

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

x

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

x

Index No.

**VERIFIED PETITION
PURSUANT TO CPL
§ 190.25 AND JUDICIARY
LAW § 2-b(3)**

The petitioner New York City Civilian Complaint Review Board (“CCRB”), by its attorney, CCRB Assistant Deputy Executive Director of Investigations Brian Krist, respectfully alleges the following:

PRELIMINARY STATEMENT

1. As part of an ongoing investigation concerning allegations that, among other things, members of the New York City Police Department (“NYPD”) used excessive physical force and committed other misconduct against Eric Garner (“Mr. Garner”) during an incident on or about July 17, 2014 (the “Incident”), CCRB pursuant to NYC Charter 440(a) is examining the facts and circumstances of the Incident 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 (the “Investigation”).

2. CCRB is aware that the District Attorney’s Office conducted an investigation of the Incident, and presented evidence and testimony to the Grand Jury of Richmond County (the “Grand Jury”) concerning the Incident (collectively, the “Evidence”).
3. Although CCRB initially began the Investigation by actively seeking witness statements and evidence, CCRB was restricted from continuing an active investigation of its own by holds imposed by the District Attorney’s Office and the Office of the United States Attorney for the Eastern District of New York (“EDNY USAO”).
4. As an independent agency tasked with investigating and prosecuting allegations of police misconduct however, CCRB has a clear obligation pursuant to NYC Charter 440(a) to conduct thorough and complete investigations that assure the public that police officers who commit misconduct will be investigated and recommendations made to NYPD so that officers are held accountable for their actions through effective disciplinary action. Unjustified use of force by law enforcement personnel cuts at the heart of ordered liberty, and unjustified and reckless physical force resulting in a civilian’s death threaten public safety and confidence in law enforcement in modern society. As such, the City has a

manifest interest in CCRB thoroughly reviewing such allegations to the fullest extent and taking all appropriate action within CCRB jurisdiction.

5. By the same measure, police officers are public servants guaranteed due process rights by the United States and New York State constitutions, and state and local civil service laws. Officers are entitled to an investigation and prosecution of allegations against them that are fair and impartial. In order to fully and fairly investigate and prosecute the Incident in a way that will satisfy CCRB's obligations under law, CCRB has a compelling and particularized need to obtain the probative information sought here.

6. Following the Grand Jury's decision not to issue an indictment or report concerning the Incident, CCRB is seeking judicial assistance to obtain the information it requires to conduct its Charter-mandated work on behalf of the City. A copy of a proposed order is annexed as Exhibit A.

PARTIES TO THE ACTION

7. CCRB is, pursuant to Chapter 18-A of the New York City Charter (N.Y.C. Charter § 440), an agency of the City of New York, itself a municipal corporation organized under the laws of the State of New York, with its principal place of business located at 100 Church Street, in New York County.

8. The District Attorney's Office is, pursuant to Articles 18 and 24 of the County Law (County Law §§ 700 *et seq.* and 900 *et seq.*), an independent prosecutorial agency of the County of Richmond, itself a municipal corporation organized under the laws of the State of New York, with its principal place of business located at 130 Stuyvesant Street, in Richmond County.

JURISDICTION AND VENUE

9. This Court has jurisdiction pursuant to CPL § 190.25 and Judiciary Law § 2(5).
10. CCRB is seeking to proceed by order to show cause in this matter because the immediate circumstances of the NYPD disciplinary process and its imminent initiation upon lifting of the requests to stay this matter pending the outcome of the investigation by the EDNY USAO mandate that CCRB complete its independent, Charter-mandated functions in a timely manner so all potential disciplinary outcomes are preserved.
11. Venue is proper in Richmond County pursuant to CPLR 504(3) and 506(b) because the District Attorney's principal place of business is located, the Grand Jury sat, and the cause of action arose, in Richmond County.

STATEMENT OF FACTS

Background and Statutory Scheme

12. Pursuant to N.Y.C. Charter § 440, CCRB is an agency of the City of New York tasked with conducting independent investigations of allegations concerning NYPD police officers alleging “misconduct involving excessive use of force, abuse of authority, discourtesy, or use of offensive language, and to make findings and recommend action, if any, to be taken in response to those allegations. Additionally, pursuant to N.Y.C. Charter § 440(a), these investigations are to be “complete, thorough and impartial,” and conducted “in a manner in which the public and the police department have confidence.”

