

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

In the Matter of the Investigation into the Death
of Eric Garner,

LETITIA JAMES, New York City Public
Advocate,

Petitioner-Applicant,

-against-

DANIEL DONOVAN, Richmond County District
Attorney,

Respondent.

Index No.

080304/14

Criminal Term – Part 5

Justice Stephen J. Rooney

**ORDER TO
SHOW CAUSE**

Filed Under Seal

Upon reading the annexed and accompanying Affirmation of Matthew D. Brinckerhoff, counsel for Petitioner-Applicant Letitia James as Public Advocate for the City of New York, dated December 10, 2014, and all prior proceedings relevant to this action, it is hereby:

ORDERED that the District Attorney, Daniel Donovan, or his representative, shall appear and show cause before Justice Stephen J. Rooney, Supreme Court of the State of New York, County of Richmond, Criminal Term – Part 5, located at 18 Richmond Terrace, Staten Island, New York, 10301, on the 19 th day of December, 2014, at 10:30 o'clock in the 10:30 ^{morning} ~~noon~~, or as soon thereafter as counsel can be heard, why an order should not be issued, pursuant to N.Y. Crim. Pro.

Law § 190.25(4)(a), directing that:

1. The minutes and all other records and evidence presented to the Grand Jury in the Matter of the Investigation into the Death of Eric Garner be unsealed and released; and

2. Such other and further relief that may be appropriate; and it is further

ORDERED that service of a copy of this Order and the papers upon which it is based be made on or before the 10th day of December 2014, by email or hand delivery of such papers to the Office of the District Attorney Daniel Donovan, Richmond County, 130 Stuyvesant Place, Staten Island, New York 10301.

ENTER:

/s/ Stephen J. Rooney
Justice Stephen J. Rooney

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

In the Matter of the Investigation into the Death
of Eric Garner,

LETITIA JAMES, New York City Public
Advocate,
Petitioner-Applicant,

-against-

DANIEL DONOVAN, Richmond County District
Attorney,

Respondent.

Index No.

Criminal Term – Part 5

Justice Stephen J. Rooney

AFFIRMATION OF MATTHEW D. BRINCKERHOFF

MATTHEW D. BRINCKERHOFF, an attorney duly admitted to practice law in the Courts of the State of New York, and counsel for Petitioner-Applicant Letitia James, Public Advocate for the City of New York hereby affirms under penalty of perjury, the following:

1. I am a member of Emery Celli Brinckerhoff & Abady LLP, counsel for the Public Advocate in this matter. I submit this affirmation in support of the Public Advocate's Order To Show Cause seeking an order directing the unsealing and release of the minutes and all other records and evidence presented to the grand jury in the Matter of the Investigation into the Death of Eric Garner, pursuant to N.Y. Crim. Pro. Law ("C.P.L.") § 190.25(4)(a).

Grand jury proceedings are presumptively secret and the minutes of those proceedings are sealed. Grand jury secrecy is not sacrosanct, however. Upon a showing of compelling and particularized need for access, this Court may unseal grand jury minutes and other evidence. *See People v. Di Napoli*, 27 N.Y.2d 229, 235-36 (1970) (permitting disclosure of grand jury minutes

to New York Public Service Commission to “assist [in the] investigation and preparation for . . . public hearings”); *People v. Werfel*, 82 Misc. 2d 1029 (Sup. Ct. Queens Cty. 1975) (permitting disclosure of grand jury minutes for inquiry into the background of a candidate for judicial appointment). The Public Advocate seeks access to the grand jury proceedings concerning the death of Eric Garner in order to execute her duties under the New York City Charter.

A. Role of the Public Advocate

2. The New York City Charter — the constitution of New York City government — provides for the Office of the Public Advocate to serve an essential “watchdog” over all government activities. Under the Charter, the Public Advocate is the elected official empowered and charged with overseeing all City agencies, including investigating any shortcomings or failures in the provision of services to New York City residents.

