawford-like
10 memos, once those are turned over, that - - - that
11 satisfies their obligation, and you do not retain a right
12 to say, oh, no, there were other things that clearly fall
13 within our FOIL request, separate and apart from any
14 privilege argument, that you did not disclose.

15 MR. DING: That's right. So if OCA is turning
16 over the universe of documents I just described with Judge
17 Halligan, and as Judge Halligan pointed out, may be our
18 clarified request - - -

19 JUDGE CANNATARO: Well, it's not really - - -
20 it's really counsel's concession. They've collected some
21 documents that they think are Crawford like.

22 MR. DING: Yes.

23 JUDGE CANNATARO: And are you saying that - - -
24 that that's it in terms of the request separate and apart
25 from any assertion of privilege?

1 MR. DING: Well, I just - - - I'm not sure what
2 they mean by, they've collected some documents. If they -
3 - - if that's - - -

4 JUDGE CANNATARO: Yeah. That's the problem.

5 MR. DING: - - - all of the documents that are
6 responsive to what - - - the description I provided, then
7 yes, we - - - that's all - - -

8 JUDGE CANNATARO: According to who?

9 MR. DING: - - - we are asking for.

10 JUDGE CANNATARO: According to you or according
11 to them?

12 JUDGE GARCIA: But wouldn't the process here be -
13 - -

14 JUDGE HALLIGAN: Yeah.

15 JUDGE GARCIA: - - - if that's your narrow
16 request, you send it back. We - - - if we agree that that
17 was reasonably described, they produce what they believe is
18 responsive to that request, and then you litigate all these
19 things. Privilege? No, it's not, you know - - - isn't - -
20 - why would we get in that business? Isn't our business
21 really just to say, that's a reasonable description?
22 Because something that seems a little problematic to me is
23 the Appellate Division giving a blanket privilege without
24 reviewing any documents. And it almost seems like we would
25 have - - - be asked to do the same thing. We haven't seen

1 any documents. Nothing's been submitted in camera and say,
2 no, those aren't privileged. But to me, the proper thing
3 seems to be this request, or at least to this extent, is
4 appropriate request. They respond. They identify
5 documents responsive, go argue privilege.

6 MR. DING: Yeah. So if - - - if that's what the
7 court is inclined to do, we would be amenable to it. But I
8 do want to reiterate that we don't think a remand is
9 necessary to address the narrow question of whether
10 privilege applies to these documents we're describing that
11 provide advice to judges - - -

12 JUDGE HALLIGAN: So - - -

13 MR. DING: - - - on their adjudicatory duties.

14 JUDGE HALLIGAN: Just on - - - on that point - -
15 -

16 MR. DING: Yeah.

17 JUDGE HALLIGAN: - - - it seems to me the ground
18 the Appellate Division - - - the alternative holding,
19 right? Is this notion of a blanket privilege, right? A
20 privilege that, I think, runs - - - I think we - - - we,
21 you know, pinned this down during argument from OCA's
22 counsel to all judges in the court system. And so if we
23 were to agree with you - - - I'm not saying we would, but
24 if we were to agree with you that a - - - a blanket
25 privilege like that can't be invoked, why would we not then

1 allow for, as I think Judge Garcia is suggesting, the
2 standard document-by-document review and assertion of any
3 other privileges that might lie? Maybe none lie, but I
4 don't know.

5 MR. DING: Yeah. Because I think, as Judge
6 Rivera pointed out, just as a matter of law, for that
7 specific category of documents that purport to inform
8 judges about how they should adjudicate cases cannot be
9 privileged. And so you know, if the court sends this back
10 for an in-camera review and just provides, you know, the
11 instruction that that category of dockets - - - documents
12 cannot be privileged, that's what we're asking for because
13 - - -

14 JUDGE GARCIA: But I hear - - -

15 JUDGE RIVERA: Well, let me just - - -

16 MR. DING: - - - as a matter of law - - -

17 JUDGE RIVERA: If I can also just clarify here.
18 You - - - I take it you're beyond the blanket privilege
19 issue given what your position is on the work product
20 privilege assertion. Your position is, there are no other
21 privileges that they can raise now. At best, it is these
22 two. They cannot now come with some other privilege - - -

23 MR. DING: That's exactly right.

24 JUDGE RIVERA: - - - because they had their
25 opportunity to do that with respect to these documents

1 because these - - - this subclass - - - because these are
2 the ones they invoked a privilege for as opposed to
3 something else - - - I'm not going to get into that right
4 now - - - that perhaps they thought was not clear and they
5 weren't sure if there was a privilege that applied.

6 MR. DING: That's right, Your Honor. And - - -
7 and the court just said this recently in the Reclaim the
8 Records case, which is the agency has to rest on the
9 exemptions they've claimed during the administrative
10 process. So they cannot - - - you know, we haven't asked
11 for any new kinds of documents, so they cannot raise new
12 arguments we're withholding at this point.

13 JUDGE RIVERA: Okay. Thank you, Counsel.

14 MR. DING: Thank you, Your Honors.

15 (Court is adjourned)

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C E R T I F I C A T I O N

I, Brandon Deshawn, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of NYCLU v. OCA, No. 74 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Brandon Deshawn

Signature: _____

Agency Name: eScribers

Address of Agency: 7227 North 16th Street
Suite 207
Phoenix, AZ 85020

Date: September 16, 2025

