

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 verified 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* Indictment, *People v. Donald J. Trump*, Ind-71543-23 (N.Y. Cnty Apr. 4, 2023) (Ex. A) (“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 Office (“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*, in which Mr. Pomerantz heavily criticized DA Bragg for declining to prosecute President Trump at that time. *Read the Full Text of Mark Pomerantz’s Resignation Letter*, N.Y. Times (Mar. 23, 2022) (Ex. D). Mr. Pomerantz later published a 286 page “tell all” book highly critical of DA Bragg. *See* Pomerantz at 197–267.

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 Mr. 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 the Congressional investigations featured front and center in reports that DA Bragg may have coordinated his case with President Trump’s political opponents in the White House, the United States Department of Justice (“DOJ”), the Federal Bureau of Investigation (“FBI”), and Congress. *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 met with answers. 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 Presidential Campaigns* (May 12, 2023) admits to any other conclusion. See Ex. I; see also Ex. J (news compilation concerning this Report).

8. Petitioners' FOIL Request to Respondent Bragg, dated Mar. 21, 2023 ("Request") sought to explore the issue of what level of coordination there was between DA Bragg and President Trump's political opponents in Washington, D.C. (Ex. K).

9. By design, the Request did *not* seek information relating to the merits of DA Bragg's prosecution that would raise questions of FOIL exemptions. Instead, it largely sought communications that (should) raise minimal issues under FOIL exemptions on the known record.

### Parties

10. 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 section 501(c)(3) organization which engages in substantial dissemination of information to the public. Heritage operates a national news outlet, *The Daily Signal*.

11. Plaintiff Mike Howell is an adult resident and citizen of the State 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).

12. 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**

13. This matter is brought pursuant to Article 78.

14. 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**

15. Petitioners submitted the Request via email on March 21, 2023. The Request sought seven distinct categories of records:

1) All communications between Representative Daniel Goldman and Manhattan District Attorney Alvin Bragg, or any person communicating explicitly on behalf of the aforementioned persons, containing the following terms: “retainer agreement,” “Trump,” “former president,” “Trump Organization,” “GOP,” “Stormy Daniels,” “hush money,” “Michael Cohen,” “business records,” “130,000,” “Hope Hicks,” “Kellyanne Conway,” “investigation,” “indictment,” “conspiracy,” “campaign finance,” “2016 election,” OR “grand jury.”

2) All communications between any employee of the Manhattan District Attorney’s Office and any employee of the United States Department of Justice ” containing the following terms: “2016 election,” “retainer agreement,” “Trump,” “former president,” “Trump Organization,” “Stormy Daniels,” “hush money,” “Michael Cohen,” “business records,” “130,000,” “Hope Hicks,” OR “Kellyanne Conway.”

3) All communications between any employee of the Manhattan District Attorney’s Office and the domain that ends in “eop.gov” containing the following terms: “2016 election,” “retainer agreement,” “Trump,” “former president,” “Trump Organization,” “Stormy Daniels,” “hush money,” “Michael Cohen,” “business records,” “130,000,” “Hope Hicks,” OR “Kellyanne Conway.”

4) all communications between any employee of the Manhattan DA's office and: (1) member of congress, (2) congressional staff, or (3) email domain ending in house.gov containing the following search terms: "2016 election," "retainer agreement," "Trump," "former president," "Trump Organization," "Stormy Daniels," "hush money," "Michael Cohen," "business records," "130,000," "Hope Hicks," OR "Kellyanne Conway."

5) All communications between any employee of the Manhattan DA's office and: (1) member of the Senate, (2) senate staff, or (3) email domain ending in senate.gov containing the following search terms: "2016 election," "retainer agreement," "Trump," "former president," "Trump Organization," "Stormy Daniels," "hush money," "Michael Cohen," "business records," "130,000," "Hope Hicks," OR "Kellyanne Conway."

