

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

NEW YORK CIVIL LIBERTIES UNION,

Petitioner-Plaintiff,

v.

NEW YORK STATE OFFICE OF COURT  
ADMINISTRATION,

Respondent,

and

CHIEF ADMINISTRATIVE JUDGE  
LAWRENCE K. MARKS, in his official  
capacity,

Defendant.

Index No. \_\_\_\_\_  
(NYSCEF Filed)

**VERIFIED PETITION AND  
COMPLAINT**

**PRELIMINARY STATEMENT**

1. This action seeks to vindicate the public's right to know how the New York state court system operates and how the Office of Court Administration influences judicial decision-making. As the administrative agency responsible for overseeing New York's unified court system, the Office of Court Administration issues memoranda instructing judges on how to interpret the law and apply the agency's interpretation of the law. Even though these memoranda are central to the judicial process, reflect agency policy, and often affect the public, the Office of Court Administration rarely discloses them to the public. The New York Civil Liberties Union sought the release of these documents through New York's Freedom of Information Law, but the agency denied the request. As a result, administrative policies impacting judicial determinations that have enormous consequences for those at the mercy of the courts remain in the shadows. The

agency's refusal to release these memoranda does a disservice to the public's interest in the transparent administration of justice and violates the Freedom of Information Law, federal common law, and the First Amendment to the United States Constitution.

## **PARTIES**

2. Petitioner-Plaintiff the New York Civil Liberties Union ("NYCLU") is a not-for-profit, nonpartisan organization that seeks to promote government transparency and to defend civil rights and civil liberties on behalf of individuals who have experienced injustice. The NYCLU maintains its primary office at 125 Broad Street, 19th Floor, New York, New York 10004.

3. Respondent the Office of Court Administration ("OCA") is a public agency subject to the requirements of the Freedom of Information Law. OCA maintains offices at 25 Beaver Street, Room 852, New York, New York 10004 and 4 ESP, Suite 2001, Empire State Plaza, Albany, New York 12223.

4. Defendant Lawrence K. Marks is the Chief Administrative Judge of the New York State Unified Court System. As the Chief Administrative Judge, he oversees the administration and operation of the court system and supervises the operation of OCA, including OCA's issuance of memoranda to judges in the court system. Chief Administrative Judge Marks is sued in his official capacity.

## **FACTS**

### **Transparency and the Administration of Justice**

5. Transparency regarding how governmental bodies operate is essential to our democratic form of government. This includes transparency over how courts operate and how judges decide the rights of litigants. As the National Center for State Courts explains, "Courts stand as an important and visible symbol of government. Compliance with the law is dependent to

some degree upon public respect for courts. Public trust and confidence in courts stem from public familiarity with and understanding of court proceedings, actions and operations.”

6. It is common for court systems at all levels of government to provide transparency over their administrative operations. For example, the New York City Civil Court provides access to its “[l]egal and [s]tatutory [m]emorand[a]” and the “[c]hief [c]lerk’s [m]emorand[a],” as well as “[a]dvisory [n]otices” and “[d]irectives and [p]rocedures” through its public website at <https://www.nycourts.gov/courts/nyc/civil/directives.shtml>. The website includes more than 100 of these memoranda and directives, covering topics spanning from power of attorney to small claims actions against horse-racing-betting corporations. Court systems outside of New York also provide transparency over their administrative operations. For example, the State Court Administrative Office of Michigan makes its legal memoranda from 1997 to the present publicly available at <https://www.courts.michigan.gov/publications/administrative-memoranda/>.

7. Similarly, the federal court system operates with transparency over its administrative procedures. Whenever the Judicial Conference and its committees propose operational or administrative rule changes, the proposed draft is published in the Federal Register and on the judiciary’s rulemaking website at <https://www.uscourts.gov/rules-policies>. The rules make clear that “[p]ublication should be as wide as possible.” There is then time for public comment and hearing on the proposed changes. All proposed drafts, public comments, and notes from public hearings are available on the court system’s website. These proposed amendments frequently include memoranda from judges serving on various committees.

8. By contrast, OCA does not regularly make its memoranda available to the public even though they exert significant amounts of control over New York’s judicial process.

## OCA's Practice of Issuing Instructions to Judges

9. Pursuant to the New York State Constitution, the Chief Administrative Judge and OCA are responsible for “supervis[ing] the administration and operation of [New York’s] unified court system.” One of the ways in which OCA operates the court system is by issuing instructions, typically through documents labeled as memoranda or directives, to administrative law judges detailing how judges should interpret the law to adjudicate certain claims as well as the procedures to be used in processing certain cases. These instructions then routinely are distributed to judges within the state court system and often affect the substantive rights of litigants. An OCA spokesperson explained that it is “normal practice” for the agency to issue instructions regarding “cases that have potential significant operational impacts on the courts.”

