SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND, CIVIL TERM, PART 22

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In the Matter of the Application of

Index No. 080073/2015

THE NEW YORK CITY CIVILIAN COMPLAINT REVIEW BOARD

Petitioner

against

THE OFFICE OF THE DISTRICT ATTORNEY FOR THE COUNTY OF RICHMOND

Respondent

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PETITIONER'S MEMORANDUM OF LAW IN REPLY TO RESPONDENT'S OPPOSITION AND IN FURTHER SUPPORT OF PETITIONER'S VERIFIED PETITION

Preliminary Statement

The petitioner New York City Civilian Complaint Review Board ("CCRB") submits this memorandum of law in reply to the Respondent Office of the District Attorney for the County of Richmond (the "District Attorney's Office" or "Respondent") and in further support of its application, pursuant to CPL § 190.25(4) and Judiciary Law § 2-b(3), for an order directing the District Attorney's Office to produce a certified copy of the evidence and testimony presented to the Grand Jury of Richmond County (the "Grand Jury") as part of its examination of the circumstances surrounding the July 17, 2014 death of Eric Garner in Staten Island (individually and collectively, the "Evidence"), and regulating subsequent limited use and disclosure of the Evidence in support of CCRB's investigative and prosecutorial work.

Proceeding from the principle that "secrecy of grand jury minutes is not absolute," *People v. Di Napoli*, 27 N.Y.2d 229, 234 (1970), CCRB seeks *limited* disclosure of particular grand jury material, subject to a protective order of this Court, in order to fulfill its statutory obligation to investigate and prosecute instances of police misconduct. CCRB has amply demonstrated that it has a compelling, narrow and particularized need for the Evidence, and that the various public interests here clearly favor limited and controlled disclosure of the Evidence.

The Evidence represents the best evidence – in fact, the only sworn evidence – and the only method CCRB currently has available to fully and fairly investigate the Incident, to determine the existence of any police misconduct, and to pursue any appropriate disciplinary action. Despite its clear mandate, CCRB's investigative process has been hamstrung given the pending investigation by United States Attorney's Office for the Eastern District of New York ("EDNY USAO"). Far from being voluntary, CCRB was required by the New York City Charter and well-established case law requiring administrative or civil investigations to yield to their prosecutorial counterparts to comply with the District Attorney's Office's and, subsequently, the EDNY USAO's request to hold the Investigation. With the Evidence, CCRB could review and conclude its Investigation and if warranted, pursue disciplinary action. None of these actions, including a disciplinary trial, would result in disclosure of the Evidence to the public.

The public's stated interest in CCRB's investigation of allegations of police misconduct and disciplinary officers outweighs any remaining interest in grand jury secrecy here. Under the terms of CCRB's proposed order, no witness names or testimony will be disclosed to the public. As for the impact upon future grand jury proceedings, the

Court of Appeals has explicitly recognized that investigations such as those by CCRB have no "chilling effect" upon witnesses since witnesses can reasonably anticipate being called before government investigatory bodies. *See Di Napoli*, 27 N.Y.2d at 236. Careful judicial oversight of the Evidence will satisfy any reasonable secrecy concerns.

Fundamentally, CCRB is a litigant that stands in separate shoes from the prior petitioners that sought access to the Evidence from this Court. CCRB's capacity and standing to seek disclosure cannot be seriously questioned given its subpoena powers under the Charter and the Court's authority to grant relief pursuant to CPL § 190.25(4). Unlike the previous petitioners, who sought grand jury material for a variety of purposes, CCRB has a narrow, specific mandate to investigate the Incident under question, which no other evidence can fulfill. CCRB will not share the Evidence with the public. Therefore, CCRB's request for limited and controlled disclosure of the Evidence should be granted.

Statement of Facts

The facts in support of CCRB's position and application for the relief sought herein are set forth in CCRB's papers in support of its application dated May 7, 2015.

Argument

POINT I

CCRB IS AN INDEPENDENT CITY AGENCY WITH CLEAR ABILITY TO SEEK THE RELIEF SOUGHT

A. CCRB Has Capacity and Standing to Seek the Relief Sought

The District Attorney's Office questions whether CCRB has capacity and standing to seek relief in the courts; however, CCRB's capacity and standing could not be

firmer.[1] (Respondent's Memorandum of Law, pp. 1-5). A government agency has capacity to sue concerning access to records if it possesses subpoena power or as a "necessary implication" of the agency's enumerated powers and there is "no clear legislative intent negating" capacity. *City of New York v. City Civil Service Commn.*, 60 N.Y.2d. 436, 443-445 (1983) (City personnel director had implied capacity to file Article 78 petition challenging decision by City civil service commission). *See also Green v. Safir*, 255 A.D.2d 107, 107-108 (1st Dept. 1998) (citing *Schaffer* and *City Civil Service Commn.*, court held Public Advocate had implied capacity to seek NYPD and CCRB records through Article 78 proceeding).

