



OFFICE OF THE BRONX DISTRICT ATTORNEY

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November 13, 2020

Via email to 89404-50080260@requests.muchrock.com

Mr. Avinash Samarth, Esq.

**Re: Freedom of Information Law Request dated March 4, 2020
DETERMINATION LETTER**

Dear Mr. Samarth,

This letter responds to your request pursuant to Public Officers Law §84, *et seq.*, New York's Freedom of Information Law ("FOIL"). In your email dated March 4, 2020, you made four separate requests:

- (1) Any and all documents or materials used to train assistant district attorneys on C.P.L. § 30.30, including, but not limited to, powerpoint slides and training manuals; ["Speedy Trial Materials"]
- (2) Any and all documents or materials used to train assistant district attorneys on Brady or Giglio requirements, including, but not limited to, powerpoint slides and training manuals; ["Disclosure Materials"]
- (3) Any and all documents or materials describing the policy of reviewing, adjudicating, or disciplining prosecutorial misconduct by Bronx assistant district attorneys, as limited to only those documents constituting final policy determinations; and ["Professional Conduct Materials"]
- (4) Any and all documents or materials describing charging policies, including, but not limited to, descriptions of the types of circumstances under which it is appropriate to charge more or less severe violations of the Penal Law or Vehicle and Traffic Law, as limited to only those documents constituting final policy determinations ["Charging Materials"].

Request #1: Speedy Trial Materials

Access to the following documents is denied on the basis that that they constitute attorney work product and are intra-agency materials exempt from disclosure:

- Section 30.30 2017 Presentation;
- 30.30 Training Corner;
- Orientation Training Program Speedy Trial;
- Speedy Trial Practice September 7, 2017; and
- NYPTI: Speedy Trial: The Misdemeanor Story (8/30/2018).

Request #2: Disclosure Materials

Access to the following documents is denied on the basis that that they constitute attorney work product and are inter-agency/intra-agency materials exempt from disclosure:

- Giglio Step by Step;
- The Effects of the New Disclosure Order; and
- Orientation Training Program, “Discovery, Rosario, and Brady Giglio.”

Access to the following document is granted:

- District Attorneys Association of the State of New York, “The Right Thing: Ethical Guidelines for Prosecutors” (2016), <http://www.daasny.com/wp-content/uploads/2016/02/2016-Ethics-Handbook.pdf> (40 pages).

Request #3: Professional Conduct Materials

Access to the following four documents is granted:

- Memorandum dated June 28, 2016, on The Professional Responsibility Bureau (2 pages);
- Memorandum entitled “Professional Responsibility Bureau: Mission, Structure and Operation (6 pages);
- Press release entitled “Bronx District Attorney Darcel D. Clark appoints Victor Olds as Chief of Professional Responsibility Bureau,” dated October 3, 2016, (2 pages); and
- Legal Staff Employment Manual (72 pages).

Request #4: Charging Materials

Access to the following documents is granted:

- Office of the Bronx County District Attorney, “A Safer Bronx Through Fair Justice” (January 22, 2020) (<https://www.bronxda.nyc.gov/downloads/pdf/safer-bronx-through%20fair-justice.pdf>) (14 pages); and
- Office of the Bronx County District Attorney, “2019 Annual Report,” p. 17 (a description of Project Reset), <https://www.bronxda.nyc.gov/downloads/pdf/annual-reports/Bronx-DA%202019-Annual-Report.pdf> (32 pages).

Access to the following documents is denied on the basis that that they constitute attorney work product and are inter-agency/intra-agency materials exempt from disclosure:

- Staff Memorandum, “A Safer Bronx Through Fair Justice,” (December 16, 2019); and
- Orientation Training Program: Alternatives to Incarceration Bureau.

Explanation

Attorney Work Product

An agency may deny access to records when disclosure is specifically exempted by other state and federal statutes. *See* Pub. Off. L. §87(2)(a). Multiple statutes exempt attorney work product from disclosure: CPL §245.65, which exempts from discovery attorney work product that “the legal research, opinions, theories or conclusions of the adverse party or its attorney;” CPLR §3101(c), which provides that “[t]he work product of an attorney [in civil proceedings] shall not be obtainable;” and CPLR §3101(d) which covers materials “prepared in anticipation of litigation or for trial.” “Attorney work product under CPLR §3101(c), which is subject to an absolute privilege, is limited to documents prepared by counsel acting as such, and to materials uniquely the product of a lawyer’s learning and professional skills, such as those reflecting an attorney’s legal research, analysis, conclusions, legal theory or strategy.” *In re New York City Asbestos Litig.*, 109 A.D.3d 7, 12 (1st Dep’t 2013) (quotations omitted). Furthermore, “an attorney’s work product is privileged both in the context of the litigation for which it was prepared and in [. . .] any subsequent legal proceedings.” *Kinge v. State*, 302 A.D.2d 667, 670 (3d Dep’t 2003) (citations omitted).

