

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**

Index No. 80304/2014

Petitioner,

- Against -

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

MEMORANDUM OF LAW

Respondent.

Respondent Richmond County District Attorney (“RCDA”) files this memorandum of law in further opposition to an application by the Civilian Complaint Review Board (“CCRB”) for disclosure of the grand jury minutes and evidence created in connection with its investigation into the death of Eric Garner.

A. The Civil Procedure Law and Rules Provide No Basis for the Relief Sought.

Petitioner purports to seek pre-action discovery, as authorized by C.P.L.R. 3102(c), to obtain the disclosure of grand jury minutes generated in that body’s investigation of the circumstances surrounding the death of Eric Garner on July 17, 2014. CCRB also maintains that Judiciary Law § 2-b(3) also entitles them to the material. The resort to the pre-action discovery mechanism is a rather remarkable one and in and of itself justifies denial of the application. And, the resort to Judiciary Law § 2-b(3) would appear unnecessary inasmuch as the District Attorney has never disputed a party’s ability to make a motion under C.P.L. § 190.25(4)(a) to obtain an order unsealing the material.

As a general matter, individuals contemplating litigation may, under the appropriate circumstances, obtain discovery pursuant to C.P.L.R. 3102(c) “to aid in bringing an action, to preserve information or to aid in arbitration.” When the relief is sought for aid in bringing an action by enabling identification of a possible defendant, the applicant must demonstrate that there is a prima facie cause of action, pre-action disclosure can be invoked to determine who the defendant should be. Toal v. Staten Island Univ. Hosp., 300 A.D.2d 592 (2d Dept. 2002). Pre-action disclosure under C.P.L.R. 3102(c) is not available to the prospective plaintiff to determine if she has a cause of action. Holzman v. Manhattan and Bronx Surface Transit, 271 A.D.2d 346, (1st Dept. 2000). When the application seeks to preserve testimony, not to aid in bringing an action, there is no requirement that the existence of a cause of action be demonstrated with the certainty required when the application is intended to assist in framing a complaint or in identifying defendants. Matter of Davis, 178 Misc.2d 65 (Ct. Cl. 1998). Here, it is difficult to see how either basis for relief is remotely relevant.

First, the CCRB itself does not appear to have the authority to bring an action of any sort. In describing the agency’s authority, the New York City Charter empowers the Board to “receive, investigate, hear, make findings and recommend action upon complaints by members of the public against members of the police department that allege misconduct involving excessive use of force, abuse of authority, discourtesy, or use of offensive language, including, but not limited to, slurs relating to race, ethnicity, religion, gender, sexual orientation and disability. The findings and recommendations of the board, and the basis therefor, shall be submitted to the police commissioner. No finding or recommendation shall be based solely upon an unsworn complaint or statement, nor shall prior unsubstantiated, unfounded or withdrawn complaints be the basis for any such finding or recommendation.” New York City Charter

§ 440(c)(1). Since the CCRB does not have the power to commence an action, pre-action discovery is unavailable to it.

Moreover, as noted above, to be entitled to pre-action discovery, an applicant must establish a prima facie cause of action. Here, CCRB has not even made an effort to do so; instead, they seek the material for use as part of its investigation to recommended findings to the NYPD and for its use in any potential administrative prosecution based upon those findings. This is simply not an action within the meaning of the C.P.L.R.

C.P.L.R. § 103(b) provides that “all civil judicial proceedings shall be prosecuted in the form of an action.” And, C.P.L.R. § 105 provides that “[a] ‘civil judicial proceeding’ is a prosecution, other than a criminal action, of an independent application to a court for relief.” The crucial terms are “court” and “relief.” An action (or a special proceeding for that matter) is a process through which a court, not an administrative agency, is asked to provide relief to an applicant. And, even if the CCRB may be considered a court for these purposes, it is not a body that can provide relief to a complainant. As noted above, it is empowered to make recommendations to the Police Commissioner with respect to discipline of a police officer. This is not a form of relief either for a complainant or an officer about whom a complaint has been made. Cf. Matter of Marrano Construction Co. v. State Comm’n on Human Rights, 45 Misc.2d 1081 (Sup. Ct., Erie Co. 1965) (Matthew Jasen, J.) (observing that proceeding before commission was not a civil judicial proceeding because it was not before a court).

Indeed, that the relief sought is an “order” rather than a “judgment” (see Petition at 12) reflects that even petitioner recognizes that the relief sought is an order pursuant to C.P.L. § 190.25, rather than a judgment pursuant to Article 4 of the C.P.L.R. C.P.L.R. § 411. Leblon Consultants, Ltd. v. Jackson China, Inc., 92 A.D.2d 499 (1st Dept. 1983).

