

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

In the Matter of the Application of

**THE NEW YORK CITY CIVILIAN COMPLAINT
REVIEW BOARD**

Petitioner,

- Against -

**THE OFFICE OF THE DISTRICT ATTORNEY
FOR THE COUNTY OF RICHMOND**

Respondent.

Index No. 80073/2015

**AFFIRMATION IN
OPPOSITION TO MOTION FOR
AN ORDER PURSUANT TO
C.P.L. § 190.25(4)(a),
C.P.L.R. 3102(c) AND
JUDICIARY LAW §2-B(3)**

ANNE GRADY, being an attorney duly admitted to practice before the courts of this state, hereby affirms, under penalty of perjury, that the following statements are true:

1. I am a duly appointed Assistant District Attorney in and for the County of Richmond, State of New York. I submit this affirmation in response to the motion by Brian Krist, Esq. Assistant Deputy Executive Director of Investigations of the New York City Civilian Complaint Review Board (“CCRB”), for an order directing the District Attorney’s Office to provide CCRB with a certified copy of “the Evidence,” consisting of all evidence and testimony presented to the Grand Jury which investigated the death of Eric Garner, and other relief, and in response to the Court’s Order to Show Cause dated May 8, 2015, for this Office to show cause why petitioner should not be granted such relief.

2. This affirmation is made upon personal knowledge and information and belief, the sources of which are the file of this matter maintained by my Office, the evidence before the grand jury, and conversations with members of staff, including conversations with the prosecutors who presented this matter to the grand jury. Unless otherwise admitted herein, respondent denies each of petitioner’s factual assertions.

3. On July 17, 2014, the Staten Island Advance reported that Eric Garner died after being taken into police custody for an alleged sale of untaxed cigarettes in the Tompkinsville area of Staten Island, New York. That day, the New York Daily News published on its website a video which, the Daily News reported, was video footage captured by a witness with his cell phone. On July 19, 2014, a second video was released, which showed the response of the emergency medical technicians. On August 19, 2014, then District Attorney Daniel M. Donovan, Jr. announced publicly that evidence regarding the circumstances of Eric Garner's death would be presented to a dedicated Richmond County Grand Jury empanelled to hear evidence in the Garner matter; District Attorney Donovan declined to say what criminal charges the grand jury might consider, or against whom any charges might be filed.

4. Consistent with normal practices, the Richmond County District Attorney's Office asked the Civilian Complaint Review Board ("CCRB") to place its investigation on hold during the criminal investigation, and the CCRB complied with that request.

5. Upon information and belief, the source of which is my conversations with the Assistant District Attorneys who spoke to persons before calling them as witnesses in the grand jury, many of those persons testified with full assurances of the secrecy of the grand jury proceedings.

6. On December 3, 2014, District Attorney Donovan issued a statement outlining the investigation and informing the public that it had concluded without the filing of any charges by the grand jury (attached hereto as Exhibit 1). In pertinent part, District Attorney Donovan explained that the initial investigation had been conducted independently by investigators in his Office and by the Internal Affairs Bureau of the New York Police Department (hereinafter "IAB"). In the statement, the District Attorney also alluded to an application he had made for a court order authorizing the release of additional information.

7. On or about December 4, 2014, then District Attorney Donovan moved for an order from the judge charged with overseeing the grand jury in Richmond County, Hon. Stephen J. Rooney, to permit limited disclosure of the nature and scope of the grand jury proceedings.

This application was granted in part by Justice Rooney who, in recognition of the strong public interest in this case, permitted limited disclosure of the grand jury proceedings as follows: the grand jury sat for a period of nine weeks and heard from a total of 50 witnesses; twenty-two of the witnesses were civilians; the remaining witnesses were police officers, emergency medical personnel, and doctors; sixty exhibits were admitted into evidence, including four videos, records regarding NYPD policies and procedures, medical records, photographs of the scene, autopsy photographs, and records pertaining to NYPD training; 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; the grand jury returned a No True Bill and filed its dismissal of the matter with the Court in conformity with C.P.L. § 190.60 and 190.75. The order did not authorize disclosure of the transcripts of grand jury proceedings. Matter of District Attorney of Richmond County, 2014 N.Y. Misc. LEXIS 5898, 2014 NY Slip Op 24427 (N.Y. Sup. Ct. Dec. 4, 2014). Around that time, this Office communicated to CCRB that, as far as the District Attorney was concerned, there was no further need for a "hold" on the CCRB's investigation.

8. By application dated December 10, 2014, the New York City Public Advocate, sought disclosure of the minutes and all other records and evidence presented to the grand jury in this matter. She stated that the release of those materials was necessary for her to fulfill her mandate as Public Advocate to investigate and resolve systemic concerns regarding the conduct and accountability of New York City police officers, to make recommendations for reform in the area of the appointment of special prosecutors, to determine whether a formal proceeding under § 1109 of the City Charter is warranted, and to investigate "what part, if any, race played in the death of Mr. Garner and the grand jury proceedings themselves." Four other applicants also moved for disclosure. The applications were reassigned to Justice William Garnett and consolidated. The Public Advocate was represented, pro bono, by Emery Celli Brinckerhoff & Abady, LLP, a law firm of which the Chair of the CCRB is the founding partner.

9. Following response and oral argument, by a Decision and Order entered on March 19, 2015, this Court denied the applications in their entirety (see Decision and Order, attached as Exhibit 2). In pertinent part, the Court found the Public Advocate did not have a particularized need for the material sought because she had other avenues for the information that would not

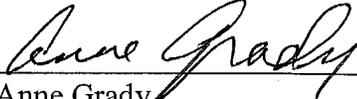
impair the secrecy of the grand jury proceedings themselves. Among them is her power to conduct hearings, see City Charter § 1109, and to obtain documents and information from other city agencies, among them the CCRB (Exhibit 2, at 7). Indeed, in connection with her determination whether to conduct hearings, the Public Advocate is empowered to obtain documents directly from the NYPD as a city agency. See City Charter § 24(j); § 431, et seq. The Public Advocate had conceded at oral argument that the documents and findings of the Internal Affairs Bureau of the NYPD would be readily available to her. For that reason, her bid to establish a particularized and compelling need for the grand jury materials on this ground failed.

