| **Matter of Apotheker** |
| --- |
| 2020 NY Slip Op 31109(U) |
| April 30, 2020 |
| Supreme Court, New York County |
| Docket Number: 160936/2019 |
| Judge: George J. Silver |
| Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service. |
| This opinion is uncorrected and not selected for official publication. |

**SUPREME COURT OF THE STATE OF NEW YORK**
**COUNTY OF NEW YORK, PART 10**
----------------------------------------------------------------------X

**Index №. 160936/2019**

**In re the Application of Charles Apotheker and Gail S. Coleman for an Order Pursuant to C.P.L. §190.25(4) Directing Limited Disclosure of Portions of Transcripts and Other Records of the Grand Jury Investigation of Dr. Reginald MacGregor Archibald**
----------------------------------------------------------------------X

**HON. GEORGE J. SILVER:**

Petitioners Charles Apotheker ("Mr. Apotheker") and Gail S. Coleman ("Ms. Coleman") (collectively "petitioners") have commenced this CPLR Article 78 proceeding to challenge the New York County District Attorney Office's ("DANY") failure to unseal grand jury minutes in response to a Freedom of Information Law ("FOIL") request.

## BACKGROUND AND ARGUMENTS

Petitioners retained counsel following Governor Andrew Cuomo's signing of the Child Victims Act ("CVA"), a law that lengthens the statute of limitations for both criminal and civil prosecutions against those alleged to have sexually abused children. The CVA also revives civil claims that had lapsed under longstanding law, giving claimants one year from August 14, 2019 to bring those "revived" claims.

Prior to the CVA's enactment, Rockefeller University retained the law offices of Debevoise & Plimpton, LLP, to investigate allegations of child sex abuse against Reginald M. Archibald, M.D. ("Dr. Archibald"), a deceased former employee of Rockefeller University who allegedly abused petitioners and scores of other children. On May 23, 2019, Debevoise & Plimpton, LLP, issued a 27-page report (the "Rockefeller Report"), concluding that Dr. Archibald's sexual abuse of his child patients was "widespread," "pervasive," and well-established. As is relevant to the instant petition, the Rockefeller Report also revealed for the first time that there was a New York state grand jury investigation conducted by DANY that explored allegations of misconduct against Dr. Archibald in late 1960, some 60 years ago. In January 1961, the grand jury dismissed the matter without indicting Dr. Archibald.

The Rockefeller Report noted that Rockefeller University's then-president was aware of the investigation, but otherwise revealed very little information about the content of the grand jury investigation and found that neither the then-president nor any other witness was living or recalled the relevant events. Notably, Rockefeller University was unable to independently uncover pertinent information it provided to the grand jury, the specific misconduct in which Dr. Archibald allegedly engaged, and the possible penal law section, or sections, Dr. Archibald may have violated. The Rockefeller Report also noted a handful of subsequent individual patient complaints against Dr. Archibald that occurred in the 1970s and later.

Following receipt of the Rockefeller Report, on June 14, 2019, petitioners served a FOIL request on DANY seeking documents pertaining to Dr. Archibald. Pursuant to that request DANY searched its records in its closed cases unit, as well as records in the custody of the New York City Municipal Archives and the New York State Supreme Court. In a subsequent letter response, DANY revealed for the first time that the grand jury had investigated Dr. Archibald for a crime involving the sexual abuse of children. The letter went on to note that a New York Municipal Archives logbook entry divulged that on January 23, 1961, the grand jury dismissed case number 290/1961 concerning "Archibald, Penal Law 483." In 1960, Penal Law 483, in effect, criminalized child sex abuse.

The DANY letter further stated that all relevant records related to the investigation into Dr. Archibald are sealed pursuant to Criminal Procedure Law ("CPL") §160.50.[1] For that reason alone, DANY denied the FOIL request. However, DANY also said that on August 7, 2019, because of petitioners' request for these files, as well as well as requests of other law firms, it had applied to the New York State Supreme Court to unseal the relevant records for its own internal review. The New York State Supreme Court denied that request. DANY concluded that, "[i]n the absence of any unsealing order, [DANY] cannot provide you with any records."

