

**Matter of Majuc v New York County Dist. Attorney's  
Off.**

2019 NY Slip Op 33696(U)

December 16, 2019

Supreme Court, New York County

Docket Number: 160988/2017

Judge: John J. Kelley

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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. JOHN J. KELLEY** PART IAS MOTION 56EFM

*Justice*

-----X

INDEX NO. 160988/2017

In the Matter of

MOTION DATE 09/17/2019

JOHNMARK MAJUC,

MOTION SEQ. NO. 001

Petitioner,

- v -

NEW YORK COUNTY DISTRICT ATTORNEY'S OFFICE  
and CYRUS R. VANCE, JR., IN HIS OFFICIAL CAPACITY  
AS THE DISTRICT ATTORNEY OF NEW YORK COUNTY

**DECISION + ORDER ON  
MOTION**

Respondent.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 28, 32, 35, 36

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER)

**I. INTRODUCTION**

In this proceeding pursuant to CPLR article 78, the petitioner seeks judicial review of an August 17, 2017 New York County District Attorney's Office (DA) determination denying his administrative appeal of an initial determination rejecting his request for agency records pursuant to the Freedom of Information Law (Public Officers Law § 84, *et seq.*; hereinafter FOIL). In that March 2, 2017 request, the petitioner had requested "documents under the Freedom of Information Law arising from [the DA's] investigation" of French bank BNP Paribas, S.A. (BNPP) "for [its] role in processing financial transactions for the [Government of Sudan]." The petitioner asserted that he and others are in the process of prosecuting a civil action against BNPP in the United States District Court for the Southern District of New York to recover for violations of federal and international law prohibiting the provision of financial assistance to terrorist organizations and the evasion of U.S. sanctions imposed upon Sudan (*see Kashef v*

*BNP Paribas, S.A.*, 925 F3d 53 [2d Cir 2019]). They allege that they or their families were wounded, kidnapped, or killed by the Janjaweed Militia that was supported by the Sudanese government, both of which received financial assistance from BNPP; they further allege that the DA prosecuted BNPP criminally for the same conduct, and successfully secured a plea of guilty in 2014, resulting in a conviction in 2015, pursuant to which that bank agreed to pay a record \$9 billion fine (*see id.* at 56).

The DA answered the petition in this proceeding, and filed the administrative record, explaining that it reviewed thousands of pages of documents, many of which it claimed fell within several exemptions from disclosure set forth in FOIL. During the pendency of the proceeding, the court requested the DA to provide it with exemplars of the documents that would fall into the exempt categories. The DA provided the court with a CD-R containing those exemplars, and the court reviewed them. Thereafter, the court conducted an in camera review session with the attorneys for the DA, at which they were asked to explain the factual basis for several of the DA's legal claims. The court concludes that numerous categories of documents are indeed exempt from disclosure under FOIL. It thus grants the petition only to the extent of directing the DA to produce documents constituting or containing "raw data," as will be defined herein, unless otherwise exempt from disclosure under FOIL by virtue the law enforcement, grand jury, attorney-client privilege, attorney work product, and trade secret exceptions to that statute. To that end, the court directs the DA to submit those documents constituting or containing "raw data" to a referee, who is directed to hear and report on the issue of whether those documents are otherwise exempt from disclosure pursuant to the law enforcement, grand jury, attorney-client privilege, and attorney work product, and trade secret exceptions.

## II. BACKGROUND

Although the petitioner limited his initial FOIL request to several identified categories, the DA denied the request in its entirety, citing several reasons, including the extremely large size of

the requested documentation, consisting of thousands of pages of documents, and the petitioner's alleged failure reasonably to describe the records that he sought. The DA also asserted that matters relating to its investigation against BNPP were ongoing despite the 2014 plea agreement, and therefore were not only subject to the law-enforcement exception, but would reveal sensitive law-enforcement techniques; it further argued that the DA's office obtained many of the records from French law-enforcement authorities through a multilateral law enforcement treaty between France and the United States that requires documents to be kept confidential where, as here, the providing party requests confidentiality. The DA further asserted that the records contained confidential personal information, such as banking records of individuals and businesses who are not related to the prosecution of BNPP, and that BNPP allegedly provided several documents to the DA on the basis that they would be exempted from disclosure on the ground that they were trade secrets or needed to be kept confidential for other reasons. The DA also argues that the records contain documents subject to attorney-client and attorney work-product privilege.

