

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

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In the Matter of the Application of

Index No.

THE NEW YORK CITY CIVILIAN COMPLAINT  
REVIEW BOARD

*Petitioner*

against

THE OFFICE OF THE DISTRICT ATTORNEY  
FOR THE COUNTY OF RICHMOND

*Respondent*

\_\_\_\_\_X

**MEMORANDUM OF LAW IN SUPPORT  
OF PETITIONER'S VERIFIED PETITION**

**Preliminary Statement**

The petitioner New York City Civilian Complaint Review Board ("CCRB") submits this memorandum of law in support of its application pursuant to CPL § 190.25(4), for an order directing the Office of the District Attorney for the County of Richmond (the "District Attorney's Office") to produce a certified copy of the evidence and testimony presented to the Grand Jury of Richmond County (the "Grand Jury") as part of its examination of the circumstances surrounding the July 17, 2014 death of Eric Garner in Staten Island (individually and collectively, the "Evidence"), and regulating subsequent limited use and disclosure of the Evidence in support of CCRB's investigative and prosecutorial work. CCRB's request for limited and controlled disclosure of the Evidence balancing the City's need for independent review of the Incident and the Grand Jury's statutory secrecy interest should be granted in this matter because: (1) this Court

is authorized to grant the relief sought; (2) CCRB is an investigative and prosecutorial agency conducting an ongoing investigation, based on civilian complaints it received, regarding alleged police misconduct within CCRB's jurisdiction; (3) the information sought in this application is highly relevant to CCRB's investigative and prosecutorial work; and (4) the interests of justice clearly support granting the relief sought here.

### **Statement of Facts**

The facts in support of CCRB's application for the relief sought herein are set forth in the accompanying verified petition, dated May 7, 2015 (the "Verified Petition"), and are briefly set forth below.

Eric Garner ("Mr. Garner") died on July 17, 2014 in Staten Island during the course of an encounter (the "Incident") with police officers employed by the New York City Police Department (individually and collectively, the "Officers") attempting to arrest Mr. Garner for selling cigarettes in violation of state and local tax laws. (Verified Petition, ¶¶ 1, 19-22). Following Mr. Garner's death, various government agencies began conducting criminal and/or administrative investigations of the Incident, including CCRB. (Verified Petition, ¶¶ 23, 25-29). As part of its ongoing investigation ("the Investigation") CCRB began to collect statements and other evidence. (Verified Petition, ¶ 25).

The District Attorney's Office subsequently directed CCRB to hold the Investigation in abeyance to allow the Grand Jury free access to evidence close-in-time as it considered criminal charges against the Officers. (Verified Petition, ¶ 26). Additionally, an investigation by the United States Attorney's Office for the Eastern District of New York ("EDNY USAO") also began, with a similar request made to

CCRB not to further interview witnesses during the course of the Investigation, but without any indication of how long that request would be necessary or in place. (Verified Petition, ¶ 28). Although multiple recent press statements and information CCRB has received from NYPD make clear that NYPD has completed an investigation of the Incident, CCRB's efforts to obtain evidence from the NYPD concerning that investigation have not been successful. (Verified Petition, ¶ 35).

Following its deliberations, the Grand Jury did not issue a true bill or a grand jury report. (Verified Petition, ¶ 6). However, the District Attorney's Office sought and obtained an order of the Court in a sealed proceeding authorizing the disclosure of the number of witnesses and exhibits considered by the Grand Jury, and the duration of the Grand Jury's investigation. (Verified Petition, ¶ 27). In order to permit CCRB to conduct its Charter-mandated work to complete its investigation into this death in police custody involving allegations of illegal physical force and abuse of authority, while seeking to preserve the *status quo* in keeping with the still-in place hold of EDNY USAO, CCRB is seeking judicial assistance to obtain copies of evidence that has already been gathered and considered in this matter. CCRB is also seeking judicial assistance to safeguard the Evidence as well as the integrity of CCRB's ongoing investigation. (Verified Petition, ¶¶ 35-36).