10. OCA recently issued a memorandum instructing judges on the interpretation and application of the Appellate Division’s decision in *Crawford v Ally* (197 AD3d 27 [1st Dept 2021]). In *Crawford*, the Appellate Division held that due process requires courts to provide people charged with crimes with an evidentiary hearing before they can be subjected to a pre-trial temporary order of protection that may deprive them of significant personal or property interests. The *Crawford* ruling constituted an important safeguard for the rights of low-income New Yorkers, particularly people of color, who all too frequently were barred from their homes and separated from their families without process based solely on a prosecutor’s representation that an order of protection was warranted.

11. Three days after the Appellate Division decided *Crawford*, however, OCA issued a memorandum attempting to limit the impact of the decision and instructing judges to read it very narrowly. The *Crawford* memorandum, marked “Confidential” and “Internal Use Only,” was written by “Anthony R. Perri, Deputy Counsel [for] Criminal Justice” at OCA and sent to “Hons.

Vito C. Caruso, George J. Silver, and Edwina G. Mendelson[,] Deputy Chief Administrative Judges.”

12. The *Crawford* memorandum, using bold and underlined text for emphasis, instructed judges that *Crawford* “**should not be read** as to require live witnesses and/or non-hearsay testimony” (emphases in original) and urged judges to “resist—unless absolutely necessary and appropriate—anything approaching a full testimonial hearing.” The memorandum further informed judges that “normal best practices in issuing a [temporary order of protection]—rather than a full-blown hearing with live testimony—could potentially” satisfy the due process requirements the *Crawford* court ordered.

13. Courts in New York City are following the edicts of the *Crawford* memorandum. Judges hearing order-of-protection cases have routinely rejected defendants’ requests for live witnesses to testify at such hearings and allowed the prosecution to argue for the issuance of orders of protection based solely on unauthenticated evidence or without any presentation of evidence at all. In some instances, courts are refusing to hold order-of-protection hearings at all on the rationale that the separation of a defendant from their family members as a result of an order of protection does not constitute deprivation of a substantial personal interest. In other instances, courts are purporting to hold the order-of-protection hearing at a defendant’s arraignment, providing the defense no opportunity to gather evidence or present witnesses.

14. In one of the first order-of-protection hearing conducted under *Crawford* in the Bronx, the judge overseeing the hearing acknowledged that he had received and reviewed the *Crawford* memorandum. Defense counsel referenced the memorandum during the hearing, at which point the court inquired, “May I ask how you obtained a copy of that since that is supposed to be confidential and for the internal use of the court system only?” The court then acknowledged,

“I have a copy of the memo,” and ordered, “The memo is a topic that is off limits for the rest of this hearing.”

15. Another example of OCA’s announcing policy through memoranda occurred in August 2021, following the United State Supreme Court’s order granting an emergency application for injunctive relief in *Chrysafis v Marks* (141 S Ct 2482 [2021]). In *Chrysafis* the Supreme Court enjoined the enforcement of Part A of New York’s COVID Emergency Eviction and Foreclosure Prevention Act, which had permitted a tenant to invoke financial hardship or health impacts during the COVID-19 pandemic as a defense to eviction. Subsequently, OCA issued a memorandum addressed from Chief Administrative Judge Marks and sent to administrative law judges George J. Silver and Vito C. Caruso, with administrative law judge Carolyn Walker-Diallo copied. The *Chrysafis* memorandum instructed courts on how to handle residential eviction proceedings in light of the Supreme Court’s order and concluded with the direction to “[p]lease distribute this memorandum and attachments to judges and non-judicial staff as you deem appropriate.”

16. In April 2022, OCA Counsel’s Office issued a memorandum instructing judges on how to handle bail applications in the aftermath of bail reforms contained in the then-recently enacted state budget. Though the memorandum noted that the bail laws continued to require courts to apply factors associated with the “least restrictive means” standard in making custody determinations, it stated that those factors only “arguably weigh against setting higher bail amounts or remanding a defendant in specific cases.” The memorandum further encouraged courts to take an expansive view of their authority to confine defendants under the Mental Hygiene Law and Criminal Procedure Law.