On April 19, 2017, the petitioner administratively appealed the DA's initial rejection to the DA's records access appeals officer, asserting that the DA cannot reject a FOIL request simply because the request would be burdensome or the document production would be too voluminous, that the agreement between the DA and BNPP to keep BNPP's documents confidential was not enforceable, and that the DA could not categorically deny FOIL requests.

On August 17, 2017, Susan Roque, Assistant District Attorney of the Special Litigation Bureau, denied the petitioner's administrative appeal. Roque concluded that the documents sought were provided to the DA under the condition that they remain confidential and used only for the DA's investigation. In addition, Roque claimed that the request failed specifically to describe the records sought, despite the petitioner's attempts to narrow the scope of the request. Further, Roque stated that the investigation of BNPP was ongoing and, therefore,

disclosing these documents could have a prejudicial effect on law enforcement matters. This CPLR article 78 proceeding ensued.

As a general rule, “if the court is unable to determine whether withheld documents fall squarely within the scope of the asserted exemption, it should conduct an in camera inspection of representative documents and order disclosure of all nonexempt, appropriately redacted material” (*Matter of Gould v New York City Police Dept.*, 89 NY2d 267, 275 [1996]). Here, although some records are clearly exempt from disclosure, others described by the DA presented a closer issue. Hence, an in camera inspection of representative documents was warranted. On May 6, 2019, upon the court’s request, the DA provided this court with exemplars of documents to review in camera. With the consultation of the petitioner’s attorneys, the DA identified 100 documents, totaling 17,390 pages, from the original search results. In addition, the DA provided the 56 documents that had been employed for the Factual Statement attached to the June 29, 2014 plea deal with BNPP, which came to an additional 399 pages. On August 13, 2019, counsel for the DA appeared in court, on the consent of the petitioner, to explain in camera as to whether and why there were ongoing law enforcement proceedings and whether French authorities requested confidentiality with respect to documents that it provided pursuant to treaty.

### III. DISCUSSION

“While the Legislature established a general policy of disclosure by enacting the Freedom of Information Law, it nevertheless recognized a legitimate [governmental need] to keep some matters confidential” (*Matter of Fink v Lefkowitz*, 47 NY2d 567, 571 [1979]). When denying a FOIL request, a state or municipal agency must “state, in writing, the reason for the denial of access” (*Matter of West Harlem Bus. Group v Empire State Dev. Corp.*, 13 NY3d 882, 884 [2009]). If the requesting party administratively appeals the denial, the agency’s appeals officer must also provide written reasoning for upholding the denial (*see id.*).

“[O]n the issue of whether a particular document is exempt from disclosure under the Freedom of Information Law, the oft-stated standard of review in CPLR article 78 proceedings, i.e., that the agency’s determination will not be set aside unless arbitrary or capricious or without rational basis, is not applicable” (*Matter of Capital Newspapers Div. of Hearst Corp. v Burns*, 109 AD2d 92, 94 [3rd Dept. 1985], *affd* 67 NY2d 562 [1986]; *see Matter of Prall v New York City Dept. of Corrections*, 129 AD3d 734 [2d Dept 2015]; *Matter of New York Comm. for Occupational Safety & Health v Bloomberg*, 72 AD3d 153 [1st Dept 2010]). Rather, upon judicial review of an agency’s determination to deny a FOIL request, the court must assess whether “the requested material falls squarely within a FOIL exemption” and whether the agency, upon denying such access, “articulat[ed] a particularized and specific justification for denying access” (*Matter of Capital Newspapers Div. of Hearst Corp. v Burns*, 67 NY2d at 566). In other words, the court may only review an agency’s FOIL determination to ascertain whether the determination to invoke a particular statutory exemption was affected by an error of law (*see Matter of Abdur-Rashid v New York City Police Dept.*, 31 NY3d 217, 246 & n 2 [2018], *affg* 140 AD3d 419, 420-421 [1st Dept 2016]; CPLR 7803[3]).