## Argument

### POINT I

#### **CCRB'S INDEPENDENT INVESTIGATORY AND PROSECUTORIAL ROLE HERE ESTABLISHES A RIGHT TO THE EVIDENCE**

##### **A. CCRB Has a Compelling and Particularized Need for the Evidence as Part of Its Ongoing Investigation and Possible Prosecution**

New York courts have been clear that agencies conducting administrative or disciplinary investigations may obtain grand jury records in support of their investigations. *In re Quinn*, 267 A.D. 913 (2d Dept.), *affd without op.*, 293 N.Y. 787 (1944) (records of grand jury investigation unsealed for use in proceeding to remove town official), *People v. DiNapoli*, 27 N.Y.2d 229 (1970) (grand jury records may be disclosed to Public Service Commission following grand jury investigation of bid rigging by public utilities) and *In re Crain*, 139 Misc. 799 (Ct. of Gen. Sessions, New York Co. 1931) (unsealing grand jury records for use by commissioner appointed by the Governor to consider misconduct charges against district attorney in removal proceeding).

The courts have specifically recognized the need for City officials to obtain limited grand jury records. *People v. Werfel*, 82 Misc. 2d 1029, 1032 (Sup. Ct., Queens Co. 1975) (noting that while “the administrative needs of a municipality may be less dramatic than an investigation of crime, both functions are necessary to protect the public” in granting City Commissioner of Investigation access to grand jury records as part of administrative background investigation of candidate for judiciary), *citing Marinelli v. State*, 71 Misc. 2d 62 (Ct. of Claims 1972) (unsealing minutes of grand jury testimony by state police officer investigated – but not indicted – by grand jury in death of suspect for use in subsequent civil action).

Additionally, the courts have also granted access to grand jury records in circumstances alleging police misconduct in a number of contexts, including releases for use in disciplinary proceedings against police officers investigated by a grand jury. *In re Scotti*, 53 A.D.2d 282 (4<sup>th</sup> Dept. 1976) (records of grand jury investigation of Attica Prison riot properly unsealed for use by state police and correction agencies in disciplinary proceedings against officers), *People v. Behan*, 37 Misc. 2d 911 (Onondaga Co. Ct., 1962) (unsealing grand jury records for use by Moreland Act commissioner investigating misconduct by county jail personnel over the objection of the district attorney) and *Marinelli, supra*.

At the outset, CCRB's role as an independent investigatory and prosecutorial agency stands it apart from other entities that have sought the Evidence. Unlike the petitioners in *Matter of Garner v. Donovan*, CCRB has an ongoing, mandated, direct role in the investigation and discipline of police officers, and has a focused and narrow need for evidence in a disciplinary investigation and, if warranted, prosecution. *Compare* N.Y.C. Charter § 440 and *Matter of Garner v. Donovan*, 080304/2014, NYLJ 1202721321984, (Sup. Ct., Richmond Co. Mar. 19, 2015) (holding that City Public Advocate, newspapers and private parties did not show compelling and particularized need to unseal unrestricted records of the Grand Jury's proceedings). In this application, CCRB is seeking the Evidence for the purpose of reviewing the Incident 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.<sup>1</sup> Unlike the Public Advocate, who serves as an ombudsperson within City

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<sup>1</sup> Additionally, CCRB is empowered to issue recommendations for policy and procedural changes based upon information uncovered during investigations, and has issued a report concerning chokehold cases.

government, CCRB is precisely the investigative and prosecutorial agency to which the Public Advocate would refer a complaint about the Incident for appropriate action. N.Y.C. Charter § 24(g).

While addressing local corruption of a bygone era, the court's ruling in *Crain* is particularly instructive here, where the court noted:

The application before me, however, although not involved in a criminal action, yet involves public interests in the broadest measure. The application is made by the Governor's Commissioner for necessary use in investigating the conduct of a public officer of great importance and it is obvious to me that not only would sound discretion warrant the granting of the order in such a case but that a refusal to grant it would be an abuse of discretion and injurious to public interests.

*Crain*, at 800-801.

Given the impact of police misconduct on society's relations with the police, and the particular concern whenever allegations of misconduct arise, the City Charter has fixed upon the CCRB to independently assess the accountability of its police officers. While several months have passed since the Incident, any disciplinary charges resulting from the Investigation could be filed and prosecuted by CCRB and would be timely pursuant to N.Y.C. Admin. Code § 14-115 and N.Y.C. Charter § 1046(c)(1).<sup>2</sup> As such, CCRB's request here is neither academic nor for generic review purposes, and as such, is in contrast to the generalized applications previously sought by other parties concerning the Incident. *Matter of Garner*, at \*6-8.