Here, where CCRB has an express grant of subpoena power and "any power necessary to carry out the powers and duties" vested in it pursuant to N.Y.C. Charter § 1120, it also has clear capacity to exercise its power to obtain information through the courts, either through an application for an order releasing restricted information or through issuing a subpoena and seeking an order to compel compliance pursuant to CPLR 2308(b).[2] *The New York City Civilian Complaint Rev. Bd. v. Brookdale Univ. Hosp. & Med. Ctr.*, 2015 NY Slip Op 30221(U) (Sup. Ct., New York Co. Jan. 23, 2015) (enforcing non-judicial subpoena issued by CCRB), *New York City Civilian Complaint Rev. Bd. v. New York City Admin. for Children's Services*, New York Co. Index No.

[1] In addition, the Respondent argues that CCRB cannot seek the Evidence through pre-action discovery here. Although an apparent typographical error may have suggested this cause of action to the District Attorney's Office, it is not raised in CCRB's verified petition or memorandum of law and is not a basis for the relief sought.

[2] Though legally unnecessary, out of an abundance of caution, CCRB has issued and served a non-judicial subpoena *duces tecum* calling for production of the Evidence, which is incoporated into CCRB's application here. *City of New York v. Bleuler Psychotherapy Center*, 181 Misc. 2d 994, 996-997 (Sup. Ct., New York Co. 1999) (converting application to enforce non-judicial subpoena ordering psychotherapy center to disclose protected mental health records to Commissioner of Mental Health, Mental Retardation and Alcoholism Services for use in Charter-authorized investigation to application to release records pursuant to Mental Health Law).

452509/2014 (Donna Mills, J., entered Dec. 10, 2014) (ordering disclosure of restricted Family Court records for use in CCRB investigation). In addition to CCRB, other City agencies – including those with and without express grants of subpoena powers – have successfully sought and obtained judicial assistance to obtain records or testimony as well. *New York City Admin. for Children's Services v. New York City Health & Hosps. Corp.*, New York Co. Index No. 401573/2012 (Geoffrey D. Wright J., entered Aug. 13, 2012) and *New York City Admin. for Children's Services v. New York City Health & Hosps. Corp.*, New York Co. Index No. 400070/2013 (Manuel Mendez, J., entered Feb. 13, 2013) (ordering disclosure of hospital surveillance video for use in disciplinary proceedings), and *Gill Hearn v. Health & Hosps. Corp.*, New York Co. Index No. 401599/2008 (Eileen Rakower, J., entered Jul. 17, 2008) (ordering hospital staff to appear and testify and disclosure protected mental health information to Commissioner of Investigation for use in Charter-authorized investigation). Given CCRB's Charter-mandated obligation and authority to review the facts and circumstances of the Incident, standing is beyond question. As such, CCRB is clearly able to seek relief here.

B. <u>This Court has Authority to Grant the Relief Sought</u>

Pursuant to Judiciary Law § 2-b(3), this Court may issue orders in support of its jurisdiction as part of its equitable powers and its "inherent plenary power to fashion any remedy necessary for the proper administration of justice." *People ex rel. Doe v. Beaudoin*, 102 A.D.2d 359, 363 (3d Dept. 1984) (in exception to mootness doctrine, court noted Supreme Court's inherent power in finding no error in Supreme Court's transmittal of otherwise confidential Family Court records to district attorney) (internal citation omitted), *citing Jones v. Palermo*, 105 Misc. 2d 405, 407 (Sup. Ct., New York

Co. 1980) (court has inherent power to fashion remedies to resolve justiciable disputes and protect citizens' rights) and *People v. Cirillo*, 100 Misc. 2d 527, 531 (Sup. Ct., Bronx Co. 1979) ("The inherent power of the court is that which is necessary for the proper and complete administration of justice, resident in all courts of superior jurisdiction and essential to their existence"). As a court of general jurisdiction in law and equity, this Court is vested with equitable powers that are "very broad and adapted to meet new situations." *In re Lands of P&M Materials Corp.*, 35 Misc. 2d 197, 199 (Sup. Ct., Westchester Co., 1962) (although court declined to grant summary judgment prior to defendant's answer, court noted broad equitable powers granted to Supreme Court). *See also New York City Admin. for Children's Services v. New York City Health & Hospitals Corp.*, New York Co. Index. No. 401573/2012 and *New York City Admin. for Children's Services v. New York City Health & Hospitals Corp.*, New York Co. Index No. 400070/2013, *supra*.

