

CENTER *for* JUDICIAL ACCOUNTABILITY, INC.

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July 27, 2020

TO: Erie County FOIL Officer & Second Assistant County Attorney Jeremy Toth

FROM: Elena Ruth Sassower, Director
Center for Judicial Accountability, Inc. (CJA)

RE: FOIL/Information Request: (1) the functioning of the Erie County district attorney's office and performance of its duties with respect to public corruption complaints filed by members of the public; (2) access to the Erie County grand jury so that it can discharge its duty pursuant to Article I, §6 of the New York State Constitution and Criminal Procedure Law Article 190, unobstructed by the Erie County district attorney.

The duty of the Erie County district attorney is to enforce the penal law within Erie County and to ensure that public officers are doing their jobs. This latter function the district attorney discharges through the grand jury, whose pivotal role in safeguarding against "wilful misconduct in office of public officers" is enshrined in Article I, §6 of the New York State Constitution and expanded upon in Criminal Procedure Law Article 190 to explicitly embrace conduct of "a public servant" that is "criminal or otherwise" (§190.05, §190.55(1), §190.55(2)(c)) and authorize the grand jury to issue reports (§190.60(5), §190.85, §190.90):

- recommending "removal or disciplinary action" of "a public servant" for "misconduct, non-feasance or neglect in public office" (§190.85(1)(a));
- exonerating "a public servant" of "misconduct, non-feasance or neglect in public office" "after investigation" (§190.85(1)(b));
- "[p]roposing recommendations for legislative, executive or administrative