SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JOHN J. KELLEY** **PART** **56M**

Justice

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INDEX NO. 452190/2022

In the Matter of

MOTION DATE 10/13/2022

THE LEGAL AID SOCIETY

MOTION SEQ. NO. 001

Petitioner,

- v -

DECISION, ORDER, and JUDGMENT

NEW YORK COUNTY DISTRICT ATTORNEY'S OFFICE,

Respondent.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15

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

In this CPLR article 78 proceeding, the petitioner seeks judicial review of a March 29, 2022 determination of the records access appeals officer of the District Attorney of New York County (DA) rejecting, in part, the petitioner's appeal of a February 24, 2022 DA determination denying, in part, its request for agency records pursuant to the Freedom of Information Law (Public Officers Law § 84, *et seq*.; hereinafter FOIL). In its request, the petitioner sought all documents and records in the DA's possession that referred or related to the proceedings in *People v Melic Bradford*, New York County Indictment Nos. 3092/2007 and 1324/2007, both criminal actions prosecuted in the Supreme Court, New York County. The DA answers the petition and submits the administrative record. The petition is denied, and the proceeding is dismissed.

On March 8, 2007, at approximately 1:03 p.m., Melic Bradford, assisted by a separately charged minor accomplice, held a 14-year-old student at knife point inside the 7th floor restroom of the Leadership and Public Service High School (the high school) at 90 Trinity Place in Manhattan. Bradford threatened to shoot the 14-year-old, then rummaged through his pockets,

and forced the victim to give his jacket to Bradford's codefendant. Bradford then punched the victim and, when the victim fell to the floor, Bradford took the victim's earrings. Under Indictment Number 1324/07, Bradford and his codefendant were charged with robbery in the first degree and robbery in the second degree (Penal Law §160.10 [1]). In a separate incident, occurring on June 10, 2007 at approximately 12:35 p.m., Bradford, who then was under the influence of cocaine and armed with a handgun, approached a small group of men in front of 240 Madison Street in Manhattan, fired three shots into the group, and fled the area. One of Bradford's bullets struck a man in the back, ultimately leaving him paralyzed. On June 15, 2007, Bradford was arrested, based on an eye-witness identification. He first denied having been involved in the shooting, but eventually admitted to police officers that he had been the shooter, and that he had disposed of the gun in the East River. Under Indictment Number 3092/07, Bradford was charged with attempted murder in the second degree (Penal Law §§ 110, 125.25[1]), assault in the first degree, and two counts of criminal possession of a weapon in the second degree (Penal Law §§265.03 [1][b], 265.03[3]).

On December 13, 2007, Bradford was convicted, upon his pleas of guilty, to assault in the first degree, robbery in the first degree, criminal possession of a controlled substance in the third degree, and criminal sale of a controlled substance in the third degree, the latter two offences having been charged under Indictment Numbers 2279/2007 and 3330/2007. He thereupon was sentenced to an aggregate determinate term of 18 years of incarceration, followed by 5 years of post-release supervision. The Supreme Court denied his motion to withdraw his pleas of guilty to the crimes of assault in the first degree and robbery in the first degree. By decision and order dated May 26, 2009, the Appellate Division, First Department, affirmed the judgment of conviction (see *People v Bradford*, 62 AD3d 594, 594 [1st Dept 2009]), rejecting Bradford's contention that his attorney acted improperly, and concluding that "[c]ounsel negotiated a plea whereby defendant received a favorable disposition involving four separate

crimes that were increasingly serious, culminating in the shooting that left defendant's victim paralyzed."

Bradford thereafter retained the petitioner to represent him. On September 17, 2021 and September 25, 2021, the petitioner submitted FOIL requests to the DA's office, seeking all public records referring or relating to Bradford's arrest and convictions, specifying 56 categories of documents in its first request, and 51 categories of documents in its second request. In a February 24, 2022 determination, the DA's records access officer granted the petitioner's request to the extent of releasing and providing the petitioner with 685 pages of documents in 10 PDF files, along with two surveillance DVDs and one 911-call CD. The DA waived the copying fee. The records access officer, however, denied the petitioner's request for 40 specific documents, concluding that they were statutorily exempt from disclosure under FOIL.

The DA's records access officer concluded that the exemption applicable to disclosure of grand jury records and materials (*see* Public Officers Law § 87[2][a]) applied to the petitioner's requests, in connection with Indictment No. 3092/2007, for a CD depicting the gunshot victim at the hospital, along with accompanying witness testimony, that was presented to the grand jury, a 27-page grand jury presentation, and a grand jury subpoena to the victim of the crimes charged under that indictment. The records access officer invoked the same exemption with respect to the petitioner's requests, in connection with Indictment No. 1324/2007, for a 60-page grand jury presentation, a certificate of affirmative grand jury action for Bradford's minor codefendant, New York City Department of Education (DOE) records for Bradford, Bradford's codefendant, a minor student witness at the high school, and complaining witness Jeremy Espaillat, grand jury subpoenas and letters to a minor witness and the high school itself, and the minor codefendant's notice of intention to testify before the grand jury.

