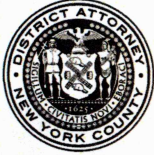


**DISTRICT ATTORNEY
COUNTY OF NEW YORK
ONE HOGAN PLACE
New York, N. Y. 10013
(212) 335-9000**



CYRUS R. VANCE, JR.
DISTRICT ATTORNEY

October 29, 2020

MuckRock News
DEPT MR 98522
411A Highland Avenue
Somerville, MA 02144-2516
Attn. Avinash Samarth

Re: FOIL Request – Policies and Training Materials

Dear Mr. Samarth:

As the assigned Records Access Officer, for your FOIL request, dated September 11, 2020, seeking records of “policies or guidances” and training materials, and in accordance with my acknowledgement and status update letters, I have completed my review of potentially responsive records. Your request is granted in part and denied in part on the grounds set forth below. For convenience, I will reference the numbers assigned to each request in your letter.

Access Granted

Request #1: Access is granted to emails, how to’s, information, and policies concerning BWC footage. These records, totaling 54 pages, are subject to redaction on law enforcement, intra-agency,¹ and other grounds noted herein.

Request #2: Access is granted to a two-page list prepared in December 2019 of officers for whom adverse credibility findings were found. Access is otherwise denied on attorney work product grounds as noted herein.

¹ Internal correspondence concerning an agency’s work is exempt from public access under POL §87(2)(g), as intra-agency material, an exemption which protects this agency’s deliberative process privilege. *See Rothenberg v City Univ. of New York*, 191 AD2d 195 (1st Dept 1993). The deliberative process privilege protects from disclosure records which reflect opinions, recommendations, and deliberations compromising part of a process by which governmental decisions and policies are formulated. POL §§87(2)(g)(i)-(iii); *Leshner v Hynes*, 19 NY3d 57 (2012).

Request #4: Access is granted to new bails laws, policies, and instructions concerning when to request bail. These records, totaling 30 pages, are subject to redaction on attorney work product grounds noted herein.

Request #5: Access is granted to notices, how to's, and policies concerning immigration status of a defendant. These records, totaling five pages, are subject to redaction on attorney work product grounds noted herein.

Request #8: Access is granted to policies and orders concerning *Brady* or *Giglio* requirements. These records, totaling 20 pages, are subject to redaction on attorney work product grounds noted herein.

Request #9: Access is granted to polices concerning prosecutorial misconduct. This two-page record is subject to redaction on the grounds set forth herein.

Request #10: Access is granted to charging polices. These records, totaling 10 pagees, are subject to redaction on attorney work product grounds noted herein.

The 130 pages will be provided in electronic format, as requested, upon payment of \$ 32.50 (.25¢ per page) by certified check or money order, payable to the "New York County District Attorney's Office."

Requests #6 and #10: Access is provided to the following links to postings on DANY's website concerning policies for dismissals and decline to prosecute low level offenses:

<http://www.manhattanda.org/district-attorney-vance-dismisses-240000-summons-cases/>

<http://www.manhattanda.org/district-attorney-vance-commissioner-bratton-mayor-de-blasio-announce-new-structural-c/>

<http://www.manhattanda.org/district-attorney-vance-end-criminal-prosecution-approximately-20000-low-level-non-vio/>

<http://www.manhattanda.org/district-attorney-vance-end-criminal-prosecution-approximately-20000-low-level-non-vio/>

Access Denied

Initially, access is denied to records or training materials and portions thereof which contain mental impressions, opinions, legal analysis, summaries or communications of an attorney intended solely for use within the District Attorney's Office, constituting privileged work product, which is exempt from disclosure by statute. POL §87(2)(a); CPLR §3101; CPL §240.10(2)+(3); *Smith v City of New York*, 49 AD3d 400 (1st Dept 2008); *Matter of Morgan v NYS Dep't of Env'tl Conservation*, 9 AD3d 586, 587 (3d Dept 2004); *Turner v Dep't of Finance*, 242 AD2d 146, 148-9 (1st Dept 1998); *John Blair Communications, Inc. v Reliance Capital Group*, 182 AD2d 578 (1st Dept 1992); *Corcoran v Peat, Marwick, Mitchell and Co.*, 151 AD2d 443, 445 (1st Dept 1989); *see generally People v Kozłowski*, 11 NY3d 223, 244 (2008), *cert denied* 556 US 1282 (2009).