#### 1. Motive or Purpose of Request

The court first notes that the petitioner seeks the subject documents for use in a pending federal court action. FOIL does not require the party requesting the information to show any particular need or purpose (*see Matter Daily Gazette Co. v City of Schenectady*, 93 NY2d 145, 156 [1999]; *Matter of M. Farbman & Sons, Inc. v New York City Health & Hosps. Corp.*, 62 NY2d 75, 80 [1984]). Nonetheless, “the Freedom of Information Law ‘was not designed to benefit litigants,’ nor was its purpose ‘to ease the research burden of private litigants’” (*John T. Brady & Co. v City of New York*, 84 AD2d 113, 115 [1st Dept 1982], quoting *Matter of D’Alessandro v Unemployment Ins. Appeal Bd.*, 56 AD2d 762, 763 [1st Dept 1977]). To some degree, the petitioner “has not shown that his request is anything other than an ill-advised

shortcut to . . . the discovery procedures” of the Federal Rules of Civil Procedure (*Matter of Arzuaga v New York City Tr. Auth.*, 73 AD2d 518, 519 [1st Dept 1979]). That said, “FOIL’s mandate of open disclosure requires that an agency’s public records remain as available to its litigation adversary as to any other person” (*Matter of M. Farbman & Sons, Inc. v New York City Health & Hosps. Corp.*, 62 NY2d at 81).

“In the absence of indication from the Legislature, [a court may not] read into FOIL the restriction that, once litigation commences, a party forfeits the rights available to all other members of the public and is confined to discovery in accordance with article 31. If the Legislature had intended to exempt agencies involved in litigation from FOIL, it certainly could have so provided” (*id.*)

Thus, although the court is cognizant that the petitioner may be able to obtain some of the same documentation via discovery requests in his pending federal action, he is not precluded from seeking them pursuant to FOIL. The court nonetheless strongly advises the petitioner to seek nonparty disclosure through the normal discovery provisions of the Federal Rules of Civil Procedure, as those rules do not contain many of the restrictions or exemptions set forth in FOIL.

## 2. Size of Files Containing Responsive Documents

There is no merit to the DA’s contention that it was exempt from producing the requested records because the request was too voluminous or burdensome. Although an agency is not obligated by FOIL to create any new record, “[a]ny programming necessary to retrieve a record maintained in a computer storage system and to transfer that record to the medium requested by a person or to allow the transferred record to be read or printed shall not be deemed to be the preparation or creation of a new record” (Public Officers Law § 89[3][a]). Crucially,

“[a]n agency shall not deny a request on the basis that the request is voluminous or that locating or reviewing the requested records or providing the requested copies is burdensome because the agency lacks sufficient staffing or on any other basis if the agency may engage an outside professional service to provide copying, programming or other services required to provide the copy” (Public Officers Law § 89[3][a]).”

“Moreover, an agency may recover the costs of engaging an outside service from the person or entity making such a request” (*Matter of County of Suffolk v Long Is. Power Auth.*, 119 AD3d 940, 942 [2d Dept 2014]; see *Matter of New York Comm. for Occupational Safety & Health v Bloomberg*, 72 AD3d 153, 161-162 [1st Dept 2010]).

In light of the seeming ease with which the DA was able to provide a significant number of exemplars of categories of documents to the court for in camera review, the DA has failed to establish that a response to the petitioner’s request could not be satisfied either by employees of the DA’s office or by engaging an outside service.

### 3. Ongoing Law-Enforcement Investigations and Law-Enforcement Techniques

Under Public Officers Law § 87(2)(e), documents exempted from FOIL include documents that

“are compiled for law enforcement purposes and which, if disclosed, would: (i) interfere with law enforcement investigations or judicial proceedings; (ii) deprive a person of a right to a fair trial or impartial adjudication; (iii) identify a confidential source or disclose confidential information relating to a criminal investigation; or (iv) reveal criminal investigative techniques or procedures, except routine techniques and procedures.”