There is, of course, only one reason to characterize the application as seeking relief under C.P.L.R. 3102(c): to convert what otherwise is a request for relief governed solely by the C.P.L. into one that is governed by the C.P.L.R.'s special proceedings provision which, presumably, would result in an appealable order should this Court deny the relief. Unfortunately for the applicant, that avenue of appeal is shut to it.

As explained in the Commentary to C.P.L.R. 3102(c), a special proceeding is a civil judicial proceeding in which a right can be established or an obligation enforced in summary fashion. Like an action, it ends in a judgment (C.P.L.R. 411), but the procedure is similar to that on a motion (C.P.L.R. 403, 409). Speed, economy and efficiency are the hallmarks of this procedure. But statutory authorization must exist for the use of a special proceeding to enforce a particular right. See C.P.L.R. 103(b) (“all civil proceedings be prosecuted in the form of an action ‘except where prosecution in the form of a special proceeding is authorized’”). There is no authority whatever to commence a special proceeding in connection with grand jury materials; while C.P.L. §190.25(4)(a) requires that a court issue an order before grand jury materials are disclosed, it makes no provision whatever for the use of the special proceeding mechanism to obtain such an order. The absence of such authorization, examples of which are replete in the statutes of this state, makes plain that it is not available in this proceeding.¹

¹ Examples of such statutory authorization include proceeding against a body or officer (CPLR Article 78); first application arising out of an arbitrable controversy which is not made by motion in a pending action (C.P.L.R. 7502(a)); habeas corpus (C.P.L.R. Article 70); proceeding for appointment of a guardian for personal needs or property management (Mental Hygiene Law, Article 81); summary proceeding to recover possession of real property (Real Property Actions and Proceedings Law, Article 7); election law disputes (Election Law, Article 16); and change of name proceeding (Civil Rights Law, Article 6). A more comprehensive list may be found in McKinneys Commentary to C.P.L.R. 3102.

CCRB's reference to Judiciary Law § 2-b(3) seems rather superfluous. That provision authorizes courts of record "to devise and make new process and forms of proceedings, necessary to carry into effect the powers and jurisdiction possessed by it." The District Attorney has never disputed an individual's ability to apply for disclosure of grand jury minutes or a court's power to grant such relief pursuant to C.P.L. § 190.25(4)(a). After all, the statute itself states that a court order is required before grand jury materials may be disclosed.

In the end, the procedural basis apparently advanced by CCRB for relief – entitlement to the sealed grand jury material pursuant to C.P.L.R 3102(c) – cannot serve as a vehicle for the relief it seeks. To the extent the application seeks the grand jury materials as pre-action discovery, that application must be denied.

B. The records sought are sealed pursuant to Criminal Procedure Law section 160.50 and petitioner is not among those persons or agencies who may obtain unsealing.

Petitioner is seeking a record that is both a court record, because the grand jury is an arm of the court, and a record of the Richmond County District Attorney, in that this Office is the custodian of the records. *See, e.g.,* C.P.L. § 240.45(1)(a); People v. Ianniello, 21 N.Y.2d 418, 424 (1968); Hall v. Bongiorno, 305 A.D.2d 508, 509 (2d Dept. 2003). The records sought were made in the course of a criminal proceeding that has now been sealed. C.P.L. §§ 1.20(18), 160.50(1). Criminal Procedure Law § 160.50 provides that "upon the termination of a criminal action or proceeding against a person in favor of such person," "all official records and papers, ... on file with the division of criminal justice services, any court, police agency, or prosecutor's office shall be sealed and not made available to any person or public or private agency." C.P.L. § 160.50(1)(c). This matter ended with the filing of a dismissal pursuant to C.P.L. § 190.60 and 190.75. 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). Such a dismissal pursuant to section 190.75 is considered a termination of a criminal proceeding in favor of the accused [see C.P.L. § 160.50(3)(h)], with the result that C.P.L. § 160.50 applies, and the file that is in the custody of this Office is sealed and may not be made available to any person.

While there is a view that C.P.L. § 160.50 does not apply to this case because the target or targets of the grand jury investigation were not arrested and no criminal court felony complaint was filed against them, that view is unpersuasive. Criminal Procedure Law § 160.50(2) provides that sealing is automatic upon “a report of the termination of the action or proceeding in favor of the accused” unless a court orders otherwise. Here, that proceeding was, of course, the grand jury investigation and its “report of the termination... in favor of the accused” is embodied by the grand jury’s filing of No True Bill pursuant to C.P.L. § 190.75. See C.P.L. § 160.50(3)(h).