10. Appeals from this Court's denial are now pending, and Emery Celli Brinckerhoff & Abady, LLP, continues to represent the Public Advocate pro bono in that effort.

11. On May 7, 2015, two months after this Court's decision, petitioner CCRB filed the instant application. The grounds for the instant application bear a strong resemblance to those raised by the Public Advocate. The CCRB also points to its mandate under the City Charter to "determine whether the officers involved in the Incident (individually and collectively, "the Officers") committed misconduct, whether they should be disciplined for such misconduct, and whether CCRB should make any additional recommendations in light of the facts uncovered over the course of its investigations." (Verified Petition at ¶ 1).

WHEREFORE, for the reasons stated more fully in the accompanying memorandum of law, the application should be denied in its entirety.

Dated: June 5, 2015
Staten Island, New York


Anne Grady
Assistant District Attorney

To: Brian Krist, Esq.
Attorney for Petitioner
Civilian Complaint Review Board
City of New York
100 Church Street, 10th Floor
New York, NY 10007

EXHIBIT 1

Statement by
Richmond County District Attorney
Daniel M. Donovan, Jr., Regarding the No True Bill in
The Matter of the Investigation into the Death of Eric Garner

I first want to express my condolences to Eric Garner's family for their loss, and to acknowledge the heartache of his mother, his wife, his children, as well as his other family members, loved ones, and friends, who have consistently carried themselves with grace during the past four months.

A Richmond County grand jury has completed its investigation into the tragic death of Eric Garner on July 17, 2014, after being taken into police custody for an alleged sale of untaxed cigarettes in the Tompkinsville area of Staten Island, New York. After deliberation on the evidence presented in this matter, the grand jury found that there was no reasonable cause to vote an indictment.

Upon Eric Garner's death, investigations were immediately commenced, and independently conducted, by the Office of the New York City Chief Medical Examiner, the Internal Affairs Bureau of the New York Police Department, and the Richmond County District Attorney's Office.

Although the Internal Affairs Bureau had immediately responded to the scene and conducted its own investigation, I directed all of the Detective Investigators of my Office, along with other investigative personnel, all of whom who do not work for the New York Police Department, to initiate an independent investigation, in cooperation with eight Assistant District Attorneys of my Office assigned to the case.

That investigation spanned four months, and focused on locating civilian eyewitnesses with information and evidence to offer, speaking to those who provided medical treatment, whether on the scene or at the hospital, and consulting expert witnesses in the area of forensic pathology, policies, procedures, and training of police officers, as well as emergency medical technicians. Over 38 interviews were conducted, yielding 22 civilian witnesses who reported to have seen some part of the interaction between Eric Garner and members of the NYPD.

On August 19, 2014, I announced that evidence regarding the circumstances of Eric Garner's death would be presented to a Richmond County Grand Jury. At that time, I assured the public that I was committed to a fair, thorough, and responsible investigation into Mr. Garner's death, and that I would go wherever the evidence took me, without fear or favor.

Clearly, this matter was of special concern in that an unarmed citizen of our County had died in police custody. For that reason, a dedicated grand jury was empanelled exclusively to hear this case, committed to serving in that capacity for the months the investigation would entail. All 23 members of this community who comprised the Grand Jury in this matter dutifully fulfilled that commitment by attending each and every one of the sessions that began on September 29, 2014, and concluded on December 3, 2014. I would like to thank them for their time, effort, and commitment to this investigation, and for the careful manner in which they discharged their solemn duty as grand jurors.

Ex. 1

As this grand jury was dedicated to hearing only evidence regarding the circumstances surrounding Eric Garner's death, it was afforded the opportunity to singularly focus on the evidence in this case, and this case only, and to hear from all witnesses with any material evidence to offer, as well as expert witnesses, and to consider documentary and photographic evidence, in order to ensure that a thorough, just and fair investigation was accomplished. It has now completed its investigation into *The Matter of the Investigation into the Death of Eric Garner*.

Regarding comments that I can or cannot make, unlike other jurisdictions that have statutes that permit a district attorney to disclose specific details regarding what took place during a grand jury proceeding, New York law does *not* permit a district attorney to engage in such disclosure. Rather, only upon a showing of a compelling and particularized need for access can disclosure of grand jury information, limited as it may be, be made in a public forum.¹

After the grand jury reached its decision this afternoon, I applied for a court order pursuant to CPL § 190.25(4)(a) seeking authorization to publicly release specific information in connection with this grand jury investigation. That application is under consideration by the court, and I am therefore constrained by New York law to reveal nothing further regarding these proceedings.

Attached hereto is some general information regarding grand juries in New York.

¹ Criminal Procedure Law §190.25(4)(a) provides that the Grand Jury proceedings are secret and, thus, a strong presumption of confidentiality attaches to the record of Grand Jury proceedings. This presumption must be overcome by a demonstration of "a compelling and particularized need for access" to the Grand Jury material. *Matter of District Attorney of Suffolk County*, 58 N.Y.2d 436 (1983). Upon such a demonstration, the court must then balance the public interest for disclosure against the public interest favoring secrecy.

