

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

In the matter of:

HERITAGE FOUNDATION

and

MIKE HOWELL

Petitioners,

v.

**ALVIN BRAGG, in his official capacity as
DISTRICT ATTORNEY OF THE COUNTY OF
NEW YORK**

Respondent,

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

Index No.: _____

VERIFIED PETITION

INTRODUCTION

Petitioners HERITAGE FOUNDATION & MIKE HOWELL (“Petitioners”) for their petition against Respondent ALVIN BRAGG, in his official capacity as DISTRICT ATTORNEY OF THE COUNTY OF NEW YORK (“DA Bragg” or “Respondent”), allege as follows:

Nature of Action

1. This is an action under Article 78 of the Civil Law and Practice Rules to compel compliance with the New York Freedom of Information Law (“FOIL”), Public Officers Law (“POL”) §§ 84–90, and to compel production under a records request made jointly by both Petitioners.

2. DA Bragg’s April 4, 2023, indictment of former President Donald J. Trump (“President Trump”) is—regardless of political ideology or viewpoint—immensely controversial. *See* Ex. A (Indictment, *People v. Donald J. Trump*, Ind-71543-23 (N. Y. Cnty Apr. 4, 2023) (“Indictment”). Part of this controversy focused—and focuses—on the widespread criticism that the legal theory under which Respondent indicted President Trump is extraordinarily weak, and in the eyes of some, flirts with the frivolous. *See* Ex. B (press coverage of legal experts criticizing the Indictment’s legal basis).

3. A frequent focus of this criticism was—and is—the fact that DA Bragg’s predecessor, then-DA Cyrus Vance’s (“DA Vance”) *declined* to pursue the same charges on what appears to be a similar record in 2021. *See, e.g.,* Mark Pomerantz, *People v. Donald Trump*, at 33–46 (Feb. 2023) (Ex. C) (“Pomerantz”); Ex. B at B000007; B000092-98. Moreover, shortly after assuming Office, DA Bragg *reversed* the decision by then-DA Vance to prosecute President Trump on other charges. *Id.* at 248–52. DA Bragg’s initial decision *not* to prosecute President Trump was publicly aired in great detail.

4. Former Special Assistant District Attorney Mark Pomerantz—who had played a key role in DA Vance’s investigation of President Trump—released his resignation letter in *The New York Times* which heavily criticized DA Bragg for declining to prosecute President Trump. *Read the Full Text of Mark Pomerantz’s Resignation Letter*, N.Y. Times (Mar. 23, 2022) (Ex. D). Mark Pomerantz later published a 286 page “tell all” book highly critical of DA Bragg. *See generally* Mark Pomerantz, *People v. Donald Trump*, 197–267 (Feb. 2023).

5. When it became apparent that DA Bragg may well pursue the charges in the Indictment, the press reported extensively on both the widespread criticism of the legal theory underlying the Indictment, and on reports that DA Bragg’s actions may have been motivated in

part by the public criticisms of Pomerantz and others which the *Washington Post* reported “deeply stung” DA Bragg. Mark Berman et al., *The Prosecutor, the Ex-President and the ‘Zombie’ Case that Came Back to Life*, Wash. Post (Mar. 17, 2023) (Ex. E); *see also* Ex. F (collecting similar reporting).

6. These criticisms as well as other concerns and multiple clear federal nexuses led the U.S. House Committee on Oversight & Accountability, the U.S. House Committee on the Judiciary (“Judiciary Committee”), and the U.S. House Committee on Administration to open investigations into DA Bragg’s conduct. *See* Ex. G (Congressional correspondence); *see also* *Bragg v. Jordan*, __ F.Supp.3d __, No. 23-cv-3032 (MKV), 2023 WL 2999971 (S.D.N.Y. Apr. 19, 2023) (denying preliminary injunction against pending Judiciary Committee deposition subpoena), *admin. stay granted sub nom., Bragg v. Pomerantz*, No. 23-615 (L), 2023 WL 3015207 (2d Cir. Apr. 19, 2023) (Robinson, J., In Chambers), *appeal dismissed* (Apr. 24, 2023).

7. Of particular applicability here, these criticisms and Congressional investigations featured front and center in reports that DA Bragg may have coordinated his case with President Trump’s political opponents. *See* Ex. H (collection of news articles raising reports of such communications and speculating at political coordination); Ex. G at G000001-12; G000018-25; G000036-40; G000043-47. Regrettably, these questions have not been answered. These reports have raised concerns in many circles based in large part upon the longstanding history of President Trump’s political opponents coordinating their activities to systematically weaponize the criminal justice system against him and thereby pervert the course of Justice. No honest reading of Special Counsel John H. Durham’s, *Report on Matters Related to Intelligence Activities and Investigations Arising Out of the 2016 President Campaigns* (May 12, 2023)

admits to any other conclusion. *See* Ex. I; *see also* Ex. J (news compilation concerning this Report).