Moreover, the purpose of the sealing statute applies no less in circumstances where formal charges have not been filed. The purpose is to lessen the adverse consequences of unsuccessful criminal prosecutions “consistent with the presumption of innocence, which simply means that no individual should suffer adverse consequences merely on the basis of an accusation, unless the charges were ultimately sustained in a court of law.” Harper v. Angiolillo, 89 N.Y.2d 761, 766 (1997).

In light of the sealing statute’s purpose, only certain persons and agencies may seek unsealing under C.P.L. § 160.50(1)(d). That subdivision lists the persons and agencies that may have access to sealed records, and the list is to be “narrowly construed.” Matter of Hynes v. Karassik, 47 N.Y.2d 659 (1979). Courts have held that they are bound by the statute’s specific and narrowly defined unsealing authorization which manifests an intent “to limit the exceptions

to persons or groups having some association with law enforcement problems.” In re Joseph M., 82 N.Y.2d 128, 133 (1993).

Petitioner has failed to satisfy its identity as one who may obtain the requisite unsealing of this matter. Therefore, because petitioner is not among those categories of persons or agencies for whom unsealing is available, unsealing may not be ordered upon the instant motion.

C. Grand Jury Secrecy is in the Public Interest.

The Legislature determined many decades ago that there exists a compelling public interest in grand jury secrecy. See C.P.L. § 190.25; former Code Crim. Pro. § 952-t. In New York, secrecy has long been considered an “integral feature of Grand Jury proceedings.” In re District Attorney of Suffolk County, 58 N.Y.2d 436, 443 (1983); see also Decision and Order, Garnett, J., March 19, 2015 (attached as Exhibit 2). Although such secrecy may be breached by court order, in People v. Di Napoli, 27 N.Y.2d 229, 235 (1970), the Court of Appeals set forth five general purposes to be served by maintaining Grand Jury secrecy: “(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.” *Id.*

In addition to those purposes, a sixth reason for grand jury secrecy has been long recognized. The grand jury is the exclusive judge of the facts before it and must be allowed to render a decision free from outside influence, political pressure, or popular opinion, which would be undermined in the absence of absolute grand jury secrecy. Butterworth v. Smith 494 U.S. 624,

636-37 (1990) (Scalia, J., concurring). Put another way, the grand jury stands between an accused or a target and the awesome power of the state. People v. Thompson, 22 N.Y.3d 687, 698 (2014). If it is to fulfill that role, the grand jury must feel free to vote an indictment against the powerful and influential as well as to dismiss charges where they are not supported by the evidence, even where the accused is publicly despised or the alleged crime is notorious and heinous. Secrecy assures the jurors that they are free to make the right, albeit unpopular decision without fear of reprisal. Butterworth, 494 U.S. at 636-37.

In furtherance of the strong public interest in maintaining grand jury secrecy, the Legislature has established that “grand jury proceedings are secret, and no grand juror, or other person ... may, except in the lawful discharge of his duties or upon written order of the court, disclose the nature or substance of any grand jury testimony, evidence, or any decision, result or other matter attending a grand jury proceeding.” C.P.L. § 190.25(4)(a).

Further, the Legislature ensured strict adherence to the rule of secrecy by enacting the Class E felony of Unlawful Grand Jury Disclosure. Under that statute, a person will guilty of unlawful grand jury disclosure when he or she intentionally discloses “the nature or substance of any grand jury testimony, or any decision, result or other matter attending a grand jury proceeding which is required by law to be kept secret.” P.L. § 215.70.

Disclosure without court order is permitted only by a person acting “in the discharge of his duties.” C.P.L. § 190.25(4)(a). Thus, for example, disclosure of witnesses’ prior statements is required by Article 240 of the Criminal Procedure law, which provides that, upon swearing of a jury, the prosecutor must disclose the grand jury testimony of those persons the prosecutor intends to call as witnesses at trial. See C.P.L. §§ 240.44, 240.45; People v. Rosario, 9 N.Y.2d 286 (1961). Notably, however, even upon that disclosure, the secrecy attendant to that testimony

is not obviated. E.g. People v. Seymour, 255 A.D.2d 866, 867 (4th Dept. 1998) (“misconduct” for prosecutor to reveal grand jury testimony of one prosecution witness to another prosecution witness); Turturro v. City of New York, 33 Misc. 3d 454, 456 (N.Y. Sup. Ct. 2011) (“The release of the minutes by the district attorney to the defense attorney is meant to be utilized for the limited purpose of defense in the criminal action. Thereafter the minutes are still confidential and future use must be upon application to the court”).