INFORMATION CONCERNING GRAND JURIES IN NEW YORK

- Grand jury proceedings in New York are governed by Article 190 of the New York Criminal Procedure Law.
- Because grand jury procedures are governed by state law, grand jury procedures in New York can be different from procedures in other states.
- Recent events in other jurisdictions may have created unrealistic expectations regarding what can be disclosed regarding the proceedings of a New York grand jury. For example, the state of Missouri has enacted “Sunshine Laws” that permit disclosure of grand jury testimony and evidence.
- It is important to understand that under New York law everything that happens in the grand jury is secret; therefore only very limited or no disclosure is permitted. Moreover, those limited disclosures can only be made after an application has been made for a court order allowing disclosure, and said application has been granted.
- Disclosure of anything further may be a violation of New York law.
- For example, the gender and racial makeup of the grand jury is not disclosed.
- A District Attorney, for a variety of factors, including, but not limited to, the great importance and public concern focused on a matter such as when an unarmed citizen dies while being taken into police custody, and because of the large amounts of investigative testimony and evidence to be considered, may choose to request the empaneling of a dedicated investigatory grand jury.
- Often, grand juries are hearing cases in which an arrest has been made and the prosecutor has six days to indict. In contrast, investigative grand juries typically have greater flexibility to hear a broader scope of evidence before making a determination.
- The decision to make that request for the empaneling of a dedicated grand jury, the review of that request, and the granting of that request, as well as sending out juror notices, empaneling of the dedicated grand jury by a judge, and the swearing in of the dedicated grand jury, can be a time consuming process in and of itself. All of this occurs before any testimony is heard or evidence is presented in a case.
- In the instant matter, the location of where the incident occurred was extensively canvassed for several weeks by numerous investigators, in an effort to identify as many witnesses and to gather as much evidence as could be found. This is important to ensure a complete and fair investigation. Once again, such activities can be time consuming and, once again, this was done before any testimony was heard or evidence was presented.

- In New York, the grand jury is an arm of the court. It is not an agent of the prosecutor or the police. Nor does the grand jury decide whether or not a person has been proven guilty. That is the responsibility of the trial jury. The grand jury decides whether or not a person should be formally charged with a crime.
- In New York, the District Attorney does not make opening statements, closing statements or arguments to the grand jury, nor attempt to influence its decision. The District Attorney presents evidence, instructs grand jurors on the relevant principles of law, and the grand jury makes its decision based on the evidence and the law.
- In New York, a grand jury has 23 members. A quorum of 16 grand jurors must be present to hear evidence. Sixteen grand jurors who have heard all of the relevant and critical evidence must be present to deliberate. To formally charge a person with a crime, at least 12 grand jurors who have heard all the evidence and the legal instructions must agree that there is legally sufficient evidence and reasonable cause to believe the accused person committed a crime.

EXHIBIT 2

At a Civil Term, Part 22 of the Supreme Court of the State of New York, held in and for the County of Richmond, at the Courthouse thereof, 18 Richmond Terrace, Staten Island, New York, on 19th day of March 2015.

PRESENT:

THE HONORABLE WILLIAM E. GARNETT, J.S.C.

In the Matter of the Investigation into the Death of Eric Garner,	DECISION AND ORDER
	Richmond County Index Numbers:
Letitia James, New York City Public Advocate,	080304/2014
The Legal Aid Society,	080296/2014
The New York Civil Liberties Union,	080307/2014
NYP Holdings, Inc. a/k/a New York Post, and	080308/2014
The Staten Island Branch of The National Association For The Advancement of Colored People and The New York State Conference of Branches of The National Association For The Advancement of Colored People,	080009/2015
Petitioners,	
-against-	
DANIEL DONOVAN, Richmond County District Attorney,	
Respondent.	

INTRODUCTION

On July 17, 2014, Eric Garner died during a confrontation with New York City police officers.

The interaction between Mr. Garner and the police was recorded on a cellular phone. Ultimately, and before a grand jury heard the evidence in this case, that tape and the findings of the Medical Examiner's autopsy of Mr. Garner were widely disseminated. Very few members of the public had not formed an opinion about the conduct of the police.

A grand jury was convened on September 29, 2014 to examine the evidence concerning the death of Mr. Garner. On December 3, 2014, the grand jury concluded its inquiry and did not charge any person with the commission of a crime. Thereafter, the District Attorney summarized the grand jury's investigation in a statement authorized by another judge of this court. No grand jury testimony was disclosed in this statement.

In separate motions, the Public Advocate of the City of New York, the Legal Aid Society, the New York Civil Liberties Union (hereinafter, NYCLU), the National Association for the Advancement of Colored People (hereinafter, NAACP) and the owner of the New York Post moved this court to release the minutes of the grand jury pursuant to Criminal Procedure Law § 190.25 (4) (a). The District Attorney opposed the disclosure.

GRAND JURY SECRECY

The Constitution of the State of New York provides that "no person shall be held to answer for a capital or otherwise infamous crime [i.e., a felony] . . . unless on indictment of a grand jury . . ." (NY Const Art I, § 6). Thus, a district attorney may not prosecute a person for a felony or other crime in the Supreme Court without the acquiescence of a grand jury made up of lay jurors. The grand jury's decision to charge a person is manifested when it files an indictment with the Supreme Court.

This constitutional provision is implemented by Article 190 of the Criminal Procedure

Law. Pertinent to these motions is the admonition contained in CPL 190.25 (4) (a) that grand jury proceedings are secret and, in general, no person may disclose the nature or substance of any grand jury testimony without the written approbation of a court. This prohibition is enforced by Penal Law § 215.70 which makes it a felony to disclose grand jury testimony. The only exception to this proscription is that a person may disclose the substance of his/her testimony without approval. CPL 190.25 (4) (a).

Despite these statutory rules, 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. *Matter of District Attorney of Suffolk County*, 58 NY2d 436 (1983). In general, disclosure is the exception to the rule. *Id.* at 444.

The law is bottomed on the "presumption of confidentiality [which] attaches to the record of grand jury proceedings." *People v Fetcho*, 91 NY2d 765, 769 (1998). To overcome the presumption of confidentiality, a movant must initially demonstrate "a compelling and particularized need for access to the Grand Jury material." *Matter of District Attorney of Suffolk County*, 58 NY2d at 444. This showing is required to demonstrate how a party has a basis to seek relief from a court. Moreover, the mere fact that disclosure is sought by a government agency will not necessarily warrant the breach of grand jury secrecy, nor will the mere general assertion that disclosure will be in the public interest. *Matter of District Attorney of Suffolk County*, 58 NY2d at 444-445.