There is no need for a specific claim to have arisen in order to invoke the attorney work product exemption, if litigation was foreseeable. “[T]he existence (or non-existence) of a specific claim proved salient in those cases as a means of identifying whether documents had been prepared at a time when litigation was sufficiently in mind—*i.e.*, whether ‘litigation was a real possibility.’” *Nat’l Ass’n of Criminal Def. Lawyers*, 844 F.3d 246, 255 (D.C. Cir. 2016), *quoting In re Sealed Case*, 146 F.3d 881, 884 (D.C. Cir. 1998).

Here, the training materials and memoranda you requested were compiled after conducting a substantial amount of legal research for the purpose of complying with various legal obligations, which arise in the course of litigation including, but not limited to, *Brady* and *Giglio* obligations, Speedy Trial, and CPL §30.30. The training materials provide guidance to attorneys in the office,

but the guidance is not a final determination until a decision is made by an attorney in the context of a given case. For example, the decision of whether a certain disclosure must be made under *Brady* or *Giglio* is a legal conclusion that constitutes attorney work product. The decision whether to disclose information under CPL §245 is a legal conclusion. *Cf. Schiller v. N.L.R.B.*, 964 F.2d 1205, 1208 (D.C. Cir. 1992) (legal analysis circulated to agency attorneys to help them carry out litigation on behalf of the office is considered work product). Furthermore, any training materials provided by the New York Prosecutors Training Institute (NYPTI) are also attorney work product because they were written by lawyers employed by the institute for the express purpose of advising attorneys within various offices of district attorneys on the law. Such advice was the result of legal research and conducted with the litigation of thousands of criminal cases in mind.

Inter-agency and Intra-agency Materials

Public Officers Law §87(2)(g) exempts from disclosure inter-agency and intra-agency records that are not “(i) statistical or factual tabulations or data; (ii) instructions to staff that affect the public; (iii) final agency policy or determinations; or (iv) external audits. In this case, communications between Assistant District Attorneys are withheld as inter-agency materials. As mentioned above, these documents are not final instructions to staff under subsection (ii) nor are they final agency policy or determinations under subsection (iii) because they are non-final guidance. In any event, under *New York Civil Liberties Union v. New York City Police Dep't*, 32 N.Y.3d 556, 568–70 (2018), Pub. Off. L. §87(2)(a) may take precedence over the other subsequent exemptions within section 87. The Court of Appeals noted that it would illogical to undermine a privilege available through litigation using New York’s Freedom of Information Law. *Id.* at 564.

Any materials provided by The New York Prosecutors Training Institute, Inc. (NYPTI) are inter-agency materials under Pub. Off. L. §87(2)(g). NYPTI is a not-for-profit corporation created in 1995 by the District Attorneys Association of the State of New York. NYPTI’s mission is to provide comprehensive continuing legal education, training, advice, and assistance to New York State prosecutors (http://www.daasny.com/?page_id=178). Its main purpose is to assist district attorneys across New York develop non-final training materials and guidance.

Fee

Please be advised that all documents to be disclosed under FOIL require advance payment of copying fees at the rate of \$0.25 per-page; \$0.50 per color copy; \$5.00 per audio CD; and \$15.00 per video DVD copying fee. There is no provision in the Public Officers Law for a waiver of this fee. *See Whitehead v. Morgenthau*, 146 Misc.2d 806, 807-08 (N.Y. Co. 1990). In order to receive your documents, please send me a check or money order made payable to the District Attorney’s Office, Bronx County, in the amount of \$20.50 (82 pages x \$0.25). Note: There is no fee for the 86 pages of documents that are available on the Internet for free. Please make full payment within the next 60 days. If I do not receive payment or correspondence from you within this time, I will close your request and deem it abandoned.

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FOIL APPEAL

You may appeal this determination within thirty days after the documents have been produced to you by writing to: FOIL Appeals Officer Peter Coddington, Bronx District Attorney's Office, 198 East 161st Street, Bronx, NY 10451, or coddingtonp@bronxda.nyc.gov.

Sincerely,

A handwritten signature in black ink that reads "Mabel Jimenez". The signature is written in a cursive, flowing style.

Mabel Jimenez
Assistant District Attorney