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<sup>2</sup> *Police Dept. v. Smith and Revels*, OATH Index Nos. 01/0345 & 01/0346, at \*12-14 (N.Y.C. Off. of Admin. Trials & Hearings May 23, 2001) (denying statute of limitations challenge to charges filed seven years after date of assault, but noting NYPD position applying Civil Service Law § 75 to police officer discipline), citing *Montella v. Bratton*, 93 N.Y.2d 424, 429-432 (1999) (police officer discipline governed by N.Y.C. Admin. Code § 14-115, not Civil Service Law § 75), citing *Scornavacca v. Leary*, 38 N.Y.2d 583, 585 (1976).

Police officers are also entitled to due process as public servants pursuant to state and local civil service laws. Permitting CCRB controlled access to the Evidence serves to benefit the Officers by ensuring that CCRB has a full and complete understanding of the facts and circumstances of the Incident before issuing any findings and recommendations or conducting any disciplinary prosecutions. *See* Civil Service Law § 75, 1940 N.Y. Laws Ch. 834, N.Y.C. Admin. Code § 14-115 and 38-A R.C.N.Y. § 1-41 *et seq.* *See also State-Office of Mental Retardation & Dev. Disabilities v. Mastracci*, 77 A.D.2d 473, 476 (4<sup>th</sup> Dept. 1980), *Chapman v. Health and Hospitals Corp.*, 7 Misc. 3d 933 (Sup. Ct., New York Co. 2005) and *Matter of McCurry v. New York State Office for People with Dev. Disabilities*, 2014 N.Y. Slip Op. 30968(U) (Sup. Ct., Albany Co. 2014) (permitting employees access to nonparty medical and mental health records for use in disciplinary proceedings). By granting the relief sought here, this Court will assist CCRB in promoting the City Charter's mandate for a full, independent and fair review into a critical issue affecting the City.

Also, the holds requested by the District Attorney's Offices as well as EDNY USAO only serve to amplify CCRB's need here, as the CCRB was restricted in completing its Charter-mandated investigative work of contacting witnesses and obtaining suitable equivalents of the Evidence close-in-time on its own. N.Y.C. Charter § 440(f). Given the restrictions sought by the District Attorney's Office in the immediate aftermath of the Incident, EDNY UASO's subsequent hold and CCRB's unsuccessful efforts to obtain NYPD records, CCRB is forced to seek close-in-time information from the sole repository of that information, the District Attorney's Office. Where, as here, the issues before the Grand Jury concerned public officials acting in the course of performing

their duties, and the Grand Jury did not issue a report pursuant to CPL § 190.85, CCRB should not be hampered in conducting its work because it cooperated with the Grand Jury and District Attorney's Office and because it is respecting the hold requested by the EDNY USAO. As such, CCRB's need for the Evidence here for use in the Investigation is compelling and particularized.

**B. CCRB's Request is Narrowly Tailored to Protect the Grand Jury's Deliberative Process**

Recognizing the Grand Jury's need for independence, CCRB has not made a broad application. Rather than seek unfettered access to the Grand Jury's entire record concerning the Incident, CCRB's request is narrowly tailored to seek only that information that will illuminate what happened during the Incident. Seeking to review the Officers' conduct – not that of the District Attorney's Office or the Grand Jury – CCRB is seeking witness testimony and exhibits concerning the facts and circumstances of the Incident, not the Grand Jury's thought process in considering the Incident. *Matter of Garner*, at \*6 and, e.g., *Madison Square Garden, L.P., v. New York Metropolitan Transp. Auth.*, 19 A.D.3d 284, 285 (1<sup>st</sup> Dept. 2005) (noting Public Advocate did not have oversight over state authority).

CCRB does not have an interest in any advice or directions provided to the Grand Jury pursuant to CPL § 190.25(6), and does not seek any such information. By the same measure, while the grand jury system is designed to be a “bulwark against autocratic rule,” it is plainly not intended to shield government officials and employees from being rightly examined – and if necessary, disciplined – for their official acts, and the City has a substantial interest in the affairs of its employees within the criminal justice system. J.