8. One aspect of these concerns resolved around the ability of DA Vance and DA Bragg to—apparently—obtain potentially millions of dollars in free legal services from Davis, Polk & Wardwell LLP (“Davis Polk”), and Paul, Weiss, Rifkind, Wharton & Garrison LLP (“Paul Weiss”). These firms are involved in many different endeavors best characterized as “political” and as major international law firms with robust white collar defense practices, clearly have an “interest” in how the District Attorney of the County of New York conducts his affairs.

9. Publicly available details of these apparently free legal services are incomplete and raise more questions than they answer.

10. Paul Weiss and Davis Polk who according to Mr. Pomerantz provided “free associates” among other things to aid (at a minimum) then DA-Vance in investigating President Trump. For example:

- “With all of the other investigative tasks that were on the agenda, Carey [Dunne, General Counsel to then-DA Vance] and I realized that we would need more help for the team. ¶ Happily Carey and I were able to persuade the large firms for which we had once labored to provide us with associate help. A total of three talented associates were “seconded” to the district attorney’s office by Davis Polk & Wardell, where Carey had been a longtime partner, and the Paul Weiss firm, where I had been a partner before I retired. Having these associates join the Trump investigation was a ‘win/win’ for them, as they stopped working on their firm matters to become special assistant district attorneys working on the Trump investigation while the law firms continued to pay their substantial salaries. Upon joining the investigative team, they became the most highly compensated employees in the office, earning more than Cy Vance.” Pomerantz at 120–21.
- “We were not sure how much longer the associates we had ‘borrowed’ from Davis Polk and Paul Weiss would be able to stay with us.” *Id.* at 180.
- “Some quick legal research, later bolstered by a more in-depth research memo from Paul Weiss, indicated to the contrary.” *Id.* at 189.

- “The associate who had been ‘seconded’ to us from Davis Polk had to return to the law firm at the end of January.” *Id.* at 202.

11. Gibson, Dunn & Crutcher LLP (“Gibson Dunn”) represents DA Bragg in his failed attempt to stonewall the House Judiciary Committee’s subpoena to depose Mr. Pomerantz on matters of grave federal concern. *Bragg v. Jordan*, No. 23-cv-3032 (MKV) (S.D.N.Y.). A glance at the docket reveals that Gibson Dunn performed an extraordinary amount of legal work in that case. It is unclear at this time whether DA Bragg received these services at a discount or how much taxpayer money he expended hiring an outside white shoe law firm. A few highlights:

- Letter Motion, *Bragg v. Jordan*, No. 23-cv-3032 (MKV) (S.D.N.Y. Apr. 18, 2023) (ECF No. 41) (touting filing of reply brief in roughly 24 hours) (Ex. K).
- Memorandum of Law in Support of Emergency Application for an Administrative Stay and Stay of Return Date Pending Expedited Appeal, *Bragg v. Jordan*, No. 23-615 (L) (2d Cir. Apr. 19, 2023) (10,412 word brief filed within hours of adverse District Court decision) (Ex. L).

12. Petitioners’ FOIL Request (Apr. 12, 2023) (Ex. M) (“Request”) sought to explore the circumstances under which DA Vance and DA Bragg were able to obtain these legal services; the terms of those legal services; how obvious ethics and conflicts related issues were documented and addressed; and why they appeared to be allocated solely to investigations and prosecutions concerning President Trump, as opposed to the crime in New York City that has become increasingly rampant under DA Bragg.

Parties

13. Petitioner, The Heritage Foundation (“Heritage”), is a Washington, D.C.-based nonpartisan public policy organization with a national and international reputation whose mission is to “formulate and promote public policies based on the principles of free enterprise, limited government, individual freedom, traditional American values, and a strong national

defense.” The Heritage Foundation, *About Heritage*, found at <https://www.heritage.org/about-heritage/mission> (last visited June 15, 2023). Heritage is a not-for-profit Internal Revenue Code section 501(c)(3) organization which engages in substantial dissemination of information to the public. Heritage operates a national news outlet, *The Daily Signal*.

14. Plaintiff Mike Howell is an adult citizen and resident of Maryland and leads The Heritage Foundation’s Oversight Project. He is also an author for *The Daily Signal*. The Oversight Project is an initiative aimed at obtaining information via Freedom of Information Act requests and other means in order to best inform the public and Congress for the purposes of Congressional oversight. The requests and analysis of information are informed by Heritage’s deep policy expertise. By function, the Oversight Project is primarily engaged in disseminating information to the public. *See, e.g., Oversight Project, found at* <https://www.heritage.org/oversight> (last visited June 15, 2023); Twitter, *found at @OversightPR* (last visited June 15, 2023).