13. In exercising its powers, pursuant to N.Y.C. Charter § 440(c), CCRB’s board members employ a staff of civilian investigators who investigate complaints made by members of the public and propose to the board of the CCRB findings and recommendations. The principal work of CCRB is determining whether police officers complied with NYPD regulations and state and federal law.

14. Findings and recommendations, as approved by CCRB’s board members, are then forwarded to the Police Commissioner of the City of New York for review and action. Such actions can include the imposition of non-judicial punishments or referrals for disciplinary prosecution of the most serious charges pursuant to Civil

Service Law § 75, 1940 N.Y. Laws Ch. 834, N.Y.C. Admin. Code §§ 14-115 and 14-123, 38 R.C.N.Y. § 15-01 *et seq.* and 38-A R.C.N.Y. § 1-41 *et seq.* In addition, disciplinary prosecutions of the most serious charges are conducted by CCRB pursuant to 38 R.C.N.Y. § 15-12, 38-A R.C.N.Y. § 1-42, and a memorandum of understanding between CCRB and NYPD. A copy of that memorandum of understanding is annexed as Exhibit B.

15. CCRB also uses information uncovered during its investigations to issue public reports containing anonymous case information, statistics and policy observations and recommendations pursuant to N.Y.C. Charter § 440(c). As an example, CCRB issued a report following the Incident concerning the use of chokeholds by NYPD personnel, a copy of which is annexed as Exhibit C.

16. In order to conduct investigations effectively, the City of New York is afforded specific authority to issue subpoenas pursuant to General City Law § 20(21). That power has been delegated to CCRB pursuant to N.Y.C. Charter § 440(c)(3). Also, CCRB may issue subpoenas in support of its disciplinary prosecutions pursuant to 38 R.C.N.Y §§ 15-04(b) and 15-15.

17. Beyond CCRB's subpoena power, City employees are required to cooperate with investigations conducted pursuant to the Charter – including CCRB investigations – pursuant to N.Y.C. Charter § 1128(b), and NYPD personnel are under a

particular obligation to cooperate with CCRB pursuant to N.Y.C. Charter § 440(d).

18. Additionally, CCRB's board members are granted "any power necessary to carry out the powers and duties" vested in CCRB by N.Y.C. Charter § 1120.

The Incident

19. On the afternoon of July 17, 2014, in Richmond County, the Officers encountered Mr. Garner standing on a City sidewalk. According to NYPD records concerning the Incident and various publicly available reports, as well as CCRB interviews during its initial investigation, Mr. Garner became involved in an altercation with the Officers, who were attempting to investigate suspected sales of untaxed cigarettes.

20. During the course of that altercation, the Officers decided to take Mr. Garner into custody, and used physical force against Mr. Garner to effect that arrest.

21. Mr. Garner's condition deteriorated during the Incident, and emergency medical personnel were summoned to tend to Mr. Garner.

22. Mr. Garner was subsequently transported to a nearby hospital, where he was pronounced dead.
23. Following the Incident, CCRB received multiple complaints alleging, that, among other things, the Officers used improper and excessive physical force, including a chokehold, against Mr. Garner.
24. If the allegations here are proven to be correct, they would be punishable as a violation of NYPD regulations, and through them, Civil Service Law § 75 and/or N.Y.C. Admin. Code § 14-115. Such regulations would include, but are not limited to, NYPD Patrol Guide Procedures 203-09, 203-10, 203-11, 208-01, and 212-11 (Looseleaf, 2014-B Ed.), copies of which are collectively annexed hereto as Exhibit D.¹
25. CCRB commenced the Investigation soon after the Incident, and began seeking witness statements, video of the Incident, and any other evidence from public and private sources.
26. CCRB subsequently received information indicating that federal and local authorities were seeking a “hold” on the Investigation. In the midst of its investigation, CCRB received official requests from both the District Attorney’s Office and EDNY USAO to hold the Investigation, which have been honored

¹ CCRB also respectfully requests that the Court take judicial notice of the procedures annexed as Exhibit D pursuant to CPLR 4511.

pursuant to N.Y.C. Charter § 440(f). At that point, without completing its investigation, CCRB halted activity in this matter.

27. As disclosed pursuant to court order, the District Attorney's Office presented fifty witnesses and sixty exhibits to the Grand Jury over the course of a nine-week presentation, following which the Grand Jury elected not to issue a true bill or a report. The testimony of the officers who are the subject of the complaints pending before CCRB presumably included.