The language of C.P.L. § 190.25(4)(a) and P.L. § 215.70 could not have been drafted more clearly to cast the umbrella of secrecy more completely over every matter pertaining to the grand jury. Criminal Procedure Law 190.25 thus casts a presumption of secrecy over every aspect of the grand jury. Significantly, C.P.L. § 190.25(4)(b) provides that even when a prosecutor wants to reveal child abuse that came to light during the grand jury proceeding to the state central register of child abuse for investigation and intervention by them, the prosecutor still must obtain a court order before doing so.

The blanket of confidentiality extended by C.P.L. § 190.25(4)(a) covers all information learned about putative targets, applying “equally to either one who gives evidence or to one concerning whom evidence is given.” Suffolk County, 58 N.Y.2d at 443. It covers even material not obtained pursuant to a grand jury subpoena or entered as an exhibit for the grand jury, so long as it was obtained in connection with a grand jury investigation. Aiani v. Donovan, 98 A.D.3d 972 (2d Dept. 2012). It extends to witness statements, even those made outside of the grand jury chambers, so long as they were made in connection with a grand jury investigation. Melendez v. New York, 109 A.D.2d 13, 20-21 (1st Dept. 1985) (tape-recorded statements to assistant district attorney covered by grand jury secrecy). And, as perhaps relevant here, it most certainly extends to testimony made by institutional witnesses like police officers. Id. at 22

(police witness personally entitled to secrecy, which could not be waived by the City of New York).

In sum, “[t]he secrecy of the Grand Jury is jealously guarded because the confidentiality of its proceedings must be insured if it is to continue to be effective.” Suffolk County, 86 A.D.2d at 298, quoting Matter of Carey [Fischer], 68 A.D.2d 220, 229 (4th Dept. 1979). Ongoing confidentiality is presumed to cover every aspect of the grand jury proceeding, and need not be established by the party opposing disclosure, but is a presumption that must be overcome by the party seeking disclosure. Suffolk County, 58 N.Y.2d 436. The petitioner here has utterly failed to establish the requisite showing.

D. Petitioner has failed to meet the threshold requirement of establishing a particularized and compelling need for the grand jury materials.

Under the City Charter, the CCRB is under a duty:

to receive, investigate, hear, make findings and recommend action upon complaints by members of the public against members of the police department that allege misconduct involving excessive use of force, abuse of authority, discourtesy, or use of offensive language, including, but not limited to, slurs relating to race, ethnicity, religion, gender, sexual orientation and disability. The findings and recommendations of the board, and the basis therefor, shall be submitted to the police commissioner. No finding or recommendation shall be based solely upon an unsworn complaint or statement, nor shall prior unsubstantiated, unfounded or withdrawn.

- City Charter § 440(c)(1).

Thus, the purview of the CCRB is to look into complaints that, while falling short of criminal conduct warranting investigation by the IAB and prosecution by the criminal justice system, nevertheless warrant some form of administrative discipline. Indeed, the City Charter provides that “If during the course of any assessment, audit or investigation undertaken pursuant to subdivision a of this section, the board forms a reasonable belief that criminal activity or other

wrongdoing has occurred or is occurring, the board shall, as soon as practicable, report the facts that support such belief to the police commissioner and the appropriate prosecuting attorney.” City Charter § 451(b).

To meet its mandate, the CCRB is staffed with investigators who interview the complainant, the witnesses, gather evidence such as police documents and security footage from commercial establishments, and sometimes interview the police officer who is the subject of the complaint. At the conclusion of the investigation, the case file and the investigator’s report is submitted to the Board, which will vote on every allegation in the complaint and, based on a preponderance of the evidence standard, will decide whether there was any misconduct committed. See Exhibit 3, “Investigations,” <http://www.nyc.gov/html/ccrb/html>.

Where the CCRB substantiates a complaint and is recommending “Charges and Specifications,” the most serious discipline, the case will be prosecuted by the CCRB’s Administrative Prosecution Unit (APU) before an administrative judge. See Exhibit B of Petition; see also Exhibit 4, “APU and Police Discipline” at <http://www.nyc.gov/html/ccrb/html>.

Whether the CCRB decides by its own vote that misconduct occurred or proceeds by way of an APU prosecution before an administrative judge, the CCRB can only recommend action to be taken by the Police Commissioner, who alone has the authority to impose discipline and decide the appropriate penalty. See Exhibit B of Petition; see also Exhibit 4, “APU and Police Discipline” at <http://www.nyc.gov/html/ccrb/html>.

It appears from the petition that what the CCRB is seeking is the ability to skip past the use of its own investigators and rely upon the grand jury investigation already conducted to fulfill its mandate. But rarely, if ever, is wholesale disclosure of grand jury material authorized

to enable a civil litigant to prepare for trial. Suffolk County, 58 N.Y.2d 436; Matter of Loria, 98 A.D.2d 989 (4th Dept. 1983).