Thus, each movant must first show a "compelling and particularized need" such as to demonstrate that the party has a greater stake in the disclosure than does any other citizen - even one critical of the grand jury's decision. The movant must explain the purpose for which the party seeks access to the minutes. *Id.* at 444.

Simply put, what would the movant do with the minutes if the movant got them?

Only after such a showing will a court move on to balance the competing interests in deciding whether to grant disclosure.

COLLATERAL ESTOPPEL

The earlier application of the District Attorney to another judge of this court for a limited disclosure does not collaterally estop the District Attorney from arguing in these cases that the movants do not have a “compelling and particularized need” for disclosure.

First, the District Attorney only asked for a limited summary of the work of the grand jury. No grand jury testimony or the substance of any testimony was released.

More to the point, as will be explained later in this decision, each party must show a “compelling and particularized need.” Thus, even if the first judge was satisfied that the District Attorney had established a need for a summary, that decision does not preclude the District Attorney from opposing these motions or excuse these movants from making the requisite showing of a “compelling and particularized need.”

“COMPELLING AND PARTICULARIZED NEED”

In those cases in which relief has been granted, the successful movant has demonstrated a nexus between the grand jury minutes and a “compelling and particularized need” for those minutes. *People v. DiNapoli*, 27 NY2d 229 (1970) (Public Service Commission needed the minutes to adjust rates after a grand jury investigation had revealed evidence of “bid rigging”); *Matter of Quinn [Guion]*, 293 NY 787 (1944) (limited disclosure was allowed for the purpose of the removal of a village tax collector pursuant to the Public Officers Law); *People ex rel Hirshberg v Board of Supervisors*, 251 NY 156 (1929) (a Commissioner sought reimbursement from the District Attorney for the county); *Matter of Aiani v Donovan*, 98 AD3d 972 (2d Dept 2012) (bank records subpoenaed from the United Arab Emirates for a grand jury investigation, not the minutes, were disclosed where the movant had no other means to execute on a large civil judgment); *Jones v State*, 62 AD2d 44 (4th Dept 1978) (statements made by witnesses, not grand jury minutes, were given to the state police for disciplinary proceedings); *Matter of City of Buffalo*, 57 AD2d 47 (4th Dept 1977) (the city’s corporation counsel needed grand jury minutes to sue persons who had been

paid for “no show” jobs); *Matter of Scotti*, 53 AD2d 282 (4th Dept 1976) (limited release to State Police superintendent and Correction commissioner for disciplinary actions); *People v Lindsey*, 188 Misc2d 757 (Cattaraugus County Ct 2001) (in a sixty-five [65] year-old murder case in which the grand jury minutes had earlier been released by the prosecutor, the defendant’s son was given access to the minutes to ensure the accuracy of a prospective movie script); *People v Cipolla*, 184 Misc2d 880 (Rensselaer County Ct 2000) (in a case in which the grand jury minutes had earlier been released, the minutes were given to litigants to further a federal lawsuit); *Matter of FOJP Service Corp.*, 119 Misc2d 287 (Sup Ct, New York County 1983) (a nonprofit employer sought grand jury minutes to further a “RICO” civil suit against attorneys who had unethically approached prospective clients); *People v Werfel*, 82 Misc2d 1029 (Sup Ct, Queen County 1975) (the New York City Department of Investigation, tasked with investigating the background of a judicial candidate, sought the minutes of a grand jury which had heard testimony about a narcotics case of which the candidate had been the subject); *People v Behan*, 37 Misc2d 911 (Onondaga County Ct 1962) (a special prosecutor appointed to investigate corruption in the prisons was granted access to grand jury minutes); *Matter of Crain*, 139 Misc 799 (Court of General Sessions, New York County 1931) (grand jury minutes were disclosed to a commissioner appointed to investigate judicial corruption).

Thus, in each of these cases, the movants were able to demonstrate a “compelling and particularized need” for disclosure. Each movant was able to give a specific reason for the disclosure of the minutes. Each movant could answer the question: What would you do with the minutes if you were given them? Thus, a movant must have a strong reason for disclosure unique to that movant.

The case law also demonstrates that even movants with law enforcement responsibilities or governmental authority must also make the same initial showing of a “compelling and particularized need.”

In the seminal case of *Matter of District Attorney of Suffolk County*, 58 NY2d 436 (1983), the District Attorney, who had been selected by the Suffolk County legislature to bring a federal lawsuit on behalf of the county, was denied access for having failed to

establish a “compelling and particularized need.”

Similarly, in *Matter of Hynes*, 179 AD2d 760 (2d Dept 1992), the Appellate Division of the Supreme Court for the Second Judicial Department found wanting the District Attorney’s request for the release of grand jury minutes to quell community unrest and to restore confidence in the criminal justice system as “compelling and particularized need[s].”

Of particular note are the efforts by public officials over the years to have the minutes of the Wyoming County grand jury which investigated the 1971 Attica prison uprising released. Since 1975, governors and attorneys general of this State have attempted to have the grand jury minutes released. *Matter of Carey*, 68 AD2d 220 (4th Dept 1979).

Most recently, Attorney General Schneiderman moved to disclose the minutes of the grand jury that had been quoted, but redacted, in the “Meyer report.” That report had concluded, in part, that there had been prosecutorial misjudgments in the investigation. The court ruled that, even after nearly forty (40) years since the report, the Attorney General’s contention that the disclosure of the redacted grand jury minutes would inform the public and complete the historical record did not constitute “compelling and particularized need.” *Matter of Carey*, 45 Misc3d 187 (Sup Ct, Wyoming County 2014).

Thus, as with any other movant, a public official, even one with prosecutorial duties, must make the same showing of a “compelling and particularized need” to obtain the release of grand jury minutes.

THE PUBLIC ADVOCATE

The Public Advocate has not demonstrated a “compelling and particularized need” for disclosure of the grand jury minutes.