3. Courts have described the Public Advocate as “an independent public official to monitor the operations of City agencies with the view to publicizing any inadequacies, inefficiencies, mismanagement and misfeasance found, with the end goal of pointing the way to right the wrongs of government.” *Green v. Safir*, 174 Misc.2d 400, 403 (Sup. Ct. N.Y. Cty. 1997), *aff’d*, 255 A.D.2d 107 (1st Dep’t 1998), *leave to appeal denied*, 93 N.Y.2d 882 (1999). The Charter vests the Public Advocate with the authority and responsibility to review systemic complaints relating to city services and programs, and investigate and attempt to resolve such complaints, “[i]n addition to other duties and responsibilities” Charter of the City of New York (“Charter”) § 24(f).

4. The Public Advocate must work with City agencies and make “specific recommendations” in an effort to resolve complaints and systemic problems. Charter § 24(g). Where a City agency does not act to resolve the concern, the Public Advocate is authorized to

issue a formal report to the City Council and the Mayor, “describ[ing] the conclusions of the investigation and mak[ing] such recommendations for administrative, legislative, or budgetary action, together with their fiscal implications, as the public advocate deems necessary to resolve the individual complaint or complaints or to address the underlying problems discovered in the investigation.” *Id.*

5. The Public Advocate possesses independent capacity to bring suit “to implement the power set forth in the Charter.” *Green v. Safir*, 174 Misc.2d at 406. The Public Advocate also has broad and express authority under the Charter to petition for a formal “summary inquiry into any alleged violation or neglect of duty in relation to the property, government or affairs of the city.” Charter § 1109; *see also Green v. Giuliani*, 187 Misc.2d 138, 152 (Sup. Ct. N.Y. Cty. 2000).

6. The Charter expressly grants the Public Advocate authority to review the documents of City agencies for the purposes of investigating and resolving complaints. Section 24(j) provides that “[t]he public advocate shall have timely access to those records and documents of city agencies which the public advocate deems necessary to complete the investigations, inquiries and reviews required” under the Charter. In *Green v. Safir*, the court approved the Public Advocate’s petition for access to the New York City Police Department’s private personnel files for the purposes of investigating patterns involving the failure to discipline officers for misconduct. 174 Misc.2d at 406. The *Green v. Safir* court held that examination of confidential documents fell within the powers and duties of the Public Advocate and reasoned that “[m]isconduct by those invested with police power is now, and always has been, an area of concern to government.” 174 Misc.2d at 403.

**B. There Is an Extraordinary and Compelling Public Interest
In Disclosure of the Garner Grand Jury Proceedings**

7. It is axiomatic that the public has access to all court documents, including the instant request for the unsealing and release of grand jury materials sought here. This “presumption of public access to judicial documents . . . exists, in part, because public monitoring of the courts is an essential feature of democrati[c] control and accountability.” *People v. Cipolla*, 184 Misc. 2d 880, 881, 711 N.Y.S.2d 303, 304-05 (Sup. Ct. Rensselaer Cty. 2000) (ordering the unsealing of grand jury Minutes to petitioning newspaper publisher) (internal quotation marks and citation omitted); *see also Mancheski v. Gabelli Grp. Capital Partners*, 39 A.D.3d 499, 501 (2d Dep’t 2007) (“There is a presumption that the public has the right of access to the courts to ensure the actual and perceived fairness of the judicial system, as the ‘the bright light cast upon the judicial process by public observation diminishes the possibilities for injustice, incompetence, perjury, and fraud.’”) (citations omitted); CLPR 3101(a) (“There shall be full disclosure of all matter material and necessary in the prosecution or defense of an action”).

8. “Juxtaposed to” the principle of open access to court documents “is the fact that a presumption of confidentiality attaches to the record of Grand Jury proceedings.” *Cipolla*, 184 Misc. 2d at 881. Yet courts have consistently held that the “secrecy of grand jury minutes is not absolute.” *Di Napoli*, 27 N.Y.2d at 234. New York Criminal Procedure Law § 190.25(4) establishes the presumption that grand jury proceedings are secret and subject to seal. However, the statute permits grand jury minutes (1) to be disclosed to the public with a “court order,” or (2) to be “independently examined by the district attorney . . . and *such other persons as the court may specifically authorize.*” C.P.L § 190.25(4) (emphasis supplied).