The DA's records access officer invoked the statutory exemption for attorney work-product (*see* Public Officers Law § 87[2][a]) as to the petitioner's requests, in connection with Indictment No. 3092/2007, to produce an assistant district attorney's (ADA's) confidential memo

with respect to his or her thoughts on the case, the ADA's recommendations on the case, the arraignment recommendations of ADA David Hammer, and the ADA's notes to another ADA concerning Bradford. She invoked the same exemption with respect to the petitioner's requests, in connection with Indictment No. 1324/2007, for disclosure of a communication from the DA's Chief of Trial Division to an ADA that included suggestions with respect to the disposition of the case, a confidential case memo and notes circulated between the ADA assigned to the case and his or her supervisors, arraignment recommendations on the case by ADA Bandler, an ADA's notes to another ADA in connection with Bradford and his minor codefendant, an ADA's notes from an interview of Bradford's minor codefendant, all ADAs' research with respect to the charges against Bradford, the ADA's grand jury preparation notes, a handwritten note circulated between ADAs containing suggestions on the case, a post-it note provided to an ADA from a supervisor concerning bail recommendations, and the ADAs' case information and action sheet.

The DA invoked the statutory exemptions from disclosure pertaining records sealed by virtue of other state statutes, as set forth in CPL 160.50 and Public Officers Law § 87(2)(a), with respect to the petitioner's requests, in connection with Indictment No. 1324/2007, for the production of a CASES report, rap sheet, debriefing agreement, and a take-out order referable to Bradford's minor codefendant, as well as ADA notes from an interview of the codefendant, and a photo array of the codefendant. She relied on the same exemption with respect to the petitioner's request for Bradford's sealed case file, and the arrest report, DA data sheet, Criminal Court arraignment minutes, and Criminal Court complaint referable to Bradford's minor codefendant, along with the certificate of affirmative grand jury action, court appearance control, and notice of intention to testify before the grand jury referable to Bradford's codefendant.

With respect to the petitioner's request for pedigree information provided by the victim's mother, who did not testify, the DA's records access officer invoked the statutory exemption for documents that would involve an undue invasion of privacy (*see* Public Officers Law § 87[2][b]). In connection with the petitioner's request to produce documents related or referring to the

investigative search undertaken by law enforcement authorities to locate Bradford, including documents pertaining to gang intelligence, the DA's records access officer invoked the exemption applicable to documents that would reveal non-routine law enforcement methods and techniques (*see* Public Officers Law § 87[2][e][iv]).

The petitioner appealed the adverse portions of the February 24, 2022 determination to the DA's records access appeals officer. Subsequent to that determination, the petitioner provided the DA's office with authorizations, signed by Bradford, requesting release of his DOE records and his own 2006 sealed case file referable to other alleged criminal conduct. By determination dated March 29, 2022, the appeals officer affirmed the February 24, 2022 determination, in part, concluding that the records access officer correctly invoked the various statutory exemptions as to most of the documents that the petitioner requested. The appeals officer, however, granted the petitioner's request for production of Bradford's DOE records and the sealed criminal case file referable to a 2006 arrest. This proceeding ensued.

"While the Legislature established a general policy of disclosure by enacting the Freedom of Information Law, it nevertheless recognized a legitimate need on the part of government 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]; *Matter of Asian Am. Legal Defense & Educ. Fund v New York City Police Dept.*, 125 AD3d 531, 531 [1st Dept 2015]; CPLR 7803[3]).

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]). Since the petitioner has made no showing of a compelling and particularized need for the grand jury minutes, or any documents related to the grand jury, such as grand jury presentations, notes, certificates, notices, and school records of complaining witnesses and other witnesses, to the extent he seeks such minutes and records, his request for production properly was denied.

Nonetheless, a different rule applies to documents for which an exemption from disclosure is claimed merely 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]; *see Matter of Majuc v New York County Dist. Atty's Off.*, 2019 NY Slip Op 33696[U], *10, 2019 NY Misc LEXIS 6746, *14 [Kelley, J.]). The DA has established that it correctly, on this basis, exempted from disclosure the CD depicting the gunshot wounds of complaining witness as he lay in the hospital.