Numerous courts have used their broad plenary and equitable powers to fashion and grant CCRB specific relief such as the type sought here, including the disclosure of sealed transcripts, warrants, juvenile and child protective records, and other restricted material. *New York City Civilian Complaint Rev. Bd. v. New York City Admin. for Children's Services, supra.*, *New York City Civilian Complaint Rev. Bd. v. Office of the Comptroller of the City of New York*, New York Co. Index No. 452718/2014 (Frank Nervo, J., entered Mar. 30, 2015) and *New York City Civilian Complaint Rev. Bd. v. Office of the Comptroller of the City of New York*, New York Co. Index No. 451549/2015 (Frank Nervo, J., entered May 28, 2015) (ordering disclosure of transcript restricted by

General Municipal Law for use in CCRB investigation).[3] *See also Matter of Search Warrant No. 267-2014* (Sup. Ct., New York Co. Dec. 10, 2014) (Larry Stephen, J.) (unsealing search warrant for use in CCRB investigation), *Application of the New York City Civilian Complaint Rev. Bd.* (Sup. Ct., Queens Co. Jul. 2, 2014) (Barry Schwartz, J.), *Application of the New York City Civilian Complaint Rev. Bd.*, (Sup. Ct., New York Co. Aug. 13, 2014) (Robert Mandelbaum, J.), *Application of the New York City Civilian Complaint Rev. Bd.*, (Sup. Ct., Bronx Co. Oct. 22, 2014) (George Villegas, J.), *Application of the New York City Civilian Complaint Rev. Bd.*, (Sup. Ct., New York Co. Nov. 3, 2014) (Abraham Clott, J.) (releasing alleged victims' sealed case records in furtherance of investigation of police officers' conduct to police oversight agency without express exemption from CPL § 160.50), *Application of the New York City Civilian Complaint Rev. Bd.*, (Sup. Ct., Bronx Co. Dec. 5, 2014) (George Villegas, J.) (unsealing alleged victim's NYPD juvenile report records for use in CCRB investigation of officer's conduct) and *Application of the New York City Civilian Complaint Rev. Bd.*, (Sup. Ct., New York Co. Feb. 27, 2015) (Larry Stephen, J.) (granting CCRB access to restricted child protective and Family Court records for use in CCRB investigation).[4]

As in *Beaudoin*, *Cirillo* and the courts' orders in support of CCRB, DOI and ACS' investigations, promoting the proper administration of justice is clearly within this Court's jurisdiction and this Court is mandated to assist CCRB in fulfilling its legal responsibility and authority to review allegations of police misconduct and take

[3] This application is also distinguishable from *In re State Police Admin. Disciplinary Hearing on April 27, 2004*, 13 A.D.3d 884 (3d Dept. 2004) in that CPL § 190.25 specifically contemplates seeking the Evidence as a means of invoking this Court's jurisdiction, without any connection to a pending judicial proceeding whatsoever. *See also Nunziata, supra*. CCRB is also vested with broad powers in fulfilling its duties, including the power to seek assistance in obtaining highly relevant information, by N.Y.C. Charter § 1120. See *New York City Admin. for Children's Services v. New York City Health & Hospitals Corp.*, New York Co. Index No. 400070/2013, *supra*.

[4] These cases are collectively cited hereinafter as "*The CCRB Applications*."

appropriate action in response to such misconduct. As this Court has jurisdiction to promote and protect the proper administration of justice, this Court can fashion such remedies as are necessary to properly effect that jurisdiction and is authorized to grant the relief sought here by CCRB.

C. A Special Proceeding is a Proper Means to Seek Relief Here

Although the District Attorney's Office suggests that this application could not be brought as a special proceeding, its concern is misplaced. Given the procedural similarities between special proceedings and traditional motions in larger actions, special proceedings are the vehicle of choice for seeking judicial intervention to resolve many disputes where the sole issue in dispute would be dispensed with by motion if part of a larger civil action.

While the District Attorney's Office suggests that a special proceeding is not authorized here, procedures for enforcing non-judicial subpoenas are particularly instructive. Although non-judicial subpoenas are inherently subpoenas not connected to ongoing judicial proceedings, CPLR 2308(b) states they be enforced by "mov[ing] in the supreme court to compel compliance," universal practice has become to make these applications by special proceeding. *Compare, e.g., People v. Zilberman,* 297 A.D.2d 517 (1st Dept. 2002) (attorney-issued subpoena enforceable as a judicial subpoena through CPLR 2308(a) and contempt powers) and *Matter of Suffolk County Ethics Commn. (Felice)*, 29 Misc. 3d 1136 (Sup. Ct., Suffolk Co. 2010) (special proceeding to enforce non-judicial subpoena issued by county agency), *The New York City Civilian Complaint Rev. Bd. v. Brookdale Univ. Hosp. & Med. Ctr., supra.* and *Comptroller of the City of New York v. Department of Fin. of the City of New York*, 46 Misc. 3d 403 (Sup. Ct., New