Although the Public Advocate is a citywide elected official, the Advocate has no direct role in the criminal justice system. The New York City Charter, in Chapter 2, entitled, “Council” describes the work of the Public Advocate. Specifically, in section 24, the Public Advocate is permitted to participate in the discussions of the City Council but may not vote. The Advocate’s primary function is to receive complaints about, and monitor, city agencies.

By section 24 (k), the Public Advocate must refer any criminal complaint to the Department of Investigation "or . . . to the appropriate prosecutorial attorney or other law enforcement agency." Thus, the Advocate has no explicit role in the city's criminal justice system. To the contrary, the Public Advocate is mandated to refer criminal complaints to other authorities. Clearly, by the provisions of the City Charter, the Public Advocate's role in criminal matters is severely circumscribed.

Our criminal justice system is a state, not city, system. The same procedures including those for the grand jury obtain throughout the state. Thus, the City Council of which the Public Advocate is a non-voting member cannot enact laws which would alter the New York State grand jury system.

Counsel for the Public Advocate argued that these minutes are needed to make recommendations and issue reports regarding police conduct including the use of excessive force. The Advocate's request for the minutes in this one, solitary case is undermined by the fact that the Public Advocate has a myriad of sources for reviewing police actions.

Besides the tape in this case, the Public Advocate, as a monitor of city agencies, has access to the records of the Department of Investigation, the Civilian Complaint Review Board, the Police Department and the City's Law Department which litigates federal lawsuits against police officers charged with the use of excessive force and other misconduct. Thus, the Public Advocate has a plethora of sources from which the Advocate can glean evidence to support her positions regarding the policing of the criminal law in New York City.

The Public Advocate has no "compelling and particularized need" to gain access to the minutes of the grand jury in this one case to fulfill her Charter responsibilities. *Matter of District Attorney of Suffolk County*, 58 NY2d at 444. The Public Advocate's position in the constellation of public officials makes the Advocate no different from any other public official who argues for change in the administration of justice in New York State.

The Legal Aid Society has not shown a “compelling and particularized need” for the disclosure of the grand jury minutes.

In its brief, the Society asserted, presumably to show a need for disclosure, that it had represented Eric Garner. As a matter of law, that representation ended upon his death. *See e.g., People v Drayton*, 13 NY3d 902 (2009); *People v Mintz*, 20 NY2d 770 (1967).

The Society further contended that other of its clients had been adversely impacted by the events surrounding the death of Eric Garner. Nevertheless, at oral argument, no effect on other clients was articulated or quantified. The court took the Society’s position at oral argument to be that the Society needed the grand jury minutes for future reference in representing clients whose cases will be presented to a grand jury and as a strategic resource.

Clearly, none of these arguments established a “compelling and particularized need” for the release of these minutes.

THE NYCLU & THE NAACP

The NYCLU and the NAACP have both contended that the disclosure of the grand jury minutes is necessary to foster transparency and demonstrate fairness to the public. The statutory phrase “compelling and particularized need” cannot be conflated by ignoring a demonstrable “need” by simply arguing that disclosure *per se* is compelling. Under the law, a compelling interest in a case is not a “compelling and particularized need.”

Therefore, these movants have not established a “compelling and particularized need” for the minutes. *Matter of Hynes*, 179 AD2d 760 (2d Dept 1992); *Matter of Carey*, 45 Misc3d 187 (Sup Ct, Wyoming County 2014).

THE NEW YORK POST

Finally, the entity which owns the New York Post has also failed to demonstrate a “compelling and particularized need” for the minutes. The newspaper would merely publish all, or part of, the minutes and might use them as grist for its editorial mill.

The Court has not found any case in which the testimony and evidence adduced in a grand jury has been disseminated to the public by the media.

Journalistic curiosity is simply not a legally cognizable need under the law.

CONCLUSION

Compelling and Particularized Need

Each of the movants has failed to establish that it has the required “compelling and particularized need” for the grand jury minutes. In every case cited at oral argument or in the motion papers in which disclosure was granted, there existed a clear nexus between the movant’s need and the grand jury minutes.

In summary, the movants in this case merely ask for disclosure for distribution to the public. This request is not a legally cognizable reason for disclosure.

What would they use the minutes for? The only answer which the court heard was the possibility of effecting legislative change. That proffered need is purely speculative and does not satisfy the requirements of the law.

Balancing Interests

The second part of the analysis would be the balancing of interests which attach to grand jury proceedings. Of course, this balancing process begins only after a movant has satisfied the “compelling and particularized need” requirement. *Matter of District Attorney of Suffolk County*, 58 NY2d at 444.

Assuming for the sake of argument that one of the movants had established a “compelling and particularized need” for disclosure, the balancing of interests would not have justified disclosure. The disclosure of minutes would have undermined the overriding

concern for the independence of our grand juries. *Id.*

In *People v DiNapoli*, 27 NY2d 229, 235 (1970), the Court of Appeals suggested five factors for the court to consider¹. Only three are arguably applicable in this case.

The shadow of a federal criminal investigation looms over these proceedings. Presumably, if the United States Department of Justice proceeds, the same witnesses and evidence will be examined. Revealing the minutes of the state grand jury may place witnesses in jeopardy of intimidation or tampering if called to a federal grand jury or to a federal trial. Witnesses might be approached to adjust or alter their testimony if perceived to have been too favorable or unfavorable to any of the parties.

In addition, those who were not charged by the grand jury have a reputational stake in not having their conduct reviewed again after the grand jury had already exonerated them.

Most important to the integrity and thoroughness of the criminal justice system is the assurance to witnesses that their testimony and cooperation are not the subject of public comment or criticism. This concern is particularly cogent in "high publicity cases" where the witnesses' truthful and accurate testimony is vital. It is in such notorious cases that witnesses' cooperation and honesty should be encouraged - not discouraged - for fear of disclosure.