6) All communications between any employee of the Manhattan District Attorney's Office and the domain that ends in "fbi.gov" containing the following terms: "2016 election," "retainer agreement," "Trump," "former president," "Trump Organization," "Stormy Daniels," "hush money," "Michael Cohen," "business records," "130,000," "Hope Hicks," OR "Kellyanne Conway."

7) All records notating, memorializing, or summarizing a communication, or a portion thereof, responsive to Specifications 1–6.

Request at 1–2. The Request sought only records from January 1, 2022 to present. *Id.* at 2.

16. DA Bragg's Office responded to the Request by letter dated March 27, 2023. Letter from Madeleine Guilmain to Mike Howell (Mar. 27, 2023) (Ex. L) ("Denial"). The Denial found Specifications 2–7 legally defective on the grounds that they did not "reasonably describe" the records sought. Denial at 1; *see* POL§ 89(3)(a). Second, the Denial also appears to have denied Specifications 2–7 on the grounds of burden. Denial at n. 1. As to Specification 1, the Denial states that, "as to the first part" of Specification 1 "a name search was conducted for potentially responsive communications in the form of emails between 'District Attorney Alvin Bragg' and 'Daniel Goldman,' currently available on the office server, and no records were found." Denial at 2. The Denial is silent on the "other" part of Specification 1.

17. Petitioners appealed the Denial via email on April 20, 2023. Letter from Mike Howell to Robin McCabe (Apr. 17, 2023) (Ex. M) ("Administrative Appeal"). The

Administrative Appeal set out over 16 single-spaced pages a detailed explanation of the Denial's error as to both law and fact.

18. The Administrative Appeal explained at length why the Denial erred in concluding that Specifications 2–7 did not “reasonably describe” the records sought. *Id.* at 3–10.

19. As part of this explanation, the Administrative Appeal detailed that DA Bragg's Office appears to have highly antiquated—and therefore inadequate—record keeping systems and search capabilities. *Id.* at 6–7. As the Administrative Appeal explained:

Prior to receiving the Denial, we were not aware that any major District Attorney's Office lacked the capability to search email systems at the server level or still used “back-up tapes.” The fact that “back up tapes” could be implicated by a search only going back to January 1, 2022 raises additional concerns regarding record retention. These retention-related concerns are exacerbated by the fact that the Denial seems to suggest that emails are stored locally at the custodian level as opposed to at the server level. The foregoing concerns are compounded by the fact that DA Bragg has numerous discovery obligations, most notably those that are imposed by the United States Constitution and are not limited in temporal scope. *See, e.g., Brady v. Maryland*, 373 U.S. 83 (1963).

*Id.* at 7. The Administrative Appeal noted the foregoing raised several other concerns directly implicated by this proceeding. *Id.*

20. First, the Administrative Appeal discussed the apparent tension between DA Bragg's facially deficient recordkeeping and the prosecution of President Trump on a record keeping offense. *Id.* 7–8.

21. Second, the Administrative Appeal raised questions as to why DA Bragg lacked the capability to search emails at the server level or to search back-up tapes given that FTI Consulting (who among their many offerings provide advanced e-discovery solutions) had assisted DA Bragg's Office in its investigation of President Trump. *Id.* at 8. This concern was further compounded by: (1) the free legal services DA Bragg's Office had received, or was receiving, to investigate President Trump from white-shoe law firms Davis Polk & Wardwell

LLP and Paul, Weiss, Rifkind, Wharton & Garrison LLP (*id.*); and (2) the fact that Gibson, Dunn & Crutcher LLP appeared on the then-public record to represent DA Bragg *pro bono* in his lawsuit against the Judiciary Committee. *Id.* at 12.