York Co. 2014) (enforcing non-judicial subpoena seeking tax records for use during Charter-authorized audit). Following this same theory, special proceedings have been brought by a variety of City agencies to support investigations. *See, e.g, New York City Admin. for Children's Services v. New York City Health & Hospitals Corp.*, New York Co. Index. No. 401573/2012, *New York City Admin. for Children's Services v. New York City Health & Hospitals Corp.*, New York Co. Index No. 400070/2013, *Gill Hearn v. Health & Hosps. Corp.*, *New York City Civilian Complaint Rev. Bd. v. New York City Admin. for Children's Services*, *New York City Civilian Complaint Rev. Bd. v. Office of the Comptroller of the City of New York*, New York Co. Index No. 452718/2014 and *New York City Civilian Complaint Rev. Bd. v. Office of the Comptroller of the City of New York*, New York Co. Index No. 451549/2015, *supra*.

Even if a special proceeding were not an appropriate vehicle to seek judicial intervention here, however, the proper remedy would merely be to convert CCRB's application to the proper form. CPLR 103(c). *See also Armstrong v. Forgione*, 237 N.Y.L.J. 5, *13-14 (Sup. Ct., Nassau Co. 2006) (failure to bring action in proper form is not fatal, and court may issue any order necessary once personal jurisdiction over the parties has been obtained) and *Bleuler, supra*. As such, the issue of form here is moot.

D. CPL § 160.50 Does Not Control Here, and CCRB Could Seek the Evidence Even If CPL § 160.50 Did Control

Although the District Attorney's Office argues here that the Evidence is restricted by CPL § 160.50, the District Attorney's Office has made this argument previously and unsuccessfully before this very Court.[5] Respondent's Memorandum of Law, *New York*

[5] What little case exists on the applicability of CPL § 160.50 to grand jury records principally concerns cases where the defendant was arrested and then not indicted, or the defendant was acquitted at trial, and

Civil Liberties Union v. Donovan, Richmond Co. Index No. 080307/2014, at 1-2 and Respondent's Memorandum of Law, *James v. Donovan*, Richmond Co. Index No. 080304/2014, at 1-2. However, as this Court ruled on those applications pursuant to CPL § 190.25, this Court's implicit consideration and rejection of that argument is clear. *Matter of Garner v. Donovan*, NYLJ 1202721321984 (Sup. Ct., Richmond Co. Mar. 29. 2015). Even if this Court is not inclined to give preclusive effect to that implied holding, there is no reason to revisit that determination.

Even if CPL § 160.50 controlled, CCRB could still obtain the Evidence. *New York State Police v. Charles Q.*, 192 A.D.2d 142, 145 (3d Dept. 1993) (County Court had inherent authority, when appropriate, to unseal records of unsuccessful criminal prosecution of subject police officer for use in subsequent disciplinary proceeding). Although CCRB would be subject to a higher standard requiring it to show – as it has here – that "other avenues of investigation had been exhausted or *thwarted* or that it was probable that the record contained information that was ... not otherwise available by conventional investigative means," this Court has inherent power to unseal the Evidence. *Charles Q.*, at 145, *quoting In re Dondi*, 63 N.Y.2d 331, 339 (1984) (Appellate Division has inherent power to unseal criminal records of attorney for use in misconduct investigation under compelling circumstances) (emphasis added).

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are distinguishable as such. *See, e.g., Matter of Jackson v. County of Nassau*, NYLJ 1202581030259 (Sup. Ct., Nassau Co. 2012) (court declined to exercise inherent powers to unseal grand jury records where correction officer had been indicted and subsequently acquitted for use in labor arbitration proceeding). The subjects of the Grand Jury's inquiry were not arrested or charged prior to the Grand Jury's proceedings, and there is no indication what criminal charges, if any, were put before the Grand Jury. *Matter of District Attorney of Richmond Co.*, 2014 NY Slip Op 24427, *5 (Sup. Ct., Richmond Co. 2014) (with regard to legal instructions offered to the Grand Jury, disclosing only that the "Grand Jury was instructed on relevant principles of law, including Penal Law § 35.30 regarding a police officer's use of physical force in making an arrest"). As such, the Grand Jury's actions here should not be considered a "termination of a criminal action or proceeding against a person in favor of such person" as defined by CPL § 160.50(3). Additionally, CPL § 160.50(1) authorizes courts to dispense with such sealing upon their own motion or upon the application of the district attorney. Given that, the more comprehensive confidentiality scheme created by CPL § 190.25 is clearly intended to preempt in this area.