28. CCRB has also learned that EDNY USAO has commenced an investigation of the Incident, and has not been able to provide a date by which it would release CCRB from its hold to continue and complete its investigation in order to reach findings.

29. Additionally, CCRB has been informed that NYPD conducted its own internal investigation of the Incident, including interviews of an unspecified number of witnesses, including each of the officers presented at the Incident. That investigation has been concluded, and its findings forwarded to NYPD's Department Advocate's Office for possible disciplinary action. However, EDNY USAO has also placed a hold on any disciplinary action by NYPD following the results of that internal investigation. As a result, NYPD has publicly stated that it stands ready to initiate its disciplinary process, presumably, without recommendations or prosecutorial actions vested in CCRB's jurisdiction and mandate.

AS AND FOR A FIRST CAUSE OF ACTION

(For an Order Pursuant to CPL § 190.25(4)

and Judiciary Law 2-b(3))

30. CCRB repeats and re-alleges each and every allegation contained in paragraphs 1 through 29 as if fully set forth herein.
31. Pursuant to CPL § 190.25(4), the “nature or substance of any grand jury testimony, evidence, or any decision, result or other matter attending a grand jury proceeding” is secret, but may only be disclosed upon order of the court which empaneled the grand jury.
32. Because of the state and federal holds imposed upon CCRB pursuant to N.Y.C. Charter § 440(f), CCRB’s current ability to independently obtain witness testimony and evidence is limited.
33. The Evidence, while presently concealed behind CPL Art. 190’s secrecy provisions, is nonetheless clearly relevant material in the Investigation, and provides the best contemporaneous collection of a probative record of the Incident and is clearly in furtherance of CCRB’s Charter-mandated responsibility to investigate and, if warranted, prosecute alleged police misconduct.

34. Edited video clips of the Incident have been widely circulated, and the individuals involved in the Incident, including persons believed to have been investigated by the Grand Jury, are generally known to the public.
35. While CCRB is an investigative and prosecutorial agency of the City of New York conducting its Charter-mandated work, CCRB's efforts to obtain NYPD's investigative file of the Incident from the NYPD have been unsuccessful. Notwithstanding such efforts, the Evidence provides an independent, best evidence opportunity for the CCRB to fulfill its Charter-mandated function.
36. As such, CCRB has no effective currently available alternative for the close-in-time evidence and sworn testimony comprising the Evidence as presented to the Grand Jury.
37. CCRB is narrowly restricted by Civil Rights Law § 50-a and discovery rules governing disciplinary proceedings against public servants and, therefore, is required and will maintain the confidentiality of the Evidence.
38. Additionally, CCRB is actively seeking the Court's continued oversight and control of the Evidence in controlling its use and disclosure of the Evidence to balance CCRB's compelling need for the Evidence against the Grand Jury's interest in secrecy.

39. No request has been made for the relief sought in this action prior to the commencement of this proceeding.

WHEREFORE, the Petitioner requests that this Court issue an Order:

1. Finding that CCRB has a compelling and particularized need to obtain the Evidence, and that the interests of justice substantially favor controlled disclosure of the Evidence to CCRB in support of the Investigation;
2. Directing the District Attorney's Office to provide CCRB with a certified copy of the Evidence;
3. Directing that CCRB may use the Evidence as part of its investigation and recommended findings to the NYPD and any potential administrative prosecution based upon those findings;
4. Directing that CCRB may not use or disclose the Evidence in any manner or for any purpose not specifically authorized by order of the Court; and

5. Granting 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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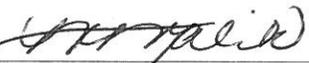
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STATE OF NEW YORK)
 SS:
COUNTY OF NEW YORK)

MINA MALIK, an attorney duly admitted to practice law before the courts of the State of New York, affirms the following to be true pursuant to CPLR 2106:

1. I am the Executive Director of the petitioner New York City Civilian Complaint Review (“CCRB”).
2. I have read the annexed verified petition and I have knowledge of the matter set forth in the annexed verified petition, upon information and belief, based on my review of CCRB’s books and records and conversations with CCRB personnel.
3. Upon information and belief, I believe the contents of the annexed petition to be true.

Dated: New York, New York
May 7, 2015



MINA MALIK