Because the DANY Letter did not provide a copy of either DANY's application to the court for unsealing or the court's denial of the same, or otherwise explain the basis for the request or the denial, several follow-up letters were sent to DANY asking for copies of its application and the court's denial. On October 9, 2019, DANY denied that request, saying those documents were themselves under seal. With no other method available to obtain this information, petitioners commenced this proceeding to unseal portions of the grand jury record.

In support of the instant application, petitioners collectively assert that since they must prove that Rockefeller University negligently supervised Dr. Archibald and failed to protect them, the contents of the grand jury record would be the earliest and best evidence of Rockefeller University's notice of Dr. Archibald's alleged impropriety. To be sure, Mr. Apotheker specifically alleges that he was abused from approximately early 1960 to late 1962, a time frame that coincides with the disclosed grand jury investigation. Mr. Apotheker further contends that Rockefeller University's primary defense in this action will likely be that it was not aware of any allegations about Dr. Archibald's proclivity to sexually abuse children in 1960. Given that the Rockefeller Report revealed that the then-president of the hospital became aware of a grand jury investigation of Dr. Archibald concerning a complaint lodged by a child patient against him in 1960-1961, Mr. Apotheker argues that disclosure of the grand jury record is material to his case. Likewise, even though Ms. Coleman was allegedly abused during a later period, from approximately 1974 to 1976, Ms. Coleman still submits that full disclosure of the grand jury record is essential to proving her claims regarding Rockefeller University's knowledge of Dr. Archibald's alleged malfeasance. Finally, petitioners make a global claim, on behalf of similarly situated individuals who may have been abused by Dr. Archibald between the 1950s and 1990s, that disclosure of the grand jury

[1] This section of the CPL seals the record of criminal proceedings brought against an accused that are dismissed.

record is the surest way for all potential victims of Dr. Archibald to be apprised of Rockefeller University's alleged role in disregarding Dr. Archibald's alleged abuses.

## DISCUSSION

Judicial review of a determination of a body or officer is limited to whether the determination was made "in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion" (CPLR §7803[3]).

Materials pertaining to a grand jury proceeding are secret and not subject to disclosure under FOIL pursuant to Public Officers Law §87(2)(a) and CPL §190.25 (*see* CPL §190.25[4][a]["'Grand jury proceedings are secret"]; *People v Fetcho*, 91 NY2d 765 [1998]). Contrary to petitioners' assertions, grand jury testimony is not information that may be disclosed pursuant to FOIL (*Matter of Bridgewater v Johnson*, 44 AD3d 549 [1st Dept 2007]; *Matter of Hall v Bongiorno*, 305 AD2d 508 [2d Dept 2003]; *Matter of Mullgrav v Santucci*, 195 AD2d 786 [3d Dept 1993]; *Matter of Newton v District Attorney of Bronx County*, 186 AD2d 57 [1st Dept 1992]; Public Officers Law §87[2][a]). Public Officers Law §87(2)(a) provides that an agency may deny access to government records that are specifically exempted from disclosure by state or federal statute. Grand jury materials are indeed secret pursuant to CPL §190.25.

Furthermore, grand jury minutes are court records, not agency records, and are not available under FOIL (*see* Public Officers Law § 86[1] and [3]; *Matter of Newsday v Empire State Dev. Corp.*, 98 NY2d 359, 362 [2002] ["The judiciary and the State Legislature are expressly excluded under the agency definition" of FOIL]; *Matter of Bridgewater*, 44 AD3d at 550, *supra*; *Matter of Hall*, 305 AD2d at 509, *supra*; *Matter of Mullgrav*, 195 AD2d at 786, *supra*: Matter of Gibson v Grady, 192 AD2d 657 [2d Dept 1993]). Moreover, the same principle which renders the statements of non-testifying witnesses as confidential also extends to the names of those individuals (*Hall v. Bongiorno, et al*, 305 AD2d 508 [2d Dept. 2003] and *Brown v. New York City Police Department*, 264 AD2d 558 [1st Dept. 1999]). Similarly, the names of witnesses called to testify at trial but who did not testify remain confidential an exempt from FOIL disclosure.