Here, the Investigation has been sequentially thwarted by the holds placed upon it by the District Attorney's Office and EDNY USAO and CCRB's statutory mandate to honor them. As such, so far, these holds have effectively deprived the CCRB, at the District Attorney's Office's request, from fulfilling the responsibility imposed upon it by the Charter. N.Y.C. Charter 440(f). *See also Budget Installment Corp. v. LaMere Assoc., Inc.,* 2009 NY Slip Op 33137(U) (Sup. Ct., Nassau Co. 2009) (noting court's inherent power to stay civil action pending outcome of criminal proceeding), *Bd. of Governors of the Federal Reserve Sys. v. Pharaon*, 130 F.R.D. 634 (S.D.N.Y. 1991) (New York County District Attorney successfully intervened in civil action to stay discovery – including depositions – pending grand jury action).

The Court of Appeals, in this context, has stated that the "gravity or circumstances of the underlying investigation" is a consideration in exercising inherent powers to unseal. *Dondi,* at 339. This factor clearly supports CCRB's application here so that it can fulfill its mandate notwithstanding the sequential prosecutorial holds. Quite simply, the gravity of the Incident and the Investigation are beyond question. Public service of any type is a "public trust," and the entrusting of police powers upon sworn law enforcement personnel is among the broadest and gravest public trust. N.Y.C. Charter § 2600. Considering that level of public trust in the context of a civilian's death during an encounter with police, and the need for orderly law enforcement in society, CCRB's need to independently review the Incident and take appropriate actions in response is clearly a sufficient reason to unseal the Evidence in a controlled manner requested here, even if the Evidence were restricted by CPL § 160.50. *The CCRB Applications, supra.* As such, CPL § 160.50 is not an impediment.

POINT II

CCRB HAS CLEARLY ESTABLISHED A COMPELLING AND PARTICULARIZED NEED

A. CCRB's Manifest Interest In Impartially Investigating Eric Garner's Death is Compelling

CCRB has demonstrated a compelling need for the Evidence given its unique position as an agency with a specific mandate to investigate allegations of police misconduct. Applications for grand jury records have hinged upon "who the applicant is, what he seeks and the purpose for which he seeks it." *Melendez v. City of New York*, 109 A.D.2d 13, 20 (1st Dept. 1985), *citing In re Scotti,* 53 A.D.2d 282 (4th Dept. 1976) and *In re Quinn*, 267 A.D. 913 (2d Dept. 1944). This Court has applied the same criteria previously, asking "Simply put, what would the movant do with the minutes if the movant got them?" *Matter of Garner v. Donovan*, at *2.

Here, CCRB is an independent investigative and prosecutorial agency of the City of New York seeking the best contemporaneous evidence and sworn testimony concerning a death in police custody for the limited purposes of determining whether disciplinary action should be taken against officers. As a city, New York City has both the right and responsibility to "maintain order, enforce the laws, protect property and *preserve and care for the safety, health, comfort and general welfare of the inhabitants of the city and visitors thereto.*" General City Law § 20(13) (emphasis added). In furtherance of that obligation, the City is authorized to "investigate and inquire into all matters of concern to the city or its inhabitants, and to require and enforce by subpoena the attendance of witnesses at such investigations." General City Law § 20(21). This

power has particularly applied to areas of concern about police conduct, and has, in significant part, devolved to an independent CCRB since 1993. *See Kilgallon v. City Council of Troy*, 53 A.D.2d 976 (3d Dept 1976) (investigation of police misconduct authorized pursuant to General City Law § 20(21)) and *Kelly v. Dinkins*, 155 Misc. 2d 787 (Sup. Ct., New York Co. 1992) (Mayor authorized to create commission to investigate police misconduct). Where, as here, the City agency principally charged with investigating alleged improper uses of physical force is examining the use of force in an encounter resulting in a civilian death, the importance of CCRB's task here is facially obvious. As such, CCRB more than satisfies its burden here.

B. The Evidence is Necessary to Fulfill CCRB's Statutory Mandate

The Evidence is crucial to CCRB's investigation of the Incident. Forcing CCRB to rely on NYPD's investigation for close-in-time information that is gathered by NYPD in large part from unsworn statements is simply no substitute for extensive, sworn testimony provided at a time when memories were fresh. CCRB is under no obligation to cobble together evidence months after the Incident, as urged by the District Attorney's Office here, when virtually contemporaneous evidence is readily available. The District Attorney cannot presume to guide the CCRB's investigation and its priorities.