The prevention of such interference requires that “violators of the law not be apprised of the nonroutine procedures by which an agency obtains its information” (*Matter of Fink v Lefkowitz*, 47 NY2d 567, 572 [1979]). Moreover, “the purpose of the Freedom of Information Law is not to enable persons to use agency records to frustrate pending or threatened investigations nor to use that information to construct a defense to impede a prosecution” (*id.*). The DA has made at least an initial showing that many of “the records withheld were compiled for law-enforcement purposes” (*Matter of Free Market Env’tl. Law Clinic v Attorney Genl. of N.Y.*, 159 AD3d 467 [1st Dept 2018]; see *Matter of Leshner v Hynes*, 19 NY3d 57 [2012]; *Matter of Loevy & Loevy v New York City Police Dept.*, 139 AD3d 598 [1st Dept 2016]). The DA has broad investigatory powers (see *People v Grasso*, 54 AD3d 180 [1st Dept 2008]). Consequently, it would be an improvident

exercise of discretion to question “what extent [the] respondent’s decision to initiate the investigation” to which the requested documents are related “was motivated by political considerations” (*Matter of Free Market Env’tl. Law Clinic v Attorney Genl. of N. Y.*, 159 AD3d at 468; see *Salnikova v Cuomo*, 93 AD3d 445 [1st Dept 2012]). This statutory justification for withholding the documents is valid even where, as here, the requesting party seeks to support the investigation and prosecution of the DA’s target rather than to impede it.

The law enforcement exemption may be invoked in a broad fashion, without the need of demonstrating “a specific, factually based explanation . . . as to why [a] document, in whole or in part, is exempt from disclosure” (*Matter of Legal Aid Socy. v New York City Police Dept.*, 274 AD2d 207, 214 [1st Dept 2000]).

The DA alleges that, even though the criminal proceeding against PNBB was essentially terminated with its 2014 plea agreement, information contained within a significant number of the documents would interfere with ongoing law enforcement investigations and would reveal specialized criminal investigative techniques and procedures involving international financial crimes. During an in camera appearance, the DA satisfied the court that certain substantive documents otherwise responsive to the FOIL request may interfere with ongoing law enforcement investigations and, therefore, these documents must not be released.

During that in camera review, the court also noted, however, that many of the documents contain raw data---specifically, banking transaction records---and others contain related email messages unrelated to law enforcement activities against PNBB. These documents do not reveal specialized law enforcement techniques. Thus, these documents are not exempt from disclosure under Public Officers Law § 87(2)(e) and must be disclosed unless they are exempt under other provisions of FOIL.

#### 4. Law Enforcement: Mutual Legal Assistance Treaty

Under Public Officers Law § 87(2)(a), records must be withheld that “are specifically exempted from disclosure by state or federal statute.” “Under Article VI, Clause 2 of the Constitution, a treaty [duly] ratified has equal status to an act of Congress. That is, a treaty is law of the United States” (*Igartua-de la Rosa v United States*, 417 F3d 145, 173 [1st Cir 2005]). In Article 14 of the Treaty with France on Mutual Legal Assistance in Criminal Matters, 1998 UST 202 (hereinafter the France MLAT), the country providing legal assistance may request that documents provided pursuant to the France MLAT be kept confidential. In this matter, the DA has informed the court that the relevant law enforcement authorities of the French Republic requested that any documents that they have provided to United States and New York investigators with respect to BNPP remain confidential. Documents identified as “BNPP-PAR-MLAT” were procured via the France MLAT and, therefore, are exempt from production.