However, the secrecy of grand jury proceedings is not absolute inasmuch as CPL §190.25(4)(a) permits disclosure of grand jury proceedings upon written court order. The decision to disclose rests in the trial judge's discretion. In exercising this discretion, the court must balance the competing interests involved – the public interest in disclosure balanced against that in secrecy (*People v. DiNapoli*, 27 NY2d 229, 235 [1970]; *see also Nelson v. Mollen* 175 AD2d 518, 520 [3d Dept. 1991]). "As a threshold matter, a party seeking disclosure of grand jury minutes must establish a compelling and particularized need for them" (*People v Robinson*, 98 NY2d 755, 756 [2002]). A mere showing of relevance is insufficient (*see Nelson*, 175 AD2d at 520, *supra*). Likewise, the desire to employ grand jury minutes as evidence in a civil action does not constitute such a need (*see Matter of District Attorney of Suffolk County*, 58 NY2d 436, 443 [1983][ even though a county legislature authorized the commencement of a certain civil action, the district attorney of that county was not permitted to unseal otherwise relevant grand jury minutes, since he did not make the necessary showing]). Moreover, "although 'the rule of secrecy is not absolute,' a presumption of confidentiality attaches to the record of grand jury proceedings'" (*see*

*People v. Fetcho*, 91 NY2d 765, 769 [1998] *quoting Matter of District Attorney of Suffolk County*, 58 NY2d at 443, *supra*). In order to overcome that presumption, a defendant must demonstrate, among other things, that sources other than the grand jury minutes are inadequate to provide the information that the petitioners seek (*Matter of Lustberg v. Curry*, 235 AD2d 615 [3d Dept.1997]). Once that burden is met, the court must balance the public interest for disclosure against the public interest favoring secrecy, and may exercise its discretion to direct disclosure where the interest in disclosure outweighs the other (*People v. Fetcho*, 91 NY2d at 769, *supra*).

Here, as an initial matter, it is axiomatic that DANY was not required to disclose the portion of the grand jury record sought by petitioners since that record cannot be disclosed under FOIL pursuant to Public Officers Law §87(2)(a) and CPL §190.25. Nevertheless, petitioners correctly invoke CPL §190.25(4)(a) as a means by which this court can permit disclosure of the grand jury record. Having reviewed the grounds for disclosure advanced by petitioners, the court finds that petitioners have not met their initial burden to "establish [a] compelling need of proof that is dispositive" (*Richburg v. Morgenthau*, 184 AD2d 316 [1st Dept 1992]). To be sure, petitioners already have access to the Rockefeller Report, which itself acknowledges the hospital's awareness of sex abuse allegations against Dr. Archibald during the relevant period. In addition, petitioners' counsel acknowledges that counsel is aware of other alleged victims of Dr. Archibald's abuses. Those alleged victims are purported to have been abused during the same time frame as petitioners. Where that is the case, petitioners cannot advance the "compelling need" that is necessary to overcome the presumption against disclosure of confidential grand jury testimony. Indeed, petitioners can allude to the allegations of other victims to corroborate their assertions regarding Rockefeller University's purported notice. The supposed testimony of one alleged victim of sex abuse purportedly provided to the grand jury is vastly outweighed by the accounts of many other similarly situated victims that petitioners can locate without having to unseal the grand jury record. Indeed, the alleged proof petitioners seek to gain from the grand jury record is that Rockefeller University was aware of Dr. Archibald's conduct – a fact that petitioners' own moving papers acknowledge can be established by sources other than the grand jury minutes, namely, the Rockefeller Report and the accounts of other alleged victims. The probative value of the grand jury record is called into further question because the grand jury ultimately did not return a true bill indicting Dr. Archibald for sex abuse when he was investigated between 1960 and 1961. That fact inures against disclosure, as the grand jury record ultimately was found insufficient to advance criminal charges against Dr. Archibald, thereby diminising the value of the grand jury record in a civil action commenced under the CVA. Certainly, it remains a long-held belief within our society that one is presumed innocent until proven guilty. It therefore necessarily follows that the record of a grand jury investigation where no true bill is returned should generally not be disclosed in a subsequent civil action as evidence of one's potential involvement in a crime.