To be sure; the CCRB is not merely an ordinary civil litigant, and, according to CCRB it has not engaged in any investigation of its own because of the criminal investigation into the events of July 17, 2014. For that reason, the CCRB requires the transcripts of the grand jury proceeding as a substitute for its own investigation, to enable it to make a recommendation of disciplinary action by the Police Commissioner.

But that argument fails to set forth any basis for an order authorizing disclosure pursuant to Criminal Procedure Law § 190.25. The “one seeking disclosure first must demonstrate a compelling and particularized need.” Suffolk County, 58 N.Y.2d at 444 (emphasis added). In so holding, the Court of Appeals affirmed the Second Department’s decision, which had expressed that thought in more practical terms: a party seeking disclosure must “demonstrate why, and to what extent, he requires the minutes of a particular Grand Jury to advance the actions or measures taken, or proposed.” Suffolk County, 86 A.D.2d 294, 299 (2d Dept. 1982).

Absent that initial showing of compelling and particularized need “strong enough to overcome the presumption of confidentiality,” the discretion conferred by Di Napoli for a court to permit disclosure should not be exercised since “there simply [are] no [competing] policies to balance.” Suffolk County, 58 N.Y.2d at 444; see also People v. Robinson, 98 N.Y.2d 755, 756 (2002); Lungen v. Kane, 88 N.Y.2d 861 (1996).

These decisions make clear, furthermore, that the words “particularized” and “compelling” are each essential to a proper understanding of this standard. By “compelling,” courts mean that “it must be shown by sufficient facts that the interest asserted is of such import that it outweighs the dangers inherent in violation of the secrecy of the Grand Jury.” Suffolk

County, 86 A.D.2d at 299. Such a compelling need was present in, for example, Di Napoli, 27 N.Y.2d 229, where the Public Services Commission sought to know whether, and by how much, the state’s utility rates needed to be corrected, a question of immediate importance to the citizens of the state.

By “particularized,” the courts mean that the applicant must show that the particular disclosure sought is “essential” to that effort. Suffolk County, 58 N.Y.2d at 444. Thus, while the Second Department had said in its decision in the Suffolk County case that it would be enough for the applicant to show the disclosures were “essential to this effort, though they need not be proven indispensable,” 86 A.D.2d at 299, the Court of Appeals held that the Suffolk County District Attorney had failed to satisfy the “particularized need” test by failing to show “what made it impossible for the District Attorney to establish his case without resort to the minutes.” 58 N.Y.2d at 446 (emphasis added). In other words, to satisfy the particularized prong of test, the applicant must articulate not only the compelling purpose for the disclosures, but must credibly explain why the grand jury minutes and evidence uniquely fulfill that purpose.

Here, the petitioner attempts to satisfy the “particularized” prong simply by narrowing the scope of its requests to the witness testimony and exhibits alone (hardly a narrow request), but, entirely absent from its application is any allegation of a purpose particular to the CCRB that cannot be accomplished without those particular disclosures. Suffolk County, 86 A.D.2d at 299.

On the contrary, petitioner’s papers establish that it has the authority to obtain the information as part of the authority vested in it by the City Charter, in that the “CCRB may compel the attendance of witnesses and the production of documents for use in its investigations pursuant to General City Law § 20(21) and N.Y.C. Charter § 440(c)(3).” See Petition at ¶¶ 16-18; Memorandum in Support, at 10. While it contends that its power in that regard was curtailed

by the “hold” requests of the Richmond County District Attorney’s Office and the Office of the United States Attorney for the Eastern District of New York (Verified Petition at ¶ 3), its compliance with those requests was voluntary. (See Exhibit B of Verified Petition, at ¶ 4). And, of course, the Richmond County District Attorney’s Office informed the CCRB that it was free to proceed six months ago (see Affirmation in Opposition at ¶ 7), yet they have not done so. Even now, their compliance with the United States Attorney’s request for restraint is not compulsory. Thus, there is no impediment to the CCRB sending its investigators to conduct independent interviews with the witnesses.

The fact that the CCRB has chosen to refrain from conducting an investigation does not create a particularized need for an alternative source of information, much less the type of particularized need that must be established for grand jury disclosure: “what made it impossible for the [the applicant] to establish [its] case without resort to the minutes.” Suffolk County, 58 N.Y.2d at 446 (emphasis added).

Next, the petitioner has attempted to satisfy the “compelling” prong by pointing to its mission to “determine – as it is empowered to do by N.Y.C. Charter § 440(c)(1) – whether the Officers engaged in misconduct during the Incident, and if so, what should be done to correct that misconduct.” Memorandum in Support at 5.