17. A final example of OCA’s enacting policy through memoranda is a March 2020 agency directive “develop[ing]” a “mechanism” by which a defendant who is rearrested after

having been released on recognizance could be remanded into custody. OCA distributed this bail directive in the wake of legislatively enacted reforms to New York's bail laws that eliminated the use of cash bail for most misdemeanors and some nonviolent felony charges. Under the new bail laws, an individual who is rearrested after having been released on recognizance should be released pending a hearing on whether bail is warranted in their original case. But OCA's bail directive interpreted the bail laws to allow the judge to remand the individual into custody at the arraignment on their new case before the bail determination has been made in the original case.

18. The role that OCA memoranda play in the adjudication of cases in New York's court system is further illuminated by a recent inquiry made by an administrative judge to the Advisory Committee on Judicial Ethics. The administrative judge asked whether they could order a court attorney-referee to comply with a 2019 memorandum from OCA's Counsel Office providing instructions on the adjudication of certain claims, even though the attorney-referee disagreed with the legal analysis set forth in the OCA memorandum.

### **The NYCLU's FOIL Request and OCA's Denials**

19. On September 30, 2021, the NYCLU submitted a FOIL request to OCA for records relating to instructions OCA has issued to New York state court judges on how to interpret and apply substantive law. A true and correct copy of the FOIL request is attached as **Exhibit A**.

20. Specifically, the request sought:

- With respect to federal or state court decisions, all documents created by the OCA (including its Counsel's Office) between January 1, 2011 and the date of your final response to this request and distributed within the OCA and/or to judges in the New York State Unified Court System in which the decisions are summarized, analyzed, interpreted, construed, explained, clarified, and/or applied;
- With respect to federal or state statutes, regulations, or ordinances, all documents created by the OCA (including its Counsel's Office) between January 1, 2011 and the date of your final response to this request and

distributed within the OCA and/or to judges in the New York State Unified Court System in which the statutes, regulations, and ordinances are summarized, analyzed, interpreted, construed, explained, clarified, and/or applied; and

- All policies, procedures, criteria, and/or guidance the OCA (including its Counsel's Office) has used since January 1, 2011 in issuing interpretations of federal and state court decisions, statutes, regulations, and/or ordinances.

21. The request also identified the *Crawford* memorandum as an example of OCA instructions the NYCLU was seeking and enclosed a copy of that memorandum.

22. On September 30, 2021, OCA acknowledged receipt of the request and indicated it would respond to the request within 20 business days. A true and correct copy of OCA's acknowledgment is attached as **Exhibit B**.

23. On November 3, 2021, OCA denied the request in its entirety. A true and correct copy of OCA's denial is attached as **Exhibit C**. OCA cited three grounds for the denial. First, OCA asserted that the request is overly broad and does not reasonably describe the records sought. Second, OCA asserted without elaboration that the requested records are exempt from disclosure because they are intra-agency materials pursuant to Public Officers Law § 87 (2) (g). Third, OCA asserted, again without elaboration, that the requested records are exempt from disclosure because they are protected by the work-product privilege pursuant to Public Officers Law § 87 (2) (a) and CPLR § 3101 (b)–(c).

24. On November 22, 2021, the NYCLU filed an administrative appeal of OCA's denial of the FOIL request. A true and correct copy of the appeal is attached as **Exhibit D**. The appeal explained that the FOIL request was appropriately circumscribed, and that OCA had not met its burden of establishing that the NYCLU's description of the records sought were insufficient to allow the agency to locate responsive records. By way of further explanation, the appeal stated that responsive records would include "documents created by the OCA that contain instructions or



guidance as to how judges should interpret and/or apply court decisions, statutes, regulations, or ordinances.” Next, the appeal explained that OCA’s conclusory assertions of the intra-agency exemption and the work-product privilege failed to meet the agency’s burden of showing that the requested materials are exempt from disclosure. With respect to the intra-agency exemption, the appeal noted that OCA had failed to explain why the requested records are covered by the exemption; that the OCA documents sought, as exemplified by the *Crawford* memorandum, are not subject to the exemption because they “affect the public” within the meaning of Public Officers Law § 87 (2) (g) (ii); and that there is a First Amendment and common-law right of access to the requested records. With respect to the work-product privilege, the appeal noted that OCA had failed to articulate a particularized and specific justification as to why the requested records are privileged and that in any event the privilege likely would not apply because OCA and the court system are primarily responsible for adjudicating cases between litigants as opposed to being litigants themselves.