9. In determining whether disclosure should be permitted, a trial “court must balance the competing interests involved[:] the public interest in disclosure against that in secrecy.” *Di Napoli*, 27 N.Y.2d at 234. As one court explained, the test is: “Would the public interest best be served by permitting disclosure at this time?” *Werfel*, 82 Misc. 2d at 1031. In *People v. Di Napoli*, the Court of Appeals outlined set forth the factors a court must consider when reviewing whether the public interest outweighs 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. 27 N.Y.2d at 235.

10. Here, there is an exceptional and manifest public interest in disclosing the proceedings concerning the grand jury’s investigation into the death of Eric Garner. The grand jury’s decision not to return an indictment has prompted a sustained wave of peaceful protests in New York City and across the country. Public figures and elected officials at every level of state, local, and federal government have spoken out about the case and potential reforms are being actively considered and pursued. It is crucial that those reforms be informed by the actual conduct of the grand jury in the Garner matter, and not speculation and supposition about what might have occurred or been presented.

11. Indeed, just two days ago, New York State Attorney General Eric T. Schneiderman, with the backing of the Public Advocate and many other public officials, announced that he had formally asked Governor Cuomo to issue an immediate “temporary

standing order under subdivisions two and three of Executive Law section 63,” authorizing the Attorney General to investigate the circumstances surrounding the death of any unarmed person at the hands of law enforcement officer and where warranted, criminal prosecute such officers. *See* Letter from Eric T. Schneiderman to Andrew M. Cuomo, Dec. 8, 2014 (“Schneiderman Letter”), available at: <http://www.ag.ny.gov/pdfs/Schneiderman-to-Cuomo-12-08-14.pdf>.

12. The Attorney General’s request was made “because of the current crisis in our State’s criminal justice system.” *Id.* The Schneiderman Letter explained that:

the promise of equal justice under law has been eroded by a series of tragedies involving the death of unarmed persons as a result of the use of force by law enforcement officers. Many of the tragedies involved unarmed persons of color. All too often, the families of the victims and the members of the communities are left with the belief that our criminal justice system has both unjustly targeted and inexplicably failed them.

Id.

13. Maintaining secrecy under these circumstances will only further erode and irreparably damage public trust in the justice system’s capacity to hold police accountable when citizens die at their hands. Disclosing information presented in these proceedings will help restore public confidence by giving critical context to the grand jury’s final determination and paving the way for the meaningful evaluation of potential reform measures.

14. The balance of interests strongly favors public access. The *Di Napoli* factors warranting grand jury secrecy carry little weight after a grand jury proceeding has concluded without bringing charges (or after any charges brought are fully resolved). *See Cipolla*, 184 Misc. 2d at 882 (“Most of the factors in favor of confidentiality of grand jury minutes relate to pending trials and are therefore inapplicable here”); *see also Aiani v. Donovan*, 98 A.D.3d 972, 974 (2d Dep’t 2012) (unsealing grand jury materials where “none of the reasons for maintaining secrecy in grand jury proceedings is implicated.”). Since the grand jury did not return an

indictment, there is simply no risk of flight by the accused, no risk of jury tampering, and no risk of suborning perjury.

15. Moreover, the central facts leading to the death of Eric Garner were videotaped and are widely available. The identity of the accused, Police Officer Pantaleo, has been extensively reported and is well known. A publicly available audio-visual recording vividly demonstrates the conduct that led to Mr. Garner's death. Here, the fourth *Di Napoli* factor aimed at protecting innocent accused from unfounded accusations militates *in favor* of disclosing the content of the grand jury proceeding. The videotape recording itself is highly inculpatory. If exculpatory evidence was provided to the grand jury, it is in the interest of both the public and the accused to disseminate that information.

C. Courts Permit Disclosure of Grand Jury Materials in order To Assist Government Officials Conducting Investigations

16. Disclosure is further justified because the Public Advocate seeks the unsealing and dissemination of the grand jury materials pursuant to her investigatory authority under the New York Charter. The Public Advocate seeks access to the sealed materials in this case in order to aid her in performing a core duty as Public Advocate: investigating and resolving systemic concerns regarding the conduct and accountability of New York City police officers. Courts permit disclosure of grand jury minutes to government bodies in furtherance of the public interest.