But, it would be a misreading of the City Charter, to suppose that the CCRB could satisfy its mandate of conducting independent investigations merely by examining the work product of another entity, such as the grand jury. Instead the City Charter provides not for the CCRB to form conclusions from the investigations performed by others, but to perform its own independent investigations. The City Charter created a CCRB on the ground that:

It is in the interest of the people of the city of New York and the New York city police department that the investigation of complaints concerning misconduct by officers of the department towards members of the public be complete, thorough

and impartial. These inquiries must be conducted fairly and independently, and in a manner in which the public and the police department have confidence. An independent civilian complaint review board is hereby established as a body comprised solely of members of the public with the authority to investigate allegations of police misconduct as provided in this section.

- City Charter, § 440(1)(a).

In light of that mandate, the argument that the CCRB, having refrained from conducting any independent inquiry, should have access to the transcripts of the grand jury proceeding in order to draw conclusions from those transcripts, must fail. If the mandate of the CCRB is to conduct its own interviews with witnesses in order to supply an independent avenue of information to the Police Commissioner relevant to his determination, the transcripts of the grand jury's proceeding here will not supply that. In other words, the CCRB contends that it cannot provide any material information to the Police Commissioner relevant to his determination, and it seeks the minutes of the grand jury in order to fill that gap. That, surely, is not what is meant by the City Charter's provision for a CCRB.

Moreover, if the CCRB is prepared to make a recommendation to the Police Commissioner based on information that does not flow from its own independent investigation, the City Charter provides that the police department shall furnish to the CCRB, upon request, "records and other materials which are necessary for the investigation of complaints submitted pursuant to this section, except such records or materials that cannot be disclosed by law." City Charter § 440(d)(1). Thus, the evidence gathered by the IAB during its investigation immediately after the incident would provide to the CCRB precisely the type of contemporaneous information it seeks without recourse to the Grand Jury minutes. Cf. Jones v. State, 62 A.D.2d 44, 49 (4th Dept. 1978) (disclosure to the State Police Bureau of Criminal Investigation of statements and reports generated independently of grand jury investigation).

The petition's vague assertion that it has attempted and failed to obtain such information from IAB is insufficient to satisfy its burden of in this application.

Finally, what is unclear from the application is what remains to be done by the CCRB that has not already been done by the IAB, RCDA, and the grand jury, or is not currently being done by the federal investigators and the Police Commissioner. In that respect, the case is readily distinguished from In re Scotti, 53 A.D.2d 282, 286 (4th Dept. 1976), upon which CCRB relies. There, disclosure was appropriate because it consisted of "evidence which bears upon the propriety of the conduct of a public employee, which information may not otherwise come to the attention of the employer agency." Here, in contrast, the IAB opened an investigation almost immediately, interviewed witnesses, and gathered evidence, which, it may be presumed, included the video or videos gathered during the investigation. According to petitioner, its findings have been provided to the Police Commissioner who is already taking action. Based on petitioner's own statement of facts, therefore, there is little purpose in the CCRB being supplied with the same information.

In sum, petitioner's assertions are simply not enough to trigger the Di Napoli balancing test. The application before the Court similarly does not articulate "the compelling and particularized need necessary to overcome the presumption of confidentiality" and warrants denial without reaching the Di Napoli balancing test. Suffolk County, 58 N.Y.2d at 445; Hynes, 179 A.Dd. at 760.

E. The public interest in maintaining grand jury secrecy far outweighs the need for disclosure.

Even assuming petitioner had overcome the initial threshold question of a particularized and compelling need for disclosure, the public interest in maintaining grand jury secrecy would

far outweigh the need for disclosure. “The public’s access to the minutes of a Grand Jury investigation, even for the sole purpose of protecting the commonweal, will not necessarily warrant disclosure. ‘No less important is the obligation of the judicial branch of government to protect the reputations of persons accused of crimes but not indicted or convicted, and to protect the court’s investigative machinery. The secrecy of the Grand Jury is jealously guarded because the confidentiality of its proceedings must be insured if it is to continue to be effective.’” In re District Attorney of Suffolk County, 86 A.D.2d at 298, quoting In re Carey, 68 A.D.2d at 229.

When conducting that balancing test, the Court should also consider the fact that petitioner does not seek limited disclosure, but the entire transcript of the witnesses’ testimonies and evidence. The public policy against such disclosure is at its greatest in this context. See Jones v. State, 62 A.D.2d 44, 49 (4th Dept. 1978) (the court observing that the “reasons for maintaining Grand Jury secrecy are cogent in circumstances where disclosure of Grand Jury testimony is sought”) (emphasis in original); compare In re Carey, 68 A.D.2d at 229 (denying public release even of redacted excerpts of evidence from the grand jury investigation into the retaking of the Attica Correctional Facility).