The Appellate Division, First Department's holding in *Melendez v. The City of New York*, 109 AD2d 13 (1st Dept. 1985), does not require a different result. Indeed, in *Melendez* the parties were allowed access to their own grand jury testimony where that testimony bore a direct relationship to the issues in the civil litigation (*id.*). There are several differences between *Melendez* and the case at bar. The most obvious difference is that the parties in *Melendez* sought their own testimony. Furthermore, as discussed in *Melendez*, CPL §190.25(4) does not specifically

prohibit a witness from disclosing his own testimony. Therefore, the issue before the trial court in *Melendez* was entirely unlike this case, where petitioners are seeking copies of the grand jury testimony of another alleged victim. Consequently, *Melendez* does implicate the court's finding here. In sum, as petitioners have failed to make a showing of a "compelling and particularized need" for copies of the grand jury record, the court is constrained to deny the motion. This denial, however, is without prejudice to petitioners renewing their application before the trial judge.[2]

Having determined that petitioners have failed to demonstrate a "compelling and particularized need" for disclosure of the grand jury record (CPL §190.25[4][a]), the court need not engage in the discretionary balancing of the public interest in secrecy of the grand jury proceedings against the public interest in disclosure (*see Matter of District Attorney of Suffolk County*, 58 NY2d 436, *supra*).

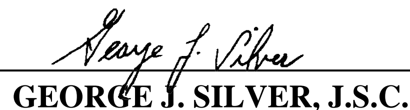
However, *assuming arguendo* that petitioners had made the required showing, the court still finds that disclosure here would be imprudent. The court acknowledges that some of the reasons generally advanced for maintaining the secrecy of grand jury minutes are inapplicable to the instant proceeding. To be sure, there is no risk that an individual who is about to be indicted will flee the jurisdiction, and there is no need to protect the grand jurors or witnesses from interference or tampering since both Dr. Archibald and any grand jurors or witnesses are deceased (*People v. DiNapoli*, 27 NY2d at 235, *supra*). Nevertheless, the disclosure sought here would still run athwart of the considerable assurance continued secrecy provides to prospective witnesses before future grand juries that their testimony will remain secret (*id.*). Additionally, courts generally favor disclosure of grand jury minutes where there is a significant public interest in ensuring that prosecutions are not procured by fraud, perjury, and the suppression of evidence of police misconduct (*People v. Sayavong*, 83 NY2d 702, 706 [1994]). That significant interest does not apply here, as the grand jury record at issue is of an attempted prosecution that the grand jurors ultimately elected not to advance. As such, any potential unsealing here would not bear upon the public's interest in altruistic prosecutions as no indictment ultimately resulted from the grand jury's investigation (*see Matter of District Attorney of Suffolk County*, 58 NY2d at 444, *supra*).

For the foregoing reasons, it is

ORDERED and ADJUDGED that the petition is denied and the proceeding is dismissed.

The Clerk is directed to enter judgment accordingly.

**Dated**: April 30, 2020



**GEORGE J. SILVER, J.S.C.**

---

[2] "[U[pon an adequate showing, an application may be renewed before the trial justice, who, in the exercise of discretion, may proceed *in camera* to determine the extent production is required for purposes of impeachment or to refresh recollection" (*Melendez v City of New York*, 109 AD2d 13, 20 [1st Dept 1985]). However, "[n]o such determination, [] may be made at this stage, where disclosure is sought, not for impeachment, but under the disclosure provisions of CPLR Article 31" (*id.*).