Prior to its creation as a separate City agency in 1993, CCRB operated in various forms as a unit within NYPD. In spinning-off CCRB away from NYPD, the City Council found it in the City's interest that "the investigation of complaints concerning misconduct by officers of the department towards members of the public be *complete, thorough and impartial*," and further found that "[t]hese inquiries must be conducted fairly and independently, and in a manner in which the public and [NYPD] have

confidence." N.Y.C. Charter § 440(a) (emphasis added). Although CCRB does have statutory access to NYPD records, CCRB was created as an independent agency primarily so that it would not have to rely upon NYPD for close-in-time information.

Notably CCRB's need for information obtained independently from NYPD concerning the Incident was also a rationale shared by the District Attorney's Office, which emphasized in a press release after the Grand Jury concluded its proceedings that it had assigned numerous attorneys and investigators to review the Incident notwithstanding a rapid NYPD Internal Affairs Bureau response. The District Attorney's Office took pains to point out that those individuals were not employed by NYPD. (Grady Aff., ¶ 6 and Exhibit 1). As the District Attorney's Office did not see fit to limit itself to NYPD records, and exercised its authority to demand that CCRB stand aside so that the Grand Jury could review the Incident, it simply cannot now challenge CCRB's common sense request for information and testimony that CCRB could have collected contemporaneously if not for the Respondent's demand for a hold.[6]

Far from "skip[ping] past the use of its own investigators" to avoid investigating the Incident on its own, CCRB's application here is being made to supplement and support information obtained from other sources and interviewing multiple witnesses within the confines of the holds imposed upon it by the District Attorney's Office and EDNY USAO. Although the District Attorney's Office states that it lifted its hold on the Investigation following the Grand Jury's decision not to issue an indictment here, that

[6] Additionally, while the District Attorney's Office suggests – incorrectly – that CCRB is only intended to investigate physical force that does not rise to the level of potential criminality, the Grand Jury's decision not to issue an indictment regarding the Incident would, by that measure, place the Incident within CCRB's purview. (Respondent's Memorandum of Law, pp. 10-11).

position ignores the subsequent and equally-imposing hold requested by EDNY USAO.[7] These restrictions distinguish CCRB from the district attorney in *Suffolk County* that the Court of Appeals noted as having the "liberal discovery devices" of federal civil procedure rules available to it for its investigation. *See In re District Attorney of Suffolk Co.*, 58 N.Y.2d 436, 446 (1983). As in *Charles Q.*, CCRB's investigation of the Incident has been thwarted by state and federal criminal investigations of the Incident, making the Evidence uniquely necessary here.

POINT III

THE RESPONDENT'S SECRECY CONCERNS CAN BE ELIMINATED WITH A PROTECTIVE ORDER

A. Grand Jury Secrecy is Not Absolute and Must Yield in The Face Of Strong Public Interests

As this very Court has noted concerning the same information at issue here, "the secrecy of grand jury testimony is not sacrosanct and *the minutes of a grand jury may be divulged, in a court's discretion, in the appropriate case*." *Garner v. Donovan*, at *2 (emphasis added), *citing Matter of District Attorney of Suffolk Co., supra*. Also, as the First Department has noted, "[l]imited publication granted to a public official or agency to further some official duty in protecting the public interest is at one end of the spectrum," far from "general discovery sought by a private litigant to prepare for litigation" at the other extreme. *Melendez, supra*. Simply, the *Melendez* court found that applications such as this turn on "who the applicant is, what he seeks and the purpose for which he seeks it." *Id.* As discussed extensively in CCRB's memorandum of law in

[7] This is not substantively different than the routine practice of the District Attorney's Office and its sister offices in the other boroughs to seek records of CCRB records concerning matters being investigated or prosecuted by the respective offices.

support of its verified petition here, courts have long held that grand jury secrecy should yield in certain situations concerning the appointment or employment of sensitive public officials. (Petitioner's Memorandum of Law, pp. 4-6). On that basis, CCRB's interest in seeking the Evidence for the narrow purposes before this Court clearly prevails.

Finally, the Court of Appeals has rejected the potential "chilling effect" of disclosure upon future grand juries' abilities to obtain witnesses in instances where the disclosure is made to a government investigating body that the witnesses "could reasonably have anticipated . . . would be set up." *Di Napoli*, at 236-37 (permission to inspect grand jury minutes should not be confined to agencies involved in criminal proceedings). *See also In re Scotti*, at 288 (assurances given to prospective grand jurors regarding secrecy does not require a denial of use of their testimony in protection of the public interest), *Application of FOJP Svc. Corp.*, 119 Misc. 2d 287, 291-92 (Sup. Ct., New York Co. 1983) (ordering disclosure of grand jury minutes for use in civil fraud action). Given the existence of CCRB, EDNY USAO and NYPD investigations, the District Attorney's Office was and is in no position to provide guarantees to grand jury witnesses that they would not be sought by other investigating bodies, or that their testimony would remain secret under all future circumstances.

