

SUPREME COURT OF THE STATE OF NEW YORK
BRONX COUNTY

----- X
NAFISSATOU DIALLO,

Plaintiff

- against -

6-11
1A-9A
DOMINIQUE STRAUSS-KAHN,

Defendant,

THE NEW YORK CITY POLICE DEPARTMENT,
Non-Party Respondent.

----- X

**AFFIRMATION IN
OPPOSITION TO
PLAINTIFF'S MOTION
FOR THE ISSUANCE OF A
SUBPOENA DUCES
TECUM**

Index # 307065/11

BRONX SUPREME COURT
CIVIL DIVISION
2012 JUN 11 AM 7:02

JAMES J. CONROY, an attorney duly admitted to practice before the courts of this state, affirms under penalty of perjury pursuant to CPLR Rule 2106 that the following statements are true, except for those made upon information and belief, which he believes to be true:

1. I am an Attorney in the Office of S. ANDREW SCHAFFER, Deputy Commissioner, Legal Matters, and I appear on behalf of the NEW YORK CITY POLICE DEPARTMENT (hereinafter the "NYPD"). I make this affirmation upon information and belief, based upon my examination of the instant order to show cause for contempt.

2. The instant motion, dated May 18, 2012, seeks the issuance of a subpoena duces tecum directing the production of evidence, investigative documents, and communications relating to the incidents giving rise to this action. The proposed subpoena directed to the NYPD is attached hereto as Exhibit 'A'.

**SEALED RECORDS MUST NOT BE DISCLOSED EXCEPT IN CERTAIN
CIRCUMSTANCES THAT DO NOT APPLY IN THIS CASE.**

3. An inquiry into the status of this investigation revealed that that the criminal indictment was dismissed and sealed in accordance with Criminal Procedure Law Section 160.50. For this reason alone, Plaintiff's application should be denied in its entirety.

4. After a sealing order issues, CPL § 160.50(1)(d) specifies that the sealed records shall be made available in only a few, specifically defined instances, e.g., upon request of the person accused or his designated agent, and to six categories of public and private agencies and persons. See CPL § 160.50(1)(d) (i)-(iv). The Plaintiff in the instant case does not fall into any of these categories, and therefore, does not have standing to request that the criminal records be unsealed.

5. Notably, too, there does not appear to be any basis for a civil court to order the unsealing of the records. An examination of Wilson v. City of New York, 240 A.D.2d 266 (1st Dept. 1997) is instructive on this issue. In that case, the administratrix brought a wrongful death action against the City based on the death of the decedent as a result of injuries he received during an altercation with corrections officers while incarcerated at Rikers Island. The prosecution against the corrections officers resulted in an acquittal, with a subsequent sealing of the files pursuant to CPL § 160.50. The administratrix sought, and the civil trial court granted, an unsealing of the files for the purpose of the civil suit. The Appellate Division, First Department, reversed, finding no basis for the unsealing order. First, the Court noted:

CPL § 160.50 employs "mandatory language" (Matter of Joseph M. v. New York City Bd. of Educ., 82 NY2d 128, 133) to require the sealing of the records of criminal proceedings that terminated in favor of the accused, absent narrowly defined exceptions. Plaintiff was not the defendant in the

criminal proceeding and, hence, is not a party protected by the privilege, nor is he one of the persons or institutions to which the statutory exceptions, allowing for an unsealing order, pertain to [CPL § 160.50(1)(d) (i)-(iv)].

Id. at 267. The Appellate Division went on to find that the “motion court lacked statutory authority to unseal the records,” since under CPL § 160.50(1), only the criminal court which supervised the proceeding could unseal the records, and only if it did so “in the interest of justice.” In addition, the Appellate Division found that the civil motion court “did not fit within the narrow exception conferring unique inherent authority over the records of an original proceeding, which has been limited to the Appellate Division in connection with attorney disciplinary proceedings, upon a showing of compelling need, or ‘extraordinary circumstances’” (citations omitted). Id. at 267-268. See also Matter of Joseph M. v. City of New York Bd. of Educ., at 134 (finding that the plain intention of the statutory scheme was “to establish” in unequivocal mandatory language, a general proscription against releasing sealed records and materials, subject only to a few narrow exceptions”).