22. Although the Denial’s conclusion that the Request did not “reasonably describe” the records sought in Specification 2–7 is devoid of legal and factual merit, Petitioners made an “effort to accommodate DA Bragg’s concerns—even though they appear to relate to deficiencies in his business record keeping—in order to provide much needed transparency on a matter of extreme interest to the American public.” Administrative Appeal at 10. As the Administrative Appeal explained, there was—and is—intense Congressional interest in the matter, but that interest was (at the time) being stymied by a since (decisively) rejected and (possibly sanctionable) effort by DA Bragg to block lawful Congressional oversight. *Id.* at 10–11; *Bragg v. Jordan*, 2023 WL 2999971. Specifically, Petitioners voluntarily narrowed the scope of the search required by the Request:

[P]lease limit your search to the following custodians: (1) District Attorney Bragg; (2) the Executive Office of District Attorney Bragg; (3) any person in the Executive Office of District Attorney Bragg; and (4) any person who performed any work on the investigation or prosecution of President Trump or his immediate family, Barry Weisselberg or his immediate family, or the Trump Organization.

*Id.*

23. The Administrative Appeal then turned to what appeared to be the Denial’s rejection of Specifications 2–7 on grounds of burden. *Id.* at 11. It explained that argument was legally erroneous—and doubly so in light of DA Bragg’s ability obtain assistance from FTI Consulting and white-shoe law firms. *Id.* at 12. Moreover, the Administrative Appeal noted that even if there was a burden concern, the Denial was procedurally deficient in that it was *required* under POL § 89(3)(a) to provide a cost estimate and offer Petitioners the opportunity to pay the



cost of engaging an outside vendor to assist in processing the Request. The Denial failed to do so. *Id.* at 13–14.

24. Turning to Specification 1, the Administrative Appeal began by noting that the basis for the denial of that Specification was unclear. *Id.* at 14.

25. Specification 1 sought:

All communications between Representative Daniel Goldman and Manhattan District Attorney Alvin Bragg, or any person communicating explicitly on behalf of the aforementioned persons, containing the following terms: “retainer agreement,” “Trump,” “former president,” “Trump Organization,” “GOP,” “Stormy Daniels,” “hush money,” “Michael Cohen,” “business records,” “130,000,” “Hope Hicks,” “Kellyanne Conway,” “investigation,” “indictment,” “conspiracy,” “campaign finance,” “2016 election,” OR “grand jury.”

Request at 1. The Denial states, “a name search was conducted for potentially responsive communications in the form of emails between ‘District Attorney Alvin Bragg’ and ‘Daniel Goldman,’ currently available on the office server, and no records were found.” Denial at 2.

26. The Administrative Appeal explained that the Denial is not clear precisely what search was conducted and that the Denial appeared to excise a portion of Specification 1 in that it did not address it. Administrative Appeal at 14. The Administrative Appeal also took issue with the Denial’s failure to conduct searches of any source of records other than “emails” “currently available on the office server” given that the Request specifically sought other types of records. *Id.* (quoting Denial at 2).

27. DA Bragg’s Office issued a final decision on the Administrative Appeal on April 28, 2023. Letter from Robin McCade to Mike Howell (Apr. 28, 2023) (Ex. N) (“Final Determination”).

28. The Final Determination remanded the Request to the Records Access Officer (“RAO”) to “conduct a search consistent” with Petitioners voluntarily “narrowed parameters.”

Final Determination at 1. It stated that “[y]ou can expect an update on the status of this process by the RAO within 90 days of the date of this decision.” *Id.* at 1. It provided no basis for, or analysis supporting, the “90 day” timeline on “remand.” 90 days from April 28, 2023 is July 27, 2023.

29. The Final Determination next affirmed the RAO’s findings as to breadth and vagueness. *Id.* at 1–2. Then, for the first time, the Final Determination took the position that the Denial’s vagueness and breadth findings also applied to part of Specification 1. *Id.* This *post hoc* explanation appears to explain the Denial’s failure to address all of Specification 1. *See* Administrative Appeal at 14.