Ironically, if courts routinely divulged grand jury testimony, disclosure would largely impact serious and newsworthy cases. It was contended that disclosure in a case such as this would be no different from disclosure after a defendant had been indicted. This argument does not justify disclosure. When a defendant is charged with a crime, the secrecy of the grand jury is trumped by the defendant's constitutional right to confront the witnesses against him (US Constitution, Sixth Amendment) and the defendant's statutory right to discovery

¹ "Those most frequently mentioned by courts and commentators are these: (1) prevention of flight by a defendant who is about to be indicted; (2) protection of the grand jurors from interference from those under investigation; (3) prevention of subornation of perjury and tampering with prospective witnesses at the trial to be held as a result of any indictment the grand jury returns; (4) protection of an innocent accused from unfounded accusations if in fact no indictment is returned; and (5) assurance to prospective witnesses that their testimony will be kept secret so that they will be willing to testify freely."

pursuant to Article 240 of the Criminal Procedure Law. These mandates would compel a limited disclosure. However, when no charges are voted by a grand jury, these rights do not come into play. Thus, this argument fails.

Finally, the decision of the grand jurors in this case was theirs alone, after having heard all of the evidence, having been instructed on the law and having deliberated. Their collective decision should not be impeached by unbridled speculation that the integrity of this grand jury was impaired in any way.

FINAL CONCLUSION

In this case, based on the arguments of the movants and the current state of the law, a decision in favor of the movants would constitute an unjustified departure from the plain statutory language of CPL 190.25 (4) (a) and case law. The movants argue for a “sea change” in the law governing the disclosure of grand jury minutes. If such a dramatic change is warranted, that change should be effected by the state legislature. The judiciary is not the branch of government for statutory repeal or amendments.

CPL 190.25 (4) (a), as interpreted in countless cases over many years, would have been judicially repealed or modified if courts succumb to the temptation to order disclosure in unique or high-publicity cases without reference to clear legal precedent. The law’s uniformity would be lost and the law would vary from court to court. The *ad hoc* release of grand jury minutes would be based on a judge’s subjective decision that a case was of singular importance or notoriety. If current, clearly articulated law governing the disclosure of grand jury minutes were abandoned each time a grand jury decision resulted in controversy, the law would have been changed by a judge. The rules of law established for the determinations of these motions would have been judicially amended and, in cases like

this one, the exception would have swallowed the rule². *Matter of Carey*, 45 Misc3d 187, 213 (Sup Ct, Wyoming County 2014).

It bears repeating that under the law, a “compelling interest” in a case is not a “compelling or particularized need.” If every newsworthy case were deemed compelling and, thus, justified disclosure, the veil of grand jury secrecy would be lifted and every citizen’s right to have fellow citizens, sitting on a grand jury, check the power of the police and the prosecutor without pressure from outside influences - real or perceived - would be imperiled.

Again, in summary, each movant has not established a “compelling and particularized need” for the release of the grand jury minutes and, if that legally-required showing had been made, disclosure, on balance, would not have been warranted.

Thus, the motions for disclosure are denied³.

This opinion shall constitute the decision and order of the court.

ENTER


HON. WILLIAM GARNETT, J.S.C.

² “At an even more basic level of analysis, this Court must point out that, if the public’s right to know could be a paramount or overriding consideration here, there would not exist a general rule of grand jury secrecy in the first place. Nor, if the supposed societal benefit of maximizing the public’s awareness could by itself trump all other considerations, would there exist a legal presumption against disclosure of grand jury evidence, let alone a rule providing that such presumption may be overcome only by a showing of a particularized and compelling need for disclosure. To adopt the Attorney General’s position in this case would be to effectively displace the presumption against disclosure of grand jury evidence with a presumption favoring the earliest and widest public revelation of grand jury material, at least in the most important and notorious cases.”

³ The NAACP’s motions to recuse and to refer the matter to the Grievance Committee of the Appellate Division of the Supreme Court for the Second Judicial Department are denied as meritless.

EXHIBIT 3

This page is located on the NYC.gov Web site at
<http://www.nyc.gov/html/ccrb/html/investigations/investigations.shtml>

Investigations

After you have filed a complaint, one of our investigative teams will get the case and assign an investigator, who will attempt to contact you within 48 hours of getting the assignment. This investigator will usually handle your complaint throughout the entire investigation.



Here's how an investigation generally progresses:

In-Person Statement

In order to get the most accurate and thorough description of the events and alleged misconduct that led to your complaint, the investigator will need to interview you in person. The CCRB often conducts in-person interviews at its office, located at 100 Church St., in Manhattan. If need be, interviews are also conducted at locations in all the boroughs. Particularly in cases of hardship, the investigator will travel to you.

Your in-person statement is vital and will be the foundation of the investigation. When you meet with the investigator, try to bring as much information as possible relating to the complaint, including the time, date, and location of the incident, the badge numbers and names of the police officers involved if you have them, physical descriptions of the officers and any relevant paperwork, photographs, or video. Providing names and contact information for witnesses is also important.

To ensure that your case can be administratively prosecuted if the board substantiates the allegations, the investigator will ask you to sign a verification form confirming that what you have told us is truthful and accurate.

Depending upon the nature of your complaint, the investigator may offer you the opportunity for mediation, instead of a full investigation.

» [Learn more about mediation](#)

Witness Statements

After speaking with you, the investigator will contact witnesses, starting with those whose names you can provide. Investigators often visit locations where incidents occurred to find video from surveillance cameras or to find other people, such as store owners or employees and neighborhood residents, who may be able to provide information or eyewitness accounts. If additional information is uncovered, the investigator might need to interview you a second time.

Evidence Gathering

The CCRB has subpoena power, which enables us to obtain records from commercial establishments and medical facilities, though we cannot view your medical records without your permission. We also obtain necessary documents from the police department, some of it immediately through onsite databases. Because the CCRB has access to police department records, such as roll calls, command logs, vehicle assignments, and stop and frisk forms, we can usually identify officers, even if you cannot give us a name or badge number.