As was the case in In re Carey, “the nature of the disclosure sought here far exceeds anything previously authorized by any court.” In re Carey, 68 A.D.2d at 228. As noted above, although limited disclosure is sometimes warranted, such disclosure must always be balanced against the public policy in favor of grand jury secrecy with the result that the content and scope of disclosure must be narrowed to that which meets the particularized need of the movant. See id.; see also, e.g. Di Napoli, 27 N.Y.2d 235 (disclosure of minutes to the Public Service Commission in connection to its inquiry into public corruption); Aiani v. Donovan, 98 A.D.3d 972 (2d Dept. 2012) (limited disclosure of a certain banking records that could not be obtained

from any other source and which were necessary to pursue civil claim); Jones v. State, 62 A.D.2d 44, 49 (4th Dept. 1978) (disclosure to the State Police Bureau of Criminal Investigation of statements and reports generated independently of grand jury investigation); Turturro v. City of New York, 33 Misc. 3d 454, 456 (N.Y. Sup. Ct. 2011) (“The release of the minutes by the district attorney to the defense attorney is meant to be utilized for the limited purpose of defense in the criminal action. Thereafter the minutes are still confidential and future use must be upon application to the court”). For that reason, a party seeking disclosure must “demonstrate why, and to what extent, he requires the minutes of a particular Grand Jury to advance the actions or measures taken, or proposed.” Suffolk County, 86 A.D.2d at 299 (emphasis added).

Furthermore, although this grand jury investigation has concluded, New York’s rule of secrecy is still an important one, since of course, in a matter as highly publicized as this one, it may be safely assumed that many witnesses were induced to provide full and candid testimony only upon the assurance that their testimony would remain secret. In re Carey, 68 A.D.2d at 229 (the need for maintaining grand jury secrecy is of special importance “in investigations such as this which are the subject of broad publicity and which are highly sensitive”).

Many of those persons testified with full assurances of the secrecy of the grand jury proceedings. Whether the witness is a civilian or a member of the police department, disclosure of the minutes of their testimony, even with redactions, would inevitably lead to the revelation of their identity to those around them based on the witness’s description of his or her vantage point and involvement. That is especially so in this case, since the widespread publication of two videos of the incident would facilitate identification of the witnesses, some of whom were police officers wearing visible name tags, and some of whom were civilian witnesses already identified by name in the media. The content of their testimony would then be the subject of scrutiny, with

the inevitable result of harassment or retaliation. Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 222 (1979) (“Concern as to the future consequences of frank and full testimony is heightened where the witness is an employee of a company under investigation.”); Melendez v. New York, 109 A.D.2d 13, 20-21 (1st Dept. 1985) (police witness personally entitled to secrecy, which could not be waived by City).

Indeed, whether they received such assurances of secrecy or not, all of those who appeared before the grand jury would have standing to oppose the instant application or to appeal its grant. “The targets of a Grand Jury investigation, [] as well as the witnesses before the Grand Jury, have standing to enforce the right of Grand Jury secrecy established by statute (C.P.L. § 190.25), since the injury suffered by each due to the violation of that secrecy falls within the zone of interest to be protected by the statute.” In re District Attorney of Suffolk County, 86 A.D.2d 294, 297 (2d Dept. 1982); see also, e.g., Steven Lee Meyers, “Judge Won’t Open Records of Crown Heights Inquiry,” New York Times, Sept. 7, 1991 (noting that Judge Jones “said he would not consider releasing the [grand jury] records... unless the 31 witnesses who testified agreed to waive their right to privacy”).

Petitioner attempts to ameliorate the impact on the witnesses by arguing that its proceedings are “confidential.” But the Memorandum of Understanding to which the CCRB cites in support of its commitment to maintaining confidentiality merely provides for confidentiality of police records and that the CCRB “shall not disclose any such document... without first notifying the NYPD’s Deputy Commissioner, Legal Matters and providing the Deputy Commission, Legal Matters a reasonable opportunity to review the proposed disclosure.” See Exhibit B at ¶25. What occurs after that opportunity to review, and who makes the final

determination whether to disclose the documents, is unclear. Similarly, petitioner does not articulate how that confidentiality would apply here.

Moreover, the recent publication of the contents and conclusion of a CCRB investigation and the vote of the Board, as well as the nature and content of the “trial” conducted before the administrative judge, including the names of the officers, the contents of their testimony and of witness statements, and the fact of a pending decision by an administrative judge, surely calls into doubt the CCRB’s ability to maintain confidentiality. See, e.g., Zak Koeske, “2 Staten Island police officers tried for misconduct over alleged face slam, improper search,” Staten Island Advance, June 3, 2015 (Exhibit 5).