15. Respondent Alvin Bragg is the elected District Attorney of the County of New York, and is in possession of, or otherwise the proper owner, in his official capacity as District Attorney, of the records petitioners seek. He is sued in his official capacity only.

Jurisdiction and Venue

16. This matter is brought pursuant to Article 78.

17. Venue is proper in this Court pursuant to CPLR § 506(b) as the determination complained of occurred in the County of New York.

Factual Background

18. Petitioners submitted the Request via email on April 12, 2023. The Request sought four distinct categories of records:

- 1) Any engagement, contract, agreement, or retention with Gibson, Dunn & Crutcher LLP. Please limit this search from January 1, 2020 to the present.
- 2) All records related to the retention of Gibson, Dunn & Crutcher LPP to act for the New York District Attorney's Office in *Bragg v. Jordan*, No. 23-cv-cv-3032 (MKV) (S.D.N.Y).
- 3) All records related to the receipt of free legal services from David Polk & Wardwell LLP for investigations into President Donald J. Trump. Please limit this search from January 1, 2020 to the present.
- 4) All records related to the receipt of free legal services from Paul Weiss LLP for investigations into President Donald J. Trump. Please limit this search from January 1, 2020 to the present.

Request at 1–2.

19. DA Bragg's Office responded to the Request by letter dated April 14, 2023.

Letter from Madeleine Guilmain to Mike Howell (Apr. 14, 2023) (Ex. N) ("Constructive Denial"). The Constructive Denial read in operative part:

We will need additional time to locate records that may be responsive to your request, and to review those records in order to rule upon your request. I am unable to give you a definite date for completion of this determination, however, you can expect an update of the process on or before May 14, 2023.

Id. at 1.

20. Petitioners appealed the Constructive Denial via email on April 20, 2023. Letter from Mike Howell to Robin McCabe (Apr. 20, 2023) (Ex. O) ("Administrative Appeal"). The Administrative Appeal set out in detail the Constructive Denial's errors as to both law and fact.

21. The Administrative Appeal began by explaining that DA Bragg had constructively denied the Request because the Constructive Denial blatantly failed to comply with the mandate of POL § 89(3)(a) and 21 NYCRR § 1401.5(c) that:

[U]pon receipt of a request, an agency has five business days in which it must either grant access to the records, deny access or furnish a written acknowledgment of the receipt of such request. When such acknowledgment is given, it must include a statement of the approximate date when the request will be granted or denied.

Data Tree v. Romaine, 9 N.Y.3d 454, 465 (2007). See Administrative Appeal at 1–4. A mere “update of the process” does not discharge this requirement and therefore worked as a constructive denial. *Id.* at 4.

22. The Administrative Appeal continued to raise another issue:

Given that the Denial is indefensible, and we therefore expect that your office will promptly reverse and remand the Request for processing, a word on timing is in order to engage in dialogue and accommodation. The Court of Appeals has construed the phrase “reasonable period under the circumstances of the request” holding that “the time needed to comply with the request may be dependent on a number of factors, including the volume of the request and the retrieval methods.” *Data Tree*, 849 N.Y.S.2d at 465.

Administrative Appeal at 4. It then laid out in detail its expectations that certain records were of the type that should be quickly processed and produced under this standard:

We do not know how all of the requested records are maintained (save for the deficient nature of DA Bragg’s records keeping systems addressed in our Apr. 17, 2023, appeal of the denial of an earlier FOIL request) but we note that some of the Request should be quickly and easily processed. The first Specification seeks only “[a]ny engagement, contract, agreement, or retention with Gibson, Dunn & Crutcher LLP” for the limited time period of “January 1, 2020 to the present.” Request at 1. Other basic business records likely exist that would be responsive to the Request. For example, we would expect conflict of interest waivers and associated materials to exist and be filed by each law firm providing free legal services. Basic business records that one expects to be organized by entity and promptly to hand should be produced quickly. See *Empire Ctr. for Pub. Pol’y*, 150 N.Y.S.3d 497, 506 (Sup. Ct. Albany Cnty. 2021).

Id. at 5.