Robert Brown, Jr., *The Witness and Grand Jury Secrecy*, 11 Am. J. Crim. L. 169, 171 (1983) and, e.g. *Green v. Giuliani*, 187 Misc. 2d 138 (Sup. Ct., New York Co. 2000) (noting local interest in proceeding concerning alleged unlawful disclosure of sealed criminal records by Mayor). As such, CCRB's narrowly tailored request should be granted.

### **C. The Balance of Interests Here Clearly Favor Controlled Disclosure to CCRB**

In considering those requests which can show, like CCRB does here, a compelling and particularized need, courts also conduct a five-prong balancing test in considering whether to disclosure grand jury records, considering:

(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.

*DiNapoli*, at 235.

Here, where the public is largely aware of the Incident and many – though far from all – of the individuals involved in the Incident are known, and the Grand Jury's proceedings have concluded, fears concerning flight or interference are misplaced. As no indictment was returned by the Grand Jury, prospective witness tampering or suborning perjury are also non-issues. With regard to the fourth and fifth prongs of the test in *DiNapoli*, the interests clearly favor limited and controlled disclosure to CCRB.

The legislative intent in creating CCRB and the importance of CCRB's work are crystal clear. In creating CCRB, the City Council found that:

It is in the interest of the people of the city of New York and [NYPD] that the investigation of complaints concerning misconduct by officers of [NYPD] 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*.

NYC Charter § 440(a) (emphasis added).

Especially, considering that 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), the City has determined that CCRB ought to have broad access to information to conduct its vital work. As such, CCRB's interest trumps many confidentiality concerns. *See People v. Elvritte A.*, Kings Co. Indictment No. 1653-2013 (Mark Dwyer, J., May 30, 2014), *Matter of Search Warrant No. 267-2014* (Sup. Ct., New York Co. Dec. 10, 2014) (Larry Stephen, J.) (unsealing search warrant for use in CCRB investigation), *Application of the New York City Civilian Complaint Rev. Bd.* (Sup. Ct., Queens Co. Jul. 2, 2014) (Barry Schwartz, J.), *Application of the New York City Civilian Complaint Rev. Bd.*, (Sup. Ct., New York Co. Aug. 13, 2014) (Robert Mandelbaum, J.), *Application of the New York City Civilian Complaint Rev. Bd.*, (Sup. Ct., Bronx Co. Oct. 22, 2014) (George Villegas, J.), *Application of the New York City Civilian Complaint Rev. Bd.*, (Sup. Ct., New York Co. Nov. 3, 2014) (Abraham Clott, J.) (releasing alleged victims' sealed case records in furtherance of investigation of police officers' conduct to police oversight agency without express exemption from CPL § 160.50), *Application of the New York City Civilian Complaint Rev. Bd.*, (Sup. Ct., Bronx Co. Dec. 5, 2014) (George Villegas, J.) (unsealing alleged victim's NYPD juvenile report records for use in CCRB investigation of officer's conduct) and *Application of the New York City Civilian Complaint Rev. Bd.*, (Sup. Ct., New York Co. Feb. 27, 2015) (Larry

Stephen, J.) (granting CCRB access to restricted child protective and Family Court records for use in CCRB investigation) and *New York City Civilian Complaint Rev. Bd. v. New York City Admin. for Children 's Services*, New York Co. Index No. 452509/2014 (Donna Mills, J., entered Dec. 10, 2014) (ordering disclosure of restricted Family Court records for use in CCRB investigation). *See also Comptroller of the City of New York v. Dept. of Finance of the City of New York*, 46 Misc. 3d 403 (Sup. Ct., New York Co. 2014) (City Department of Finance ordered to disclose otherwise confidential tax records to City Comptroller for use in audit), *City of New York v. Bleuler Psychotherapy Center*, 181 Misc. 2d 994 (Sup. Ct., New York Co. 1999) (ordering psychotherapy center to disclose protected mental health records to Commissioner of Mental Health, Mental Retardation and Alcoholism Services for use in Charter-authorized investigation) and *Gill Hearn v. New York City Health & Hospitals Corp.*, New York Co. Index No. 401599/2008 (Eileen Rakower, J., entered Jul. 17, 2008) (ordering hospital staff to testify and disclose protected mental health information to Commissioner of Investigation for use in Charter-authorized investigation). Permitting CCRB to have access to the Evidence – which is patently relevant to CCRB’s independent review of the Incident – is clearly in keeping with public interest, given that confidentiality of CCRB proceedings is mandated. *See Telesford v. Patterson*, 27 A.D.3d 328 (1st Dept. 2006) (dismissing Article 78 petition seeking CCRB records pursuant to Freedom of Information Law in light of Civil Rights Law 50-a) and *People v. James*, 46 Misc. 3d 1219(A) (Sup. Ct., Kings Co. Feb. 10, 2015) (denying defense application for CCRB records).