That type of detail was possible because, of course, the CCRB’s administrative trials are open to the public. See OATH Rules of Practice § 1-49 Public Access to Proceedings. Thus, the CCRB’s suggestion that the Court may order it not to disclose the material in any way other than its use in an administrative prosecution is irrelevant. Because the CCRB is moving for these materials specifically to introduce into evidence at an administrative trial in lieu of its own witnesses and evidence, the grant of the order sought here will be tantamount to a public disclosure of the contents of the grand jury materials in this case.

For that reason, it is not only the effectiveness of this grand jury proceeding that is at stake, but future ones as well. People v. Ruggiero, 103 A.D.2d 65 (2d Dept. 1984). “That continued witness cooperation -- the lifeblood of an effective Grand Jury system -- depends at least to some extent upon the witness’ trust that his or her testimony will remain confidential cannot be gainsaid. ... sanctioning disclosure under the circumstances presented herein would only undermine that trust.” Id. at 71. That is precisely why Di Napoli included, as a factor to be considered, the goal of providing “assurance to prospective witnesses that their testimony will be

kept secret so that they will be willing to testify freely.” Di Napoli, 27 N.Y.2d at 235 (emphasis added).

The negative impact on future investigations would be especially acute with regard to investigations of similar high-profile allegations of police misconduct. Disclosure of this highly publicized matter, after witnesses were assured of the strict rule of grand jury secrecy in New York State, would render hollow any future assurances to witnesses in similar cases and almost certainly place a chilling effect on the very type of witness cooperation that is the most to be desired and the most difficult to obtain. In re Carey, 68 A.D.2d at 229 (the need for maintaining grand jury secrecy is of special importance “in investigations such as this which are the subject of broad publicity and which are highly sensitive” in order to ensure future willingness of witnesses to come forward). As the United States Supreme Court has explained:

[I]n considering the effects of disclosure on grand jury proceedings, the courts must consider not only the immediate effects upon a particular grand jury, but also the possible effect upon the functioning of future grand juries. Persons called upon to testify will consider the likelihood that their testimony may one day be disclosed to outside parties. Fear of future retribution or social stigma may act as powerful deterrents to those who would come forward and aid the grand jury in the performance of its duties. Concern as to the future consequences of frank and full testimony is heightened where the witness is an employee of a company under investigation. Thus, the interests in grand jury secrecy, although reduced, are not eliminated merely because the grand jury has ended its activities.

- Douglas Oil Co. v. Petrol Stops Northwest,
441 U.S. 211, 222 (1979).

In that regard, the Court should also weigh in the balance the public announcements that have been made by the United States Department of Justice to the effect that it will be conducting an investigation into this matter, as it rightly did when deciding the applications by the Public Advocate et al. While CCRB contends that its use of the transcripts at an administrative hearing will remain confidential, since those proceedings are open to the public,

the impact would be the same. Even if that were not so, its determinations certainly will be publicized, and even if its determinations were disclosed to no one but the police officers against whom they recommend sanction, the chilling effect on their cooperation with the federal matter will be the same. For that reason, disclosure of their transcripts for assessment by the CCRB of their conduct would inevitably have a detrimental effect on their continued willingness to participate in any federal probe of this matter. Indeed, that, apparently, is the reason that CCRB continues to abide by the United States Attorney's request for the CCRB to refrain from conducting its own investigation. Surely then, the CCRB should not be granted the remedy of what would be far more damaging: disclosure of the witnesses' confidential grand jury minutes.

In short, although petitioner is correct in pointing out that many of the Di Napoli factors are less weighty by virtue of the fact that the instant investigation has ended and much of the nature of the grand jury proceedings has already been made public, that does not negate the harm that would be caused to future investigations by publication of the grand jury minutes and materials in this case. Id.; cf. Harper v. Angiolillo, 89 N.Y.2d 761, 766 (1997) (“These countervailing considerations to the wholesale disclosure of law enforcement records are not obviated merely because a criminal prosecution has terminated in favor of a defendant.”).

CONCLUSION

For these reasons, the application for the issuance of an order under C.P.L. § 190.25 allowing disclosure of grand jury information should be denied in its entirety.

Respectfully Submitted,

DANIEL L. MASTER, JR.
Acting District Attorney of Richmond County
130 Stuyvesant Place
Staten Island, NY 10301
(718) 876-6300

MORRIE I. KLEINBART
ANNE GRADY
Assistant District Attorneys
Of Counsel