6. The Defendant should not be entitled to disclosure of the sealed records. Moreover, under the provisions of CPL § 160.50, and as interpreted by the appellate courts of this State, it does not appear that this Court has the authority to order the unsealing of the records.

PRIVILEGED MATTER IS NOT DISCOVERABLE UNDER CPLR § 3101(b).

7. As a consequence of the sealing order, the NYPD is unable to review the specific documents which are the subject of the subpoena to determine if other privilege exists. The NYPD reserves the right to raise these objections should they arise.

8. The criminal investigation giving rise to this instant action involved an alleged sexual assault. Disclosure of materials relating to crimes of this nature is barred under Section 50-b of the Civil Rights Law (“CRL”). The NYPD has not received any written authorization from the Plaintiff indicating that she has willingly waived the privacy rights granted to victims of sex crimes through CRL Section 50-b.

9. While the NYPD has not been able to review the requested materials as a consequence of the sealing order, the likelihood exists that other witnesses or potential victims were interviewed as part of this investigation. The right of discovery to enable a party to obtain information essential for the prosecution of a civil action must be subordinated to the public interest privilege. Division of State Police v. Boehm, 71 A.D.2d 810 (N.Y. App. Div. 4th Dep't 1979); Jones v. State of New York, 58 AD2d 736(1979); Matter of Langert V. Tenney, 5 A.D.2d 586 (1958). The NYPD relies heavily on the public’s willingness to call and report crimes, and for witnesses to be forthcoming during the course of criminal investigations. An individual’s confidence that his anonymity will be preserved, absent some extraordinary circumstance, may be paramount to his decision to report a crime or provide information as a witness.

PLAINTIFF’S PROPOSED SUBPOENA IS OVERBROAD

10. The subpoena proposed by the plaintiff calls for the production of the “entire investigative file maintained and/or prepared by the NYPD”, as well as documents which are “not part of the “official” investigative file” such as “informal files and officer and/or detective desk files”. Additionally, paragraph number 4 of the proposed subpoena appears to call for all physical evidence collected during the investigation, including those containing defendant’s DNA to be delivered to Plaintiff’s attorneys’ office.

11. A request for unfettered access to the file of a non-party Police Department is manifestly overbroad. See, e.g., Oak Beach Inn Corp. et al. v. Town of Babylon, 239 A.D.2d 568 (2nd Dept. 1997). Furthermore, the request to have physical evidence delivered to Plaintiff's attorneys' office is patently absurd. The risk of the evidence being destroyed, manipulated, lost or otherwise compromised is much too great to be considered reasonable.

12. Paragraph numbers 5 and 6 of the proposed subpoena call for the production of all documents provided to the Defendant and/or his attorneys, while paragraph numbers 7 and 8 of the proposed subpoena call for the production of all documents provided by the NYPD to other parties in response to any subpoena. Documents provided to a party in the action should be obtained directly from that party, in this case the Defendant, rather than the non-party NYPD. Plaintiff's demand regarding documents provided to other parties pursuant to subpoenas is unnecessarily vague and overbroad. It is not the responsibility of a non-party to cross-reference and investigate multiple cases and their document demands. Documents provided pursuant to subpoenas in other actions could possibly be privileged, sealed, confidential, or otherwise not discoverable in the immediate action.

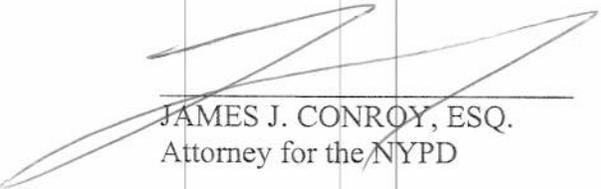
13. Plaintiff also seeks "all communications" between the NYPD and the Defendant, his attorneys, and the New York County District Attorney's Office, as well as all documents and/or communications concerning statements made to the press and/or media concerning the Defendant and/or the events that led to Defendant's arrest. These demands, too, are overbroad, potentially privileged, and could be obtained from other sources.

14. Courts have imposed limitations on the use of subpoena power. In fact, the Court of Appeals has held that the Family Court (and the Appellate Division) abused its discretion by

denying a motion to quash a subpoena duces tecum, where the Court found it improper for the defendant to "use the procedural mechanism of a subpoena duces tecum to expand the discovery available under existing law." Matter of Terry D., 81 N.Y.2d 1042 (1993). See also, Matter of Constantine v. Leto, 77 N.Y.2d 975 (1992); People v. Gissendanner, 48 N.Y.2d 543 (1973). Plaintiff's overly broad request is an obvious attempt to utilize the Court's subpoena power to expand the bounds of permissible discovery.