17. In *Di Napoli*, the New York State Public Service Commission sought to obtain minutes of a grand jury proceeding so that it could evaluate appropriate rates for public utilities. Grand jury proceedings had previously been initiated to examine allegations of bid rigging by various construction companies on public utility contracts. After the allegations came to light,

the Public Service Commission began investigating whether consumers had been overcharged for utilities as a result of collusive bidding practices. In accordance with its statutory mandate to fix “just and reasonable rates,” the Commission requested permission to review evidence from the grand jury proceeding “[t]o assist it in its inquiry.” *Di Napoli*, 27 N.Y.2d at 233.

18. In upholding disclosure to the Public Service Commission, the Court of Appeals noted that revealing grand jury materials to “a governmental investigative body” would not discourage future witnesses from testifying freely in such proceedings. *Id.* “[W]itnesses before [the grand jury] could reasonably have anticipated that some investigating body” might later “procure a copy of the minutes to assist it in such investigation.” *Di Napoli*, 27 N.Y.2d at 236. Given the high profile nature of the grand jury proceeding concerning Mr. Garner’s death, every witness who testified “could reasonably have anticipated,” that their testimony might be subject to later disclosure. Just as in *Di Napoli*, the Public Advocate seeks to examine the Garner grand jury materials to assist her in performing the core duties entrusted to her by the New York City Charter: investigation and resolution of citizen complaints.

19. Other courts have reached similar conclusions. In *People v. Werfel*, the Department of Investigation sought and gained access to grand jury minutes involving candidates for the judiciary who had previously been charged with criminal offenses. The *Werfel* court permitted the Department of Investigation to examine the full grand jury record so that it could carry out its official duty “to investigate the background of individuals being considered for sensitive positions within the government of the City of New York.” 82 Misc. 2d at 1030. The court noted that disclosure was warranted and squarely within the public interest even though the government investigation concerned a civil matter: “[I]t is clear that the scope of public interest is quite broad and should not be restricted solely to criminal matters. . . . Thus, while the

administrative needs of a municipality may be less dramatic than an investigation of crime, both functions are necessary to protect the public.” *Id.* at 1032.

20. As detailed above, the New York City Charter vests the Public Advocate with the authority and duty to work with City agencies to investigate, address, and resolve citizens’ complaints. She also may introduce legislation to address systemic problems and city-wide concerns. Charter § 24(n). The provisions of the Charter outlining the role and responsibilities of the Public Advocate are indicative of the local legislative judgment that deemed her duties as supporting the public interest. Granting the Public Advocate’s application for unsealing and access to the Garner grand jury materials will permit her to do the job entrusted to her by the people of the City of New York and would be consistent with the access granted to investigating government entities. *See People v. Lester*, 135 Misc.2d 205, 207 (Sup. Ct. Bronx Cty. 1987) (“Traditionally, applications to unseal records of criminal proceedings have been made where the underlying incident may provide the basis for . . . related investigations by government agencies, such as . . . legislative committees.”) (citations omitted).

D. Disclosure Will Aid the Public Advocate in Fulfilling Her Mandate

21. The Public Advocate has specific and compelling needs for the grand jury materials. A party seeking disclosure of grand jury materials should “demonstrate why, and to what extent, [s]he requires the minutes of a particular Grand Jury to advance the actions or measures taken, or proposed (e.g., legal action, administrative inquiry or legislative investigation), to insure that the public interest has been, or will be, served.” *Matter of Dist. Attorney of Suffolk Cnty.*, 86 A.D.2d 294, 299 (2d Dep’t 1982) *aff’d*, 58 N.Y.2d 436 (1983). This requirement does not mean that a party prove that access to grand jury proceedings are

“indispensable,” but simply of significance and importance to measures taken in the public interest. *Id.*; see also *Di Napoli*, 27 N.Y.2d at 238 (agency was not required to “conduct its own investigation at the expenditure of considerable time and money and make a record of its own rather than avail itself of the existing record resulting from the grand jury inquiry”).