With respect to the fourth factor, although the Grand Jury did not return an indictment regarding the Incident, the wide press coverage of the Incident has likely

already caused any harm to innocent individuals involved in the Incident that might be caused by the disclosure sought here. Unlike the many comparatively unknown incidents considered by grand juries across the state on a daily basis, the Incident has been the subject of extensive press coverage and public commentary. The Officers and their actions have already been the subject of discussion such that controlled disclosure for use in the Investigation will not produce any additional harm.<sup>3</sup>

Finally, as for the potential chilling effect of disclosure on this or other grand juries, the particular facts of this matter actually favor controlled disclosure to a governmental agency conducting an official investigation. As disclosed by the Court, nearly eighty percent of the witnesses who testified before the Grand Jury were “police officers, emergency medical personnel and doctors,” while the remaining witnesses were civilians. *Matter of District Attorney of Richmond Co.*, 2014 N.Y. Slip Op. 24427, \*4 (Supt. Ct., Richmond Co. Dec. 4, 2014) (granting limited unsealing of information concerning the Grand Jury’s review of the Incident). All City employees are required to appear before grand juries as requested under penalty of termination, so concerns about government witnesses failing to appear are misplaced. N.Y.C. Charter § 1123.

As to whether those witnesses may be chilled from providing frank testimony, those witnesses already testified without any guarantee that the facts provided by their testimony would be shielded from all disclosure in all circumstances. Especially considering those witnesses who were City employees, their testimony was part of their official duties, and their individual interests in shielding that on-duty testimony

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<sup>3</sup> In contrast, if subsequent investigation revealed that the Officers did not commit misconduct, such a finding might serve to rehabilitate the public standing of the Officers and any other individuals involved in the Incident. In that light, disclosure here may serve as a benefit, rather than a harm, to the involved individuals here.

concerning on-duty acts is diminished.

Also, given the confidentiality restrictions imposed by Civil Rights Law § 50-a upon CCRB investigations, controlled disclosure here would be from one confidential investigation to another, without substantial risk of public disclosure.<sup>4</sup> *See Telesford and James supra*. Additionally, Courts have adopted similar oversight controls to those proposed here for other restricted records. *People v. Malaty*, 4 Misc. 3d 525 (Sup. Ct., Kings Co. 2004) (court ordered *in camera* review of sealed divorce and family court records prior to disclosure to district attorney and required the People to seek additional court order prior to introducing any of the produced records into evidence), *United States v. Rayburn House Office Bldg.*, 497 F.3d at 663 (D.C. Cir. 2007) (discussing protective measures necessary to protect legislative privilege) and F.R.Cr.P. Rule 6.

Here, as in *Malaty*, continued judicial oversight of the Evidence will ensure that appropriate measures will be taken to protect the Grand Jury's independence while also permitting CCRB to complete its important work, and is clearly within the Court's powers of control over its own records. *See Matter of Application for Search Warrant*, 108 Misc. 2d 440, 442-443 (Crim. Ct., Kings Co. 1981) (discussing courts' inherent powers over their own records in denying an unsealing motion) and *Stevenson v. News Syndicate Co.*, 276 A.D. 614, 618 (2d Dept. 1950), *quoting In re Caswell*, 18 R.I. 835, 836 (1893) ("The judicial records of the state should always be accessible to the people for all proper purposes, under reasonable restrictions as to the time and mode of examining the same" in considering request for pleadings from divorce action). As such, concerns about disclosure can be eliminated here, and when contrasted with the apparent

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<sup>4</sup> To the extent additional measures are necessary to shield the Evidence from uncontrolled public disclosure, CCRB is seeking protective measures controlling access to and dissemination of the Evidence.

need for the Evidence, the balance of the interests here clearly favors limited and controlled disclosure to CCRB.

### CONCLUSION

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

Dated: New York, New York  
May 7, 2015

Respectfully submitted,



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