Police Officer Interviews

Investigators usually interview police officers who are the subject of a complaint or who possibly witnessed an incident as soon as possible after they have been identified and the complainant and/or alleged victim has given an in-person statement. Under the NYPD's Patrol Guide, police officers must appear at the CCRB to be interviewed and must answer investigators' questions truthfully and fully.

Outcome of the Investigation

When the investigation is finished, the entire case file, along with a report prepared by the investigator, is given to the board. A panel of three board members reads the case and votes on every allegation in the complaint and

Ex.3

based on the preponderance of evidence, decides whether there was misconduct or not. If the board substantiates an allegation, the case is promptly forwarded to the police commissioner, who has the final say concerning discipline. In the most serious cases, where the board has recommended that administrative charges be brought against an officer, an attorney with the CCRB's Administrative Prosecution Unit (APU) will prosecute the officer. The board may also decide that the allegations are unfounded, exonerated, or unsubstantiated.

- » [Learn more about the board](#)
- » [Learn more about possible outcomes](#)
- » [Learn about the APU and police discipline](#)

Notification to You

After the board votes and makes findings on the allegations in your complaint, the CCRB will promptly notify you of the board's action by letter. At the same time, the CCRB will also notify the police officer who was the subject of your complaint.

Time Limit

Under the New York State Civil Service Law, when police officers are the subjects of substantiated allegations of misconduct, they must be served with disciplinary charges within 18 months of the date of incident, in most circumstances. This means it is important that you file a complaint as soon as possible, because the clock starts ticking from the date of the incident, *not* the date that the CCRB begins its investigation.

EXHIBIT 4

This page is located on the NYC.gov Web site at
<http://www.nyc.gov/html/ccrb/html/police/police.shtml>

APU and Police Discipline

Historically, when the board substantiated a complaint and found that an officer committed misconduct, it forwarded the case to the New York City Police Department (NYPD), in most cases with a disciplinary recommendation.



While the CCRB has the authority to investigate complaints and to determine if misconduct occurred, under the law only the police commissioner has the authority to impose discipline and decide the appropriate penalty.

However, on April 2, 2012, the NYPD and the CCRB signed a Memorandum of Understanding (MOU) which conferred on the CCRB the power to prosecute substantiated cases where the board recommended "charges and specifications," the most serious discipline.

As a result, the CCRB's Administrative Prosecution Unit (APU) now prosecutes nearly all these cases, with limited exceptions. The trials are held at the police department, before an administrative law judge, known as a deputy commissioner for trials. If an officer is found guilty, punishment can be: a warning and admonishment, loss of vacation days, suspension without pay, a dismissal probation, or termination from the NYPD. The police commissioner retains the authority to decide the level of punishment.

- [View calendar of May trials](#)
- [Read the latest APU quarterly report to the police commissioner](#)

The APU grew out of a pilot project, created in February 2010, in which a CCRB attorney served as lead prosecutor for a small portion of the substantiated cases that went to disciplinary trials at the police department. Initially staffed with one attorney and one investigator, the pilot program was given permanent status and funding in November 2011 and then subsequently expanded with the signing of the MOU. This is the first time a civilian oversight agency has had prosecutorial power.

That initial pilot project was conceived after a successful second-seat program, started in the fall of 2008, in which a CCRB attorney *assisted* the Police Department Advocate's Office (DAO) with prosecutions. Prior to 2008, the CCRB had no role in the discipline process.

- [Read the MOU](#)
- [Read the MOU announcement](#)
- [Learn about earlier litigation over the APU](#)

Types of Discipline other than administrative charges, that are imposed by the police commissioner:

- **Instructions** are the mildest form of discipline. As the name implies, instructions are retraining on the procedures the officer should have followed during the encounter. Instructions are usually handled by an officer's commanding officer, though sometimes the officer is sent to the Police Academy for retraining.
- **Command Discipline** is more serious than instructions. An officer can be given a warning or lose up to 10 vacation days. The decision is based on the officer's disciplinary history and CCRB history, performance evaluations and the seriousness of the misconduct.

CCRB complaints and discipline are recorded in officers' personnel records and can affect assignments and promotions.

Learn more about police department discipline in CCRB cases in our monthly statistical and bi-annual reports.

- [View APU Quarterly Reports on our News page](#)

Ex. 4

- * View monthly statistics
- * View bi-annual reports

Copyright 2015 The City of New York

[Contact Us](#)

[Privacy Policy](#)

[Terms of Use](#)

EXHIBIT 5



2 Staten Island police officers tried for misconduct over alleged face slam, improper search

nws khan

A photo of Hassam Khan's mouth, with his front teeth broken, following an incident with police during which he alleges his head was slammed on the hood of his cousin's car. (Courtesy of Harvey Greenberg)

Zak Koeske | zkoeske@siadvance.com By **Zak Koeske | zkoeske@siadvance.com**

Follow on Twitter

on June 03, 2015 at 11:01 PM, updated June 04, 2015 at 8:58 AM

NEW YORK — Two Staten Island police officers Wednesday stood trial on administrative charges brought by the Civilian Complaint Review Board.

The CCRB, an independent office that investigates complaints of police misconduct, brought charges against Staten Island narcotics Det. Mark Scarlatelli and 121st Precinct Sgt. Steven Marshall after substantiating excessive force and unlawful search claims made by a Graniteville man they arrested in December 2013.

Hassam Khan, 24, alleges that three plainclothes cops in an unmarked van stopped him outside of his home on Regis Drive as he was returning home from Walgreens with his cousin, Syed Ali, who works as a pharmacist for the drugstore chain.

A federal lawsuit Khan filed against the city in November **alleges Scarlatelli pulled him out of the car — his cousin's brand new Mercedes E350, that he was driving — pushed his chest up against the vehicle and slammed his head on its roof, shattering his two front teeth.**

Indentations on the roof of Syed Ali's Mercedes E350 that he and Hassam Khan allege occurred when police smashed Khan's face into the car after stopping him on Dec. 26, 2013. (Courtesy of Harvey Greenberg)

Zak Koeske | zkoeske@siadvance.com

Scarlatelli and his partner, whom the suit does not name, then searched the car without permission, Khan's suit alleges.