B. Broad Protective Measures Will Address Any Legitimate Concerns About Protecting the Evidence and The Grand Jury System

The District Attorney's Office also misapprehends the scope of possible protective measures here. (Respondent's Memorandum of Law, p. 20). Any disciplinary trial of the Officers concerning the Incident would be conducted pursuant to NYPD's procedural rules, which specifically authorize closed hearings for any "legally

recognizable ground for closure." 38 R.C.N.Y § 15-04(g).[8] *See also Mosher v. Hanley*, 56 A.D.2d 141, 142 (3d Dept. 1977) (noting that valid reasons may sometimes exist for denying the request for an open or public hearing" while holding under the circumstances presented that firefighter had right to public disciplinary hearing for careless driving charge). Certainly, an order of this Court requiring that the Evidence be discussed in closed proceedings would be one such "legally recognizable ground for closure." As this Court can clearly maintain jurisdiction over the Evidence through the remainder of the Investigation and any subsequent actions, such an order would be well within this Court's jurisdiction. *See People v. Malaty*, 4 Misc. 3d 525 (Sup. Ct., Kings Co. 2004) (court ordered *in camera* review of sealed divorce and family court records prior to disclosure to district attorney and required the People to seek additional court order prior to introducing any of the produced records into evidence). Subject to this Court's oversight and contempt powers, a system of controls following *Malaty* would provide a bifurcated protective scheme for the Evidence, ensuring that only that information which was truly essential to accomplish CCRB's mission would be divulged in any way.

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[8] Trials of NYPD police officers are not conducted before the New York City Office of Administrative Trials and Hearings ("OATH") or pursuant to OATH's Rules of Practice (48 R.C.N.Y. § 1-01 *et seq.*) pursuant to 1940 N.Y. Laws Ch. 834. *See Lynch v. Giuliani*, 301 A.D.2d 351 (1st Dept. 2003) (holding that OATH is prohibited from hearing charges against police officers in light of 1940 N.Y. Laws Ch. 834). That said, OATH Rules of Practice (48 R.C.N.Y.) § 1-49 – the same rule erroneously cited by the District Attorney's Office as controlling here – also permits hearings to be closed when "legally recognized ground exists for closure of all or a portion of the proceeding, or unless closure is required by law," and case law from the City's administrative tribunals support closure of proceedings as necessary. *See DCT Case. No. 70285/95,* (N.Y.C. Police Dept. Jul. 19, 1996) (courtroom closed during testimony of victim fearing embarrassment from testifying about gunshot injury to genitals), *DCT Case No. 70144/95,* (N.Y.C. Police Dept. May 20, 1996) (closing courtroom during testimony of bookmaker to prevent intimidation), *Dept. of Corr. v. Lowndes*, OATH Index No. 1662/99 (Jul. 29, 1999) (respondent's wife and friend barred from attending testimony of undercover witness to protect the witness' safety and ongoing police investigations), *revd. on other grounds by Civ. Service Commn.* (Jul. 24, 2000) and *Health & Hosps. Corp. (Elmhurst Hosp. Ctr.) v. Polepalle*, 2012 N.Y. OATH LEXIS 288, *2 (N.Y.C. Off. of Amin. Trials & Hearings 2012) (complainant referred to by initials to allay confidentiality and privacy concerns). As such, any risk associated with public hearings is limited.

Additionally, courts have fashioned other broad and creative protective measures to balance privacy concerns with the need to seek the truth in proceedings. Following a search of a Congressman's House office in connection with a pending criminal investigation, the district court was directed in *Rayburn* to appoint a judicial officer or special master to review materials seized from the Congressman's office to identify relevant documents responsive to the Government's warrant that were not protected by the legislative privilege - which is more absolute than the secrecy afforded to grand jury records – and then provide the Congressman with an opportunity to review the selected documents and file any objections to their release to the Government *ex parte* and under seal. *United States v. Rayburn House Office Bldg.*, 2006 U.S. App. LEXIS 19466 (D.C. Cir. 2006) (remanding application for emergency stay pending appeal to district court to identify legislative materials seized during execution of search warrant). This procedure was later more fully outlined and endorsed by the District of Columbia Circuit in that any procedure allowing executive agents to review protected legislative materials without the legislator's consent violated the speech or debate clause. *United States v. Rayburn House Office Bldg.*, 497 F.3d 654, 663 (D.C. Cir. 2007).

Here, this Court could issue an order based on the procedure in *Rayburn* to ensure a maximum level of review of the Evidence before disclosure. Following production of the Evidence by the District Attorney's Office for this Court's *in camera* inspection, this Court could more fully balance concerns about particular witness statements or evidence on a case-by-case basis. Beyond the *Rayburn* model, other potential options exist, drawing upon previously fashioned protective orders or regulatory schemes. *See, e.g., Dinler v. City of New York (In re City of New York)*, 607 F.3d 923, 935-936 (2d Cir.