23. The Administrative Appeal also submitted that because “the question of resources is relevant to the timing of a FOIL response,” Petitioners “fully expect that any consideration of resources will account for the fact that DA Bragg has received an immense amount of free legal resources from international law firms to investigate President Trump.” *Id.* at 5. It explained further “[t]here is no reason these resources are not best spent providing the American people with transparency as concerns DA Bragg’s use of free private law firm resources to investigate

President Donald J. Trump as opposed to filing pleadings to block lawful Congressional oversight,” and that Petitioners “are confident that Davis Polk, Paul Weiss, or Gibson Dunn could promptly prepare a complete response to the Request.” *Id.* at 6

24. DA Bragg’s Office issued a final decision on the Administrative Appeal on May 2, 2023. Letter from Robin McCabe to Mike Howell (May 3, 2023) (Ex. P) (“Final Determination”).

25. The Final Determination began by misstating the Administrative Appeal’s submission as to constructive exhaustion reading it as a submission that Respondent erred in that that Petitioners “ha[d] not yet received a determination.” *Id.* at 1. As discussed above, the Administrative Appeal said nothing of the sort. *See supra* ¶ 21. The Final Determination then used this strawman to entirely elide the Administrative Appeal’s principal submission and turned solely to the Administrative Appeal’s submission as to the timing of the response.

26. On the issue of timing, the Final Determination concluded that “I find that the period allotted by the RAO [Records Access Officer] was reasonable under the circumstances of the request, which included requests for “[a]ll records related” to three topics. *Id.* at 1. The Final Determination did not grapple at all with the Administrative Appeal’s submissions as to the apparent ease of locating some of the records sought as well as considerations of DA Bragg’s ability to obtain free legal services. It simply concluded by noting that “you can expect an update on or about May 14th.” *Id.* at 2.

27. May 14, 2023 came and went. On May 23, 2023, DA Bragg’s Office wrote:

“I am writing to let you know that we are still in the process of searching for potentially responsive records. I estimate this process will take at least two weeks. I will therefore provide you with either my determination, or a further update, on or before June 6, 2023.”

Letter from Todd Fitch to Roman Jankowski (May 23, 2023) (Ex. Q).

28. June 6, 2023 has come and gone, and Petitioners have received no further communications from Respondent.

29. On June 15, 2023, Petitioners learned that a redacted version of the Gibson Dunn engagement letter—a record the Administrative Appeal specifically flagged as both undoubtedly responsive and easily produced—had in fact been produced to another FOIL requestor.

FIRST CLAIM FOR RELIEF
Seeking Declaratory Judgment

30. Petitioners re-allege paragraphs 1–29 as if fully set out herein.

31. Petitioners have sought and been denied production of responsive records reflecting the conduct of official business, because Respondent has failed to provide a substantive response to the FOIL request at issue in this case, or to provide any reasonable basis to conclude that it properly searched for such records, or to produce records or portions thereof that are not properly exempt under the law.

32. Petitioners ask this Court to enter a judgment declaring that:

a. The records as specifically described in Petitioners' FOIL Request, and any attachments thereto, are public records, and as such, are subject to release under the New York Freedom of Information Law;

b. The Respondent must release those requested records or segregable portions thereof subject to legitimate exemptions;

c. The Respondent is estopped from seeking seek costs and fees for the request at issue in this case, due to the balance of the equities and the incorporation of common law principles by POL § 89(6) of the New York Freedom of Information Law.

SECOND CLAIM FOR RELIEF
Seeking Injunctive Relief

33. Petitioners re-allege paragraphs 1–32 as if fully set out herein.

34. Petitioners are entitled to injunctive relief compelling Respondent to produce all records in its possession responsive to Petitioners’ New York Freedom of Information Law request, without fees, subject to legitimate withholdings.

35. Petitioners ask the Court to order the Respondent to produce to Petitioners, within 15 business days of the date of the order, the requested records described in Petitioners’ request, and any attachments thereto, subject to legitimate withholdings.

36. Petitioners ask the Court to order the Parties to consult regarding withheld documents and to file a status report to the Court within 10 days after Petitioners receive the last of the produced documents, addressing Respondent's preparation of a withholdings log and a briefing schedule for resolution of remaining issues associated with Petitioners’ challenges to Respondent’s withholdings and any other remaining issues.

THIRD CLAIM FOR RELIEF
Seeking Costs and Fees

37. Petitioners re-allege paragraphs 1–36 as if fully set out herein.

38. Pursuant to POL § 89 (4) (c), in most cases, the Court shall award reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

39. Petitioners are statutorily entitled to recover fees and costs incurred as a result of respondent’s refusal to fulfill the open records request at issue in this case.

40. Petitioners ask the Court to order the respondent to pay reasonable attorney fees and other litigation costs reasonably incurred in this case.

WHEREFORE, Petitioners request the declaratory and injunctive relief herein sought, and an award for their attorney fees and costs and such other and further relief as the Court shall deem proper.

Respectfully submitted this the 15 day of June, 2023.

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