#### 5. Law Enforcement: Grand Jury Minutes and Records

Grand jury minutes are exempt from disclosure pursuant to CPL 190.25(4)(a), and may only be unsealed upon a showing of a “compelling and particularized need” for access to them, (*People v Robinson*, 98 NY2d 755, 756 [2002]; *Matter of District Atty. of Suffolk County*, 58 NY2d 437, 444 [1986]; *Matter of James v Donovan*, 130 AD3d 1032, 1037 [2d Dept 2015]; *Melendez v City of New York*, 119 AD2d 13, 17 [1st Dept 1985]). The desire to employ the minutes as evidence in a civil action does not constitute such a need (*see Matter of District Atty. of Suffolk County*, 58 NY2d 437, 444 [1986] [even though a county legislature authorized the commencement of a civil action, the district attorney of that county was not permitted to unseal otherwise relevant grand jury minutes in aid of the county’s civil action]). Since the petitioner has made no showing of a compelling and particularized need for the grand jury minutes, to the extent he seeks such minutes, his request for production should be denied.

Nonetheless, a different rule applies to documents for which an exemption from disclosure is claimed because they were subpoenaed for grand jury presentation. Although certain documents subpoenaed as exhibits to be presented to a grand jury may be exempt from disclosure under freedom of information statutes (*see Germosen v Cox*, 1999 US Dist LEXIS 17400, \*40-41, 1999 WL 1021559, \*13 [SD NY, Oct. 29, 1999, 98 Civ 1294 (BSJ)]), there is no “blanket rule that all documents produced in response to a grand jury subpoena are exempt”; rather, “the exemption applies to documents that would reveal the direction and strategy of an investigation, the identity of grand jury witnesses or other secret aspects of the proceedings” (*Matter of New York Times Co. v New York State Exec. Chamber*, 57 Misc 3d 405, 425 [Sup Ct, Albany County 2017]). As with the law enforcement exemption, to the extent that “raw data” banking records involving relevant transactions were subpoenaed before the grand jury convened to consider criminal charges against PNBB, these would not be exempt from disclosure pursuant to FOIL unless they were subject to another, different exemption.

#### 6. Attorney-Client Privilege

Another category of documents that “are specifically exempted from disclosure by state or federal statute” are confidential communications between an attorney or attorneys and their client or clients. Pursuant to CPLR 4503, such confidential communications are considered privileged and, therefore, exempt from disclosure. There are numerous documents in the DA’s possession that constitute communications between clients and their attorneys for which the attorney-client privilege was not waived by the plea agreement. These documents are thus exempt from disclosure.

#### 7. Attorney Work-Product

CPLR 3101(c) prohibits the disclosure of an attorney’s work product. The DA’s office asserted that calendar notes, data sheets, internal memos, interview notes, trial preparation

notes, and the like were exempt from disclosure under FOIL by virtue of constituting attorneys' work product. The court agrees (*see Matter of Woods v Kings County Dist. Attys. Off.*, 234 AD2d 554, 556 [2d Dept 1996]).

The United States Supreme Court has held that the phrase "work product" embraces such items as "interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs" conducted, prepared or held by the attorney" (*Kenford Co. v County of Erie*, 55 AD2d 466, 470 [4th Dept 1977], quoting *Hickman v Taylor*, 329 US 495, 511 [1947]; *see Central Buffalo Project Corp. v Rainbow Salads*, 140 AD2d 943 [4th Dept 1988]).

Nonetheless,

"[n]ot every manifestation of a lawyer's labors enjoys the absolute immunity of work product. The exemption should be limited to those materials which are uniquely the product of a lawyer's learning and professional skills, such as materials which reflect his [or her] legal research, analysis, conclusions, legal theory or strategy"

(*Hoffman v Ro-San Manor*, 73 AD2d 207, 211 [1st Dept 1980]). While the privilege

"extends to experts retained as consultants to assist in analyzing or preparing the case . . . that doctrine affords protection only to facts and observations disclosed by the attorney. Thus, it is the information and observations of the attorney that are conveyed to the expert which may thus be subject to trial exclusion. The work product doctrine does not operate to insulate other disclosed information from public exposure"

(*Beach v Touradji Capital Mgt., L.P.*, 99 AD3d 167, 170 [1st Dept 2012] [citations and internal quotation marks omitted]).