2010) ("The disclosure of confidential information on an "attorneys' eyes only" basis is a routine feature of civil litigation involving trade secrets"), *citing In re Terrorist Bombings of U.S. Embassies in E. Afr. v. Odeh*, 552 F.3d 93, 126 (2d Cir. 2008) (discussing protective measures for restricted information necessary to defense in criminal cases), Fed. R. Cr. P. Rule 6(e) (detailing disclosure scheme for federal grand jury information) and 39 CFR § 233.3 (detailing "rigid control and supervision" of mail cover data in government investigations by the Postal Service).

Additionally, the District Attorney's Office's questioning of the confidentiality of CCRB proceedings is misplaced. (Respondent's Memorandum of Law, p. 19). In contrast to the suggestions raised by the Respondent here, CCRB records are vigorously protected. *Telesford v. Patterson*, 27 A.D.3d 328 (1st Dept. 2006) (dismissing Article 78 petition seeking CCRB records pursuant to Freedom of Information Law in light of Civil Rights Law sec. 50-a), *People v. James*, 46 Misc. 3d 1219(A) (Sup. Ct., Kings Co. Feb. 10, 2015) (denying defense application for CCRB records), *People v. Rodriguez*, 46 Misc. 3d 1220(A) (Sup. Ct., New York Co. 2014) and *People v. Hernandez*, Kings Co. Crim. Ct. Dkt. No. 2013KN086748 (Robert D. Kalish, J. Aug. 22, 2014) (quashing subpoenas issued in violation of Civil Rights Law sec. 50-a), *People v. Wesley*, New York Co. Ind. No. 4362/2014 (Melissa Jackson, J. May 7, 2015) (granting protective order to shield work product of CCRB investigation from discovery in criminal proceeding) and *Gutierrez v. City of New York*, New York Co. Index No. 402008/2013 (Carol Edmead J. June 3, 2015) (quashing subpoena issued to CCRB without prior notice pursuant to CPLR and Civil Rights Law). As such, disclosing the Evidence in a limited

and controlled manner to CCRB, especially in light of the extensive protective measures CCRB would consent to here, would not pose an undue risk here.

CONCLUSION

For the reasons set forth herein, petitioner CCRB respectfully requests that this Court issue an Order finding that CCRB has a compelling and particularized need to obtain the Evidence, that the interests of justice substantially favor controlled disclosure of the Evidence to CCRB in support of its investigation of the Incident and CCRB respectfully requests that the Court grant such other, further or different relief as the Court deems just and proper.

Dated: New York, New York
June 10, 2015

Respectfully submitted,

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Subpoena Duces Tecum

CITY OF NEW YORK

CIVILIAN COMPLAINT REVIEW BOARD
100 CHURCH STREET, 10th FLOOR
NEW YORK, NY 10007

To: Office of the District Attorney
for the County of Richmond
130 Stuyvesant Place
Staten Island, NY 10301

Greetings

You are hereby commanded to appear and attend before the Office of the Civilian Complaint Review Board of the City of New York at 100 Church Street, 10th Floor, Borough of Manhattan, City of New York, forthwith and at any recessed or adjourned date thereof, to testify under oath in the matter of an investigation concerning use of force, abuse of authority, discourtesy or offensive language by a member of the New York City Police Department on or about July 17, 2014 in Staten Island, NY and that you bring with you and produce certified copies of the evidence and testimony presented to the Grand Jury of Richmond County in the course of an investigation into the circumstances surrounding the July 17, 2014 death of Eric Garner.

Witness my hand, this 8th day of June, 2015

Mina Malik, Esq.
Executive Director

Any inquiry concerning this subpoena should be made of:

Brian Krist, Esq.
Assistant Deputy Executive Director of Investigations
New York City Civilian Complaint Review Board
100 Church Street, 10th Floor
New York, NY 10007
Tel: (212) 912-2096
Fax: (646) 500-6405

NOTE: IN LIEU OF PERSONAL APPEARANCE AND PRODUCTION, FULL COMPLIANCE WITH THIS SUBPOENA MAY BE ACCOMPLISHED BY FORWARDING THE REQUESTED DOCUMENTS AND /OR MATERIALS AT THE AFOREMENTIONED ADDRESS ON OR BEFORE THE RETURN DATE.

Endorsement pursuant to the Civil Practice Law and Rules, Sec. 2305 (a): The Witness is bound by this Subpoena to appear at the Hearing or Examination and at any recessed or adjourned date thereof.