WHEREFORE, the Police Department respectfully requests that the Defendant's motion be denied, and/or any other relief the Court may deem just and proper.

DATED: New York, New York
June 11, 2012



JAMES J. CONROY, ESQ.
Attorney for the NYPD

EXHIBIT A

APPENDIX A

DEFINITIONS

1. **"Plaintiff"** or **"Ms. Diallo"** refers to Plaintiff Nafissatou Diallo.
2. **"Defendant"** or **"Defendant Strauss-Kahn"** refers to Defendant Dominique Strauss-Kahn.
3. The term **"NYPD"** refers to the New York Police Department, and includes each of the New York Police Department's officers, employees, attorneys, agents, predecessors, successors, subsidiaries, and affiliates (including any employees, officers, directors of such partners, corporate parent(s), predecessors, successors, subsidiaries and/or affiliates).
4. **"Person"** means any natural person, business, legal or governmental association or entity.
5. The terms **"record"** or **"records"** **"document"** or **"documents"** shall mean any written, recorded, filmed or graphic matter, or electronically stored in formation, whether produced, reproduced or on paper, cards, tapes, film, electronic facsimile, computer storage devices or any other media, including, but not limited to, memoranda, notes, minutes, records, e-mails, voicemails, instant messages, text messages, blackberry messages, photographs, correspondence, telegrams, diaries, bookkeeping entries, telephone logs, financial statements, tax returns, checks, check stubs, bank records, pay stubs, reports, studies, charts, graphs, statements, notebooks, handwritten notes, applications, contracts, agreements, books, pamphlets, periodicals, appointment calendars, records and recordings of oral conversations, work papers, and also including, but not limited to, originals and all copies which are different in any way from the original whether by interlineation, receipt stamp, notation, indication of copies sent or received, or otherwise, and drafts, which are in NYPD's possession, custody or control, or in the possession, custody or control of NYPD's present or former agents, representatives, attorneys, physicians or other health care professionals, or any and all persons acting on their or NYPD's behalf, including documents at any time in the possession, custody or control of such individuals or entities or known by NYPD to exist.
6. **"Concerning"** means relating to, referring to, describing, evidencing, constituting, supporting or contradicting, in whole or in part.
7. **"Including"** shall mean including without limitation.
8. When referring to documents, **"to identify"** means to give, to the extent known, the (i) type of document; (ii) general subject matter; (iii) date of the document; and (iv) author(s), addressee(s), and recipient(s).
9. When referring to a person, **"to identify"** means to give, to the extent known, the person's full name, present or last known address, and telephone number, and when referring to a natural person, additionally, the present or last known place of employment.

10. "All" and "Each" shall be construed as all and each, respectively.
11. "And" and "Or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the discovery request all responses that might otherwise be construed to be outside of its scope.
12. The use of any singular form of any word includes the plural and vice versa.

INSTRUCTIONS

1. The following Requests constitute a continuing demand for production of documents and information to the fullest extent permitted by law. Accordingly, if at some point after the service of these Requests, NYPD or anyone acting on its behalf obtains or becomes aware of additional documents pertaining to these Requests, or a document is located or is created which is responsive to one of the Requests herein, NYPD is required to provide any such additional document(s) by way of supplemental responses. Such supplemental responses are to be served upon Plaintiff within twenty (20) days after NYPD becomes aware of any such document(s).
2. In responding to these Requests, NYPD must furnish all documents which are available, including documents in the possession, custody, or control of NYPD's attorneys, investigators, or anyone else acting for or on NYPD's behalf, and not merely those documents held by NYPD. If NYPD is unaware of the existence of any documents responsive to a Request contained herein, NYPD should expressly so indicate, answer to the extent possible and identify any person(s) who may have additional documents to complete the response.
3. Each Request shall be responded to fully, unless, it is in good faith objected to, in which event the reasons for the objections shall be stated with specificity. If an objection pertains to only a portion of a Request, or to a word, phrase or clause contained therein, NYPD shall state its objection to that portion only and respond to the remainder of the Request.
4. The original or one copy of each document is requested to be produced. Any copy of a document that varies in any way from the original or from any other copy of the document, whether by reason of handwritten or other notation or any omission, shall constitute a separate document and must be produced.
5. Documents shall be produced as they are kept in the ordinary course of business. All documents that are physically attached to each other when located for production shall be left so attached. Documents that are segregated or separated from other documents, whether by use of binders, files, sub-files, or by dividers, tabs, or any other method, shall be left so segregated or separated. All labels or markings on any such binders, files, sub-files, dividers, tabs, or folders shall be produced.
6. If any document is withheld from production on the alleged grounds of privilege and/or the attorney work product doctrine, NYPD shall identify each such document with a