Thus, "the mere fact that a narrative witness statement is transcribed by an attorney is not sufficient to render the statement work product," particularly where a lay person could have transcribed the statement (*People v Kozlowski*, 11 NY3d 223, 245 [2008]; *see People v Consolazio*, 40 NY2d 446 [1976]). Similarly,

"an investigative report does not become privileged merely because it was sent to an attorney. Nor is such a report privileged merely because an investigation was conducted by an attorney; a lawyer's communication is not cloaked with privilege when the lawyer is hired for business or personal advice, or to do the work of a nonlawyer"

(*Spectrum Sys. Intl. Corp. v Chem. Bank*, 78 NY2d 371, 379 (1991); see *People v Belge*, 59 AD2d 307 [4th Dept 1977]). Nor are an investigator's notes protected by the work-product privilege where there is no evidence that the investigator conducted any interviews with persons in anticipation of litigation (see CPLR 3101[d]; *State of N.Y. ex rel. Murray v Baumslag*, 134 AD3d 451 [1st Dept 2015]). Although information received by an attorney from third persons may not itself be privileged,

“a lawyer's communication to a client that includes such information in its legal analysis and advice may stand on different footing. The critical inquiry is whether, viewing the lawyer's communication in its full content and context, it was made in order to render legal advice or services to the client”

(*Spectrum Sys. Intl. Corp. v Chem. Bank*, 78 NY2d at 379).

The DA's calendar notes, data sheets, internal memos, interview notes, trial preparation notes, and similar memoranda are clearly attorney work product. Here, moreover, many of the documents that might otherwise fall outside of the definition of attorney work-product are exempt from disclosure because they constituted materials prepared by and for law-enforcement officials for law-enforcement purposes; would reveal the identity of grand jury witnesses; and, would violate the terms of the France MLAT if disclosed.

#### 8. Trade-Secret Exception

Under Public Officers Law § 87(2)(d), documents exempted from FOIL include documents that “are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise.” In *Matter of Markowitz v Serio* (11 NY3d 43 [2007]), the Court of Appeals stated that, when claiming an exemption under Section 87(2)(d), a respondent's obligation to articulate a particularized and specific justification for denying access by presenting “specific, persuasive evidence that disclosure will cause it to suffer a competitive injury; it cannot merely rest on a speculative

conclusion that disclosure might potentially cause harm” (*id.* at 51). In this case, the DA has failed to provide specific and persuasive evidence that disclosing any information in its possession will cause competitive injury to PNBB or any other bank. Based on the sample provided for in camera review, the court notes that the relevant documents concern BNPP’s regulatory compliance practices, as well as network and information technology infrastructure from the mid-2000s. Disclosing compliance practices generally would not create a competitive injury (*see generally Matter of Markowitz v Serio*, 11 NY3d 43 [2007]). Although disclosure of information concerning BNPP’s network and IT infrastructure from 10 to 15 years ago would not seem to implicate the disclosure of trade secrets, the court will allow the DA to make any applicable showing to the referee appointed to hear and report; the DA must make a specific and particularized showing as to how the disclosure of any document constituting or containing “raw data” might reveal a particular trade secret.

#### 9. Confidentiality Agreements and Privacy Concerns

“Promises of confidentiality” that were made by the DA “do not affect the status of documents as records, neither do they affect the applicability of any exemption” (*Matter of Washington Post Co. v New York State Ins. Dept.*, 61 NY2d 557, 567 [1984]).

“As originally enacted, FOIL contained an exemption for records ‘confidentially disclosed to an agency and compiled and maintained for the regulation of commercial enterprise, including trade secrets’ (L 1974, ch 578; Public Officers Law, former § 88, subd 6, par b). When the statute was amended this provision was deleted. Thus, respondent had no authority to use its label of confidentiality to prevent disclosure”

(*Id.*).