In November, following a CCRB investigation, a panel of three board members voted to substantiate Khan's claims of excessive force by Scarlatelli and improper search by Marshall, and recommended administrative charges against the officers.

EX. 5

Heather Cook, a prosecutor with CCRB's Administrative Prosecution Unit who handled the case, recommended that Scarlatelli lose 15 vacation days and that Marshall lose five vacation days for their alleged misconduct.

Both officers, Khan and his cousin, Ali, testified about the incident before Judge Nancy Ryan, the deputy commissioner for trials, at police headquarters in Manhattan on Wednesday.

The officers, who were working a narcotics detail on the night of the incident, claim they followed Khan home after he cut them off on Goethals Road North. Khan, they testified, was driving recklessly — swerving in and out of lanes on the expressway service road, speeding and nearly caused multiple crashes.

The officers said they pursued him with lights flashing, but no siren, along Goethals Road North, onto Farragut Avenue, and finally caught up to him as he was parking his car in front of his home on Regis Drive.

Sgt. Marshall, who was driving the unmarked police van, said he pulled in front of the Mercedes at a 90-degree angle and the officers hopped out. Det. Scarlatelli headed to the driver's side while Lt. John Ryan, who was not administratively charged, went to the passenger's side, and Marshall stood in front of the vehicle, gun drawn. The officers shouted at the two men to put their hands up.

Ali complied immediately, the officers testified, but Khan, they said, did not submit for about 15 seconds.

Even after he did raise his hands, he wouldn't step out of the vehicle, the officers said.

"He refused to get out," Marshall said. "He said, 'I did nothing wrong.'"

When Scarlatelli grabbed the driver's side door handle and opened it, Khan tensed himself and grabbed his seatbelt, "holding on to it like for dear life," the detective said.

As a result, Scarlatelli said he had to reach into the car to unbuckle Khan's seatbelt and pull him out of the vehicle by his arm.

Khan was irate and struggling as he was being pulled from the car, but did not verbally threaten or physically strike any of the officers, they said.

Scarlatelli testified that after getting Khan out of the car, he pushed his chest up against the side of vehicle in effort to control his wildly flailing arms in order to frisk him.

He denies slamming Khan's face into the roof of the car.

"I was patting him down and he kept turning around to face me," Scarlatelli said of the moment Khan alleges his teeth were shattered, leaving indentation marks in the car's roof. "I did not slam his head on the

roof of the car. His mouth did not make contact with the roof of the car. I just pushed him up against the car."

Scarlatelli's search of Khan turned up nothing, the officers acknowledged, and, once he calmed down a bit, Marshall handcuffed him at the rear of the vehicle.

After Khan was cuffed, Marshall said he stuck his head and torso into the car to ensure there were no weapons inside — a move that got him administratively charged for an improper search.

Marshall testified that he looked at the driver's seat to see if Khan had stashed anything where he was sitting and also checked the console between the two front seats —places where someone could lunge for a weapon. He did not check under the seats or look in the back seat, he said.

Both officers testified that Khan complained of a headache, but that he did not seek medical attention for his broken teeth, which Scarlatelli said he observed only after they got him into the police van.

Following the incident, Khan was booked and charged with disorderly conduct, resisting arrest, reckless driving and obstructing governmental administration, according to his lawyer, Harvey Greenberg. He pleaded guilty to disorderly conduct on the advice of another lawyer.

Under oath Wednesday, Khan acknowledged that he was speeding before the cops stopped him and said they had a legitimate reason to pull him over. He denied driving recklessly, changing lanes and passing other motorists, however, stating that he was speeding because he wanted to see how his cousin's brand new Mercedes drove.

Khan denied resisting the officers' orders and said he complied immediately when asked to put his hands up. He testified that he didn't recall any struggle over the seatbelt and just remembers Det. Scarlatelli pulling him from the car, standing him up against it and slamming his head down on the roof without provocation.

"He did it with such force that I saw teeth fly out of my mouth," Khan said.

Despite the allegedly brutal slam, Khan said he felt no pain and said nothing about it at the time. He did not bleed, suffer cuts, abrasions, lacerations, bruising or swelling on any part of his face or mouth, he said on cross-examination.

Ali said his younger cousin didn't even seem to know his teeth had been chipped. He said he noticed the jagged remains of Khan's incisors after the pair were brought together at the back of the car.

"I said, 'Hassam, they broke your teeth,' Ali testified.

To which Khan, apparently in a daze, replied, "OK. They broke my teeth," according to his cousin. Once Khan's family and neighbors started spilling outside upon hearing the commotion in front of their house, Khan started repeating that his teeth had been shattered by the officer.

It was only after he repeated to his brother, "He broke my teeth, look," that the officers grew upset and handcuffed him, he testified.

Scarlatelli's lawyer, James Moschella, said he's not disputing the fact that Khan's teeth were chipped, but said he doesn't know whether the fractures occurred during the arrest.

"If [his teeth were chipped during the incident], it was accidental, it was inadvertent and it's because this guy really just wasn't cooperating with police who were trying to place him under arrest," Moschella said.

He called Khan's claim that his teeth left marks in the car "completely fabricated."

"The amount of force that would be necessary for two teeth to make an indentation, you'd expect the teeth to be dislodged completely, there wouldn't just be a chip at the bottom," he said. "They would be loose, they would be bleeding, there would be some kind of trauma around the mouth, around the nose, around the chin. It's completely incredible."

Following Wednesday's administrative trial, Judge Nancy Ryan will review the case and determine a verdict. If she finds the officers guilty, she'll recommend a punishment and send a draft of her decision to their attorneys for comment as well as to the police commissioner.

The police commissioner will then take the judge's non-binding decision under advisement and make the ultimate judgment on whether or not to discipline the officers, and if so, how severely.

The entire process typically takes a few months, a CCRB spokesperson said.

© 2015 SILive.com. All rights reserved.