Specifically Requests #7 and #8 specifically call for materials used to train, rather than policies. Such materials contain mental impressions, opinions, legal theories, or communications of an attorney intended solely for use within the District Attorney's Office. *Id.* Additionally, training materials, which contain case citations and summaries, are intertwined with opinion and advice as part of the consultative or deliberative process of individual decisions made by assistant district attorneys on a case by case basis. Simply put, the goal is enlightenment, not obedience. *Matter of Miller v NYS Div. Of Human Rights*, 122 AD3d 431, 432 (1st Dept 2014); *Matter of Data Tree, LLC v Romaine*, 9 NY3d 454, 462-3 (2007); *Matter of Gould v NYPD*, 89 NY2d 267, 277 (1996).

Similarly, Request #2, calling for adverse credibility "lists," concerns a compilation of information maintained by DANY for legal analysis, case assessment and disclosure purposes, which falls within the exemption of attorney work product. *Id.*; *see also Stengel v Vance, et al.*, 2020 NY Slip Op 30060(U) (Sup Ct NY Co 2020). And, Requests #6 and #10, which seek records, other than press releases/postings, concerning the use of prosecutorial discretion when making charging decisions and offers, essentially calls for protected attorney work product. New York State law and the rules of professional conduct provide the "policies or guidances" and parameters of the exercise of prosecutorial discretion by DANY prosecutors.² Charging decisions and offers are made on a case by case basis within those guidelines.

As to Request #1, access is denied to records or portions thereof which constitute confidential materials, proprietary or trade secrets of Axon Enterprise, Inc., a commercial enterprise with which DANY has entered into a non-disclosure agreement. POL §87(2)(d); *Matter of Verizon NY, Inc. v NYS Public Service Comm.*, 46 Misc3d 858 (SC Albany Co 2014), *aff'd* 137 AD3d 66 (3d Dept 2016). And, to the extent instructions and information within the records provided reveal non-routine criminal investigative

² See e.g. New York State Justice Task Force, Report on Attorney Responsibility in Criminal Cases (2017); Rules of Professional Conduct, Rule 8.4(c), (d), (h); ABA Standards Relating to the Prosecution Function, Standards 3-4.5, 3-4.6 (4th ed 2015); National District Attorneys Association, National Prosecution Standards, 3-3.1 to 3-3.8; 4-8.1 to 4-8.5 (Third Edition).

techniques and procedures, access is denied on that ground, as well. POL §87(2)(e)(iv); see *Matter of Fink v Lefkowitz*, 47 NY2d 567, 572 (1979). For example, records and information about how and under what circumstances DANY utilizes BWC footage, and details about the technology used to store and access it, directly relate to the methods by which DANY accesses evidence in a law enforcement context. To be sure, disclosure of non-routine forensic information and investigatory procedures would “enable future violators of the law to tailor their conduct to avoid detection by law enforcement personnel” or construct a defense to impede a prosecution. See e.g. *Spencer v NYS Police*, 187 AD2d 919, 921 (3d Dept 1992); *Matter of Asian American Legal Defense & Education Fund v NYPD*, 125 AD3d 531 (1st Dept 2015). In other words, FOIL was “not enacted to furnish the safecracker with the combination to the safe.” *Matter of Fink*, 47 NY2d at 573.

Finally, access is necessarily denied to “police ‘regular day off’ schedules” (Request #3), since those records are kept and maintained by the New York Police Department, not this agency. POL §89(3).

The Freedom of Information Law Appeals Officer is Patricia J. Bailey, Bureau Chief, Special Litigation Bureau, New York County District Attorney’s Office, One Hogan Place, New York, NY 10013.

Sincerely,



Robin McCabe
Assistant District Attorney
Records Access Officer