CPLR 3101(c) prohibits the disclosure of an attorney's work product. The DA's office asserted that 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, handwritten notes, suggestions, recommendations, and similar memoranda, however, are clearly attorney work product, as they all were prepared in anticipation of Bradford's prosecution. Hence, all are exempt from disclosure under FOIL.

Certain documents in criminal matters must be sealed, including those generated in criminal actions that terminated in favor of the accused (*see* CPL 160.50). Where an accused was a minor when the alleged offense was committed, the court files may be sealed in the

court's discretion, even where the minor was adjudicated a juvenile delinquent (*see* Family Court Act § 375.2). Although sealed court files may be unsealed under certain circumstances, the rules applicable to unsealing do not apply to the files maintained by the DA's office. By its terms, CPL 160.50(1) applies only to "the record of such [a criminal] action or proceeding," and not to files maintained separately by the prosecuting attorney. Rather, the contents of those files, and any portion thereof, are "agency records" within the meaning of Public Officers Law § 86(3) and (4), and may only be obtained through an appropriate request under FOIL (*see generally Matter of Lesher v Hynes*, 19 NY3d 57 [2012]). The court notes that, in response to a properly made FOIL request, a DA's office may have grounds for invoking statutory exemptions from the requirement that it release those records (see Public Officers Law § 87[2][e], [f]; *Matter of Lesher v Hynes*, 19 NY3d 57 [2012]). Here, the DA's records access appeals officer released Bradford's own sealed case file arising from a 2006 arrest, as well as his own DOE records. Under Public Officers Law § 87(2)(a), however, records must be withheld that "are specifically exempted from disclosure by state or federal statute." The appeals officer correctly determined that files and documents related to Bradford's minor codefendant were exempt from disclosure under state statutes permitting the sealing of a minor's delinquency proceeding (*see* Family Court Act § 375.2) and federal statutes imposing a penalty for releasing otherwise confidential school records (*see also* Family Educational Rights and Privacy Act, 20 USC § 1232g[a][4][A][i]; 34 CFR 99.3; *see generally Culbert v City of New York*, 254 AD2d 385, 388 [2d Dept 1998] [denying request of injured plaintiff for disclosure of school records of fellow student]).

It is well settled that it is appropriate for any agency to redact personal information of crime victims and witnesses on the ground that it would compromise their privacy (*see Matter of Gould v New York City Police Dept.*, 89 NY2d 267, 277 [1996]; *Matter of John H. v Goord*, 27 AD3d 798, 800 [3d Dept 2006]). The DA's records access appeals officer correctly determined that release of pedigree information referable to the mother of the complaining witness in the 2007 high school attack constituted an unwarranted invasion of her privacy (*see* Public Officers

Law §§ 87[2][b], 89[2][b]), particularly because she did not testify before either the grand jury or at trial. "Information pertaining to contacts with individuals who did not provide information [are] properly deemed exempt based on the privacy exemption of FOIL" (*Matter of De Oliveira v Wagner*, 274 AD2d 904, 905 [3d Dept 2000]; *see Matter of Exoneration Initiative v New York City Police Dept.*, 114 AD3d 436, 439 [1st Dept 2014]; *Matter of Bellamy v New York City Police Dept.*, 87 AD3d 874, 875 [1st Dept 2011]).

Finally, the DA's records access appeals officer correctly applied the exemption from disclosure for documents containing "non-routine criminal investigative techniques," including gang intelligence programs, to the investigative report describing the search to locate Bradford after the 2007 shooting incident (*see Matter of Abdur-Rashid v New York City Police Dept.*, 140 AD3d 419 [1st Dept 2016], *affd* 31 NY3d 217 [2018]; *see generally Matter of Johnson v New York City Police Dept.*, 257 AD2d 343 [1st Dept 1999]; *Matter of Mitchell v Slade*, 173 AD2d 226 [1st Dept 1991]; Public Officers Law § 87[2][e][iv]).

In light of the foregoing, it is

ORDERED that the petition is denied; and it is,

ADJUDGED that the proceeding is dismissed.

This constitutes the Decision, Order, and Judgment of the court.

12/20/2022
DATE

JOHN J. KELLEY, J.S.C.

CHECK ONE:	[X]	**CASE DISPOSED**		[ ]	**NON-FINAL DISPOSITION**		
	[ ]	**GRANTED**	[X] **DENIED**	[ ]	**GRANTED IN PART**	[ ]	**OTHER**
APPLICATION:	[ ]	**SETTLE ORDER**		[ ]	**SUBMIT ORDER**		
CHECK IF APPROPRIATE:	[ ]	**INCLUDES TRANSFER/REASSIGN**		[ ]	**FIDUCIARY APPOINTMENT**	[ ]	**REFERENCE**