25. On February 3, 2022, OCA’s FOIL Appeals Officer denied the appeal in large part. A true and correct copy of the denial of the appeal is attached as **Exhibit E**. OCA denied requests 1 and 2 of the FOIL request for the same reasons the agency had cited for denying the initial FOIL request. First, OCA asserted that those two requests are overly broad, do not reasonably describe the records sought, and would require an unreasonable effort to locate responsive records. Second, OCA asserted that all of the records sought in those requests are exempt from disclosure as intra-agency materials because they are “for the purpose of providing opinions and advice to [Unified Court System] officials and judges,” and “are advisory only.” Third, OCA asserted that all of the records sought in those two requests are work-product privileged. Finally, OCA purported to respond to the request 3 in the FOIL request—which seeks “policies, procedures, criteria, and/or

guidance” OCA used in “issuing interpretations of federal and state court decisions, statutes, regulations, and/or ordinances”—by describing the source and scope of OCA’s authority.

26. In sum, OCA to date has produced no records in response to the NYCLU’s FOIL request. Having exhausted its administrative remedies, the NYCLU timely files this petition and complaint seeking immediate production of responsive records as well as attorneys’ fees and costs.

### **JURISDICTION AND VENUE**

27. This Court has jurisdiction over this matter pursuant to NY Constitution, article VI, § 7 and CPLR §§ 3001 and 7801.

28. Pursuant to CPLR §§ 7804 (b), 503 (a), and 506 (b), venue in this proceeding lies in New York County, the judicial district in which the respondent made the determination complained of and refused to perform the duty enjoined upon them by law, and in which a substantial part of the events or omissions giving rise to the claims herein occurred.

### **CAUSES OF ACTION**

#### **First Cause of Action: Right to Access the Requested Records Under the Freedom of Information Law (against Respondent the Office of Court Administration)**

29. Article 78 is the appropriate method of review of final agency determinations concerning FOIL requests.

30. The NYCLU has a legal right under FOIL to each of the categories of records sought in its September 30, 2021 FOIL request.

31. FOIL recognizes the public’s right to access and review government documents, and agency records are presumed to be public and subject to disclosure under FOIL.

32. There is no basis in law or fact for the respondent to withhold the requested records.

33. The NYCLU has exhausted its administrative remedies and has no other remedy at law.

34. The NYCLU has not made a prior application for the relief requested herein.

35. Because the respondent has no reasonable basis for withholding the records requested by the NYCLU in its FOIL request dated September 30, 2021, the NYCLU is entitled to the records that are the subject of this action.

**Second Cause of Action: Right to Access the Requested Records Under  
Federal Common Law  
(against Defendant Chief Administrative Judge Lawrence K. Marks)**

36. The defendant's actions violate the petitioner-plaintiff's rights under the common law of the United States.

**Third Cause of Action: Right to Access the Requested Records Under  
the First Amendment to the United States Constitution  
(against Defendant Chief Administrative Judge Lawrence K. Marks)**

37. The defendant's actions violate the petitioner-plaintiff's rights under the First Amendment to the United States Constitution.

**REQUESTED RELIEF**

WHEREFORE, the petitioner-plaintiff respectfully requests the following relief:

- (1) A judgment pursuant to Article 78 directing the respondent to comply with its duty under FOIL to disclose the records sought by the petitioner-plaintiff in its September 30, 2021 FOIL request;
- (2) A judgment directing the defendant to disclose the records sought by the petitioner-plaintiff in its September 30, 2021 FOIL request as required by the federal common law and the First Amendment;

- (3) A declaration that the petitioner-plaintiff's rights are being violated;
- (4) An award of reasonable attorneys' fees and litigation costs to the petitioner-plaintiff pursuant to Public Officers Law § 89 (4) (c) and 42 USC § 1988; and
- (5) Any other relief the Court deems just and proper.

Dated: June 1, 2022  
New York, New York

Respectfully submitted,

NEW YORK CIVIL LIBERTIES UNION  
FOUNDATION

/s/ Terry Ding

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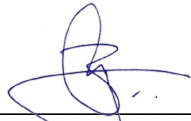
**VERIFICATION**

STATE OF NEW YORK     )  
  ) ss:  
COUNTY OF NEW YORK )

Terry Ding, an attorney admitted to practice in the State of New York, affirms pursuant to CPLR § 2106 under the penalties of perjury:

1. I am an attorney for the petitioner-plaintiff in the within proceeding. I make this Verification pursuant to CPLR § 3020 (d).
2. I have read the attached Verified Petition and Complaint and know its contents.
3. All of the material allegations of the Verified Petition and Complaint are true to my personal knowledge or upon information and belief. As to those statements that are based upon information and belief, I believe those statements to be true.

Dated: June 1, 2022  
New York, New York

  
\_\_\_\_\_  
Terry Ding