30. The Final Determination further advised Petitioners “that your request necessarily encompasses communications that, once retrieved, will be exempt from disclosure as communications relating to a pending prosecution, privileged and deliberative communications, sealed matters, and/or statutorily exempt materials and communications attending a grand jury proceeding” and as a consequence “review for these statutory and other FOIL exemptions, even as narrowed by your additional parameters, will likely take a significant amount of time.” Final Determination at 2. It contained no analysis to support this *ipse dixit* such as, *e.g.*, an explanation as to how on the current public record a communication with a Democratic Member of Congress could possibly be “sealed” or “grand jury” material.

31. The Final Determination provided no analysis squaring its holdings on timing with the relevant regulation and caselaw construing POL § 89(3)(a)’s requirement that records be produced in a “reasonable period under the circumstances of the request.” *See* 21 NYCRR § 1401.5(d); *see also, e.g., Data Tree v. Romaine*, 9 N.Y.3d 454, 465 (2007).

32. As to the portion of Specification 1 for which a search was conducted, the Final Determination rejected the Administrative Appeal's submission that the search was inadequate, writing "[a]s to the records determined not to exist, the RAO provided an appropriate certification that documents could not be located" and that such certification precluded further inquiry. *Id.* at 1. But this analysis does not comport with a fair reading of the RAO's certification. The relevant paragraph in the Denial reads:

Finally, as to the first part of request (1), a name search was conducted for potentially responsive communications in the form of emails between "District Attorney Alvin Bragg" and "Daniel Goldman," currently available on the office server, and no records were found. POL §89(3)(a); *Matter of Lebron v Smith*, 40 AD3d 515 (1st Dept 2007); *Mitchell v Slade*, 173 AD2d 226 (1st Dept 1991); *Konigsberg v Coughlin*, 68 NY2d 245 (1986). I hereby certify and affirm, as an attorney duly admitted to practice law before the courts of this State, that a diligent search has been conducted and it has been determined that responsive records do not exist. *Id.*; see *Matter of Sable v New York DA's Office*, 2014 NY Slip Op 31976(U)(SC NY Co 2014); *Matter of Rattley v New York City Police Dep't.*, 96 NY2d 873 (2001).

*Id.* at 2. Read in context, the second sentence of the paragraph—concerning certification—clearly relates to the first sentence of the paragraph—concerning a "name search." That is to say a "name search" was conducted of "emails" "currently available on the office server," and the RAO certified that *that* search was "diligent" and produced no records. Such a certification says nothing about *other* potential sources of records the Request specifically stated should be searched. See Administrative Appeal at 14–15. It therefore follows that the certification does not demonstrate that a lawful or proper search for records described in the Request was conducted.

**FIRST CLAIM FOR RELIEF**  
**Seeking Declaratory Judgment**

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

34. 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 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.

35. 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 costs and fees for the Request, 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**

36. Petitioners re-allege paragraphs 1–35 as if fully set out herein.

37. Petitioners are entitled to injunctive relief compelling Respondent to produce all records in its possession responsive to Petitioners' FOIL Request, without fees, subject to legitimate withholdings.

38. 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' FOIL Request, and any attachments thereto, subject to legitimate withholdings.

39. 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**

40. Petitioners re-allege paragraphs 1–39 as if fully set out herein.

41. 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.

42. Petitioners are statutorily entitled to recover fees and costs incurred as a result of respondent's refusal to fulfill Petitioners' FOIL Request.

43. 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.

By: Matthew D. Hardin  
Matthew D. Hardin  
43 West 43<sup>rd</sup> Street  
Suite 35  
New York, NY 10036  
Tel.: (212) 680-4938  
Email: MatthewDHardin@gmail.com

Samuel Everett Dewey (admission pro hac vice pending)  
Chambers of Samuel Everett Dewey LLC  
2200 12<sup>th</sup> Court North Apt. 609  
Arlington, VA 22201  
Tel.: (703) 261-4194

Email: [samueledewey@sedchambers.com](mailto:samueledewey@sedchambers.com)

*Attorneys for Petitioners*