sufficient description to enable the Court to rule on the validity of the claim of privilege and/or attorney work product doctrine, which includes at least the following information:

- (a) the name and address of the person(s) who possess or control the document and each copy of the document;
- (b) the name of the author of the document;
- (c) the name of the sender of the document if different from the author;
- (d) the name of the person(s) to whom copies were sent or otherwise made available;
- (e) the name of any person(s) known to have seen or have possession of a copy of the document if not identified above;
- (f) the business affiliation and job title of every person named in (a), (b), (c), (d) and (e) above;
- (g) the date of the document;
- (h) a brief description of the nature (e.g., letter, memorandum) and subject matter of the document; and
- (i) the basis for withholding the document.

7. If any document that would have been responsive to these Requests has been destroyed or is no longer in NYPD's possession, custody or control, provide the following information:

- (a) the date of the document;
- (b) the names and job titles of the preparer(s), sender(s), and recipient(s) of the documents;
- (c) the date of and the identity of the person responsible for its destruction, loss, transfer, or other act or omission by which the document left NYPD's possession, custody, or control; and
- (d) the circumstances surrounding the loss of the document or the reason for its destruction.

APPENDIX B

DOCUMENTS TO PRODUCE

1. The entire investigative file maintained and/or prepared by the NYPD concerning the investigation regarding the criminal charges against Defendant Strauss-Kahn, including but not limited to, all officer memo books, Form DD-5's, reports, memoranda, and notes.
2. All documents concerning the investigation regarding the criminal charges against Defendant Strauss-Kahn that is not part of the "official" investigative file, including but not limited to informal files and officer and/or detective desk files.
3. All documents concerning the identity of each and every officer and detective involved in and/or assigned to the investigation regarding the criminal charges against Defendant Strauss-Kahn.
4. All evidence collected and/or obtained relating to the criminal charges against Defendant Strauss-Kahn, including, but not limited to, any items recovered from Room 2806 of the Hotel Sofitel New York located at 45 West 44th Street, New York, New York 10036, (The "Sofitel"), any items containing Defendant Strauss-Kahn's DNA and any items seized from Ms. Diallo, including her work uniform dress, pantyhose, and panties.
5. All documents provided to Defendant Strauss-Kahn, Defendant Strauss-Kahn's attorneys or affiliates, and/or the New York County District Attorney's Office regarding the criminal charges against Defendant Strauss-Kahn.
6. All documents provided to Defendant Strauss-Kahn, and/or Defendant Strauss-Kahn's attorneys or affiliates regarding Plaintiff's civil case against Defendant Strauss-Kahn.
7. All documents produced by the NYPD in response to any subpoena in connection with the criminal charges against Defendant Strauss-Kahn.
8. All documents produced by the NYPD in response to any subpoena in connection with Plaintiff's civil case against Defendant Strauss-Kahn.
9. All communications between the NYPD and Defendant Strauss-Kahn, Defendant Strauss-Kahn's attorneys or affiliates, and/or the New York County District Attorney's Office regarding Defendant Strauss-Kahn.
10. Any notes and/or reports prepared by the officers or detectives who responded to the Sofitel on May 14, 2011 and interviewed Ms. Diallo.
11. All documents concerning any statements made by the NYPD to the press and/or media, whether on or off "the record," and/or communications between the NYPD and the press and/or media, whether on or off "the record," concerning Defendant Strauss-Kahn, Plaintiff and/or the events that took place in Room 2806 on May 14, 2011 that led to Defendant Strauss-Kahn's arrest.