22. The Garner grand jury materials are of central importance to several of the Public Advocate’s priorities for investigation and reform, including without limitation, the following items.

a. Special Prosecutors to Investigate Police Misconduct

23. In the wake of the Garner grand jury’s decision, numerous state and city officials have proposed reforms to address police misconduct. Under the current system, law enforcement officers rely on district attorneys to prosecute their cases. There is broad public concern that this arrangement presents an inherent conflict of interest for prosecutors charged with investigating potential criminal conduct by members of a local police force. Such a conflict could potentially be eliminated if only independent special prosecutors with no institutional relationship with the local police department investigated and prosecuted police misconduct.

24. As explained above, Attorney General Eric T. Schneiderman has also requested immediate authority to investigate and prosecute killings of unarmed civilians by law enforcement. Given the urgency of the current debate, it is essential for the Public Advocate to have access to the Garner grand jury minutes to evaluate whether the content of the proceedings substantiate any concerns about actual or perceived conflicts of interest between prosecutors and local police officers. This information is of central importance to any report or recommendation by the Public Advocate on this pressing issue.

b. Formal Proceeding Under § 1109

25. Under § 1109 of the Charter, the Public Advocate retains broad authority to initiate a “summary inquiry into any alleged violation or neglect of duty in relation to the property, government or affairs of the city.” This formal investigative procedure is presided over by a Justice of the Supreme Court who may direct persons to appear and be examined regarding the subject of the inquiry. In upholding the Public Advocate’s power to bring proceedings under § 1109, the court concluded in *Green v. Giuliani* that the “the language of the [provision] could hardly be broader. It applies to all forms of official misconduct.” 187 Misc. 2d at 150.

26. The Public Advocate requires access to Garner grand jury materials in order to determine whether a summary inquiry is warranted into official misconduct by the NYPD, Staten Island precincts, and other related city agencies. The testimony elicited in the Garner grand jury proceedings is critical evidence that may be used to shape the scope of such an inquiry and as impeachment material in a summary inquiry proceeding itself. *See Di Napoli*, 27 N.Y.2d at 237 (finding “use of a witness’ grand jury testimony for impeachment purposes” in a subsequent agency hearing “commonplace and perfectly proper.”).

c. Investigation of Race-Based Discrimination by Law Enforcement

27. A federal court has found the city liable for the unconstitutional use of race in targeting young black and Hispanic men for searches. *See Floyd v. City of New York*, 959 F. Supp. 2d 540, 560 (S.D.N.Y. 2013). It is a central priority of the Public Advocate to investigate, address, and eliminate discriminatory enforcement and racial profiling by police officers in any form. The killing of Eric Garner merges into a broad, historical pattern of deadly force employed by white officers in interactions with citizens of color. The evidence presented to the

jury is essential to determining what part, if any, race played in death of Mr. Garner and the grand jury proceedings themselves.

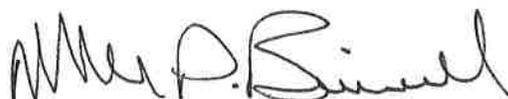
d. Proposals for NYPD Body Cameras

28. Following Eric Garner's death, the Public Advocate proposed that NYPD officers be supplied with video cameras as a means of increasing public safety and curbing police misconduct. New York City has already enacted a pilot program for body cameras. The Garner grand jury materials are of central importance to evaluating this nascent program because Eric Garner's death was filmed and presented to the grand jury. Grand jury materials would help to evaluate the efficacy of body cameras at halting the use of excessive force and ensuring police accountability. Information from the grand jury may help inform whether body cameras must be implemented in conjunction with other reforms in order to achieve the desired effect of increasing public safety.

29. Based on the foregoing, the Public Advocate respectfully requests this Court to grant her application to unseal and release the records of the grand jury proceedings in the Matter of the Investigation into the Death of Eric Garner.

30. No prior application has been made for the relief sought by this motion.

Dated: December 10, 2014
New York, New York


Matthew D. Brinckerhoff