#### IV. CONCLUSION

Although, as set forth above, many of the FOIL exemptions claimed by the DA are inapplicable, it is clear from the in camera review of document exemplars and the in camera

questioning of the DA's representatives that the only category of documents that is required to be disclosed is "raw data," defined herein as documents constituting memoranda, bank statements, account statements, ledgers, and requests, including routing requests, or receipts referring to or reflecting banking and financial transactions amongst PNBB, the Government of Sudan, and the Janjaweed Militia, or any of their affiliates, directors, officers, agents, and representatives, or between PNBB and other banks to facilitate financial transactions involving Sudan and the Janjaweed Militia, as well as any documents reflecting or referring to consequent commercial transactions involving the purchase of weaponry or other items for tactical and strategic support, including propaganda, information, and contacts with other governments or militias. Most of these documents would be in the form of account statements, transaction statements, directions, including routing directions, or receipts, as well as emails and other communications directing, discussing, or confirming such transactions.

Any document that has been marked "MLAT" by the DA to reflect that it was obtained from France under that treaty need not be produced, even if it would otherwise constitute or contain "raw data," and such documents will not be deemed to constitute or contain "raw data." Inasmuch as the actual prosecution against PNBB was completed five years ago, release of any other "raw data" will not likely interfere with law enforcement activities against other banks. Nonetheless, to the extent that the release of that documentation might present interference with law enforcement activities against other banks, and because even those documents constituting or containing such "raw data" might be exempt from disclosure under FOIL by virtue of the grand jury, attorney-client privilege, attorney work-product, and trade secret the court refers the matter to a referee to hear and report on the issue of whether those documents are exempt from disclosure by virtue of those exceptions, and directs the DA to provide such "raw data" documents to the referee in camera for his or her consideration of that issue, after it redacts any personal confidential information, such as taxpayer identification numbers, bank account numbers, addresses, and telephone numbers of persons and entities, and banking

records of persons and entities that were not involved with PNBB, Sudan, or the Janjaweed Militia.

Accordingly, it is,

ORDERED that the petition is granted to the extent that the respondents shall produce all documents in their possession constituting or containing "raw data," as described above, as well as a privilege log, to a referee for in camera review, who shall be appointed to hear and report in accordance herewith, and the petition is otherwise denied and the proceeding is otherwise dismissed; and it is further,

ORDERED that a Judicial Hearing Officer ("JHO") or Special Referee shall be designated to hear and report to this Court on the following individual issues of fact, which are hereby submitted to the JHO/Special Referee for such purpose: whether the respondents are in possession of agency records responsive to the petitioner's Freedom of Information Request that constitute or contain "raw data," as defined herein, and whether any of those records are exempt from disclosure under the Freedom of Information Law by virtue of (1) the law enforcement exemption for ongoing investigations and proceedings against persons or entities other than PNBB, (2) the law enforcement exemption for documents that would reveal sources and methods of investigating international financial crimes, (3) the fact that they constitute materials subpoenaed before a grand jury that would reveal the identities of witnesses or the strategy and direction of the prosecution of PNBB, (4) the fact that they constitute material involving privileged communications between an attorney and client or attorney work-product, and (5) the fact that they constitute trade secrets of PNBB; and it is further,

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119M, 646-386-3028 or [spref@nycourts.gov](mailto:spref@nycourts.gov)) for placement at the earliest possible date upon which the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh) at the

“References” link under “Courthouse Procedures”), shall assign this matter to an available JHO/Special Referee to hear and report as specified above; and it is further,

**ORDERED** that the petitioner shall immediately consult with counsel for the respondents, and the petitioner shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or email, an Information Sheet (which can be accessed at the “References” link on the court’s website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further,

**ORDERED** that the parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, with the disputed documents to be reviewed in camera by the referee, and shall be ready to proceed, on the date first fixed by the Special Referee Clerk subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that Part; and it is further,

**ORDERED** that the hearing will be conducted in the same manner as a trial before a Justice without a jury (CPLR 4320[a]) (the proceeding will be recorded by a court reporter, the rules of evidence apply, etc.) and, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issues specified above shall proceed from day to day until completion; and it is further,

**ORDERED** that any motion to confirm or disaffirm the Report of the JHO/Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts, and, upon disposition of that motion, the court shall enter a judgment finally disposing of this proceeding; and it is further,

**ORDERED** that the petitioner shall serve a copy of this order upon the respondents within 15 days of the entry of this order.

This constitutes the Decision and Order of the court.

12/16/2019  
DATE

  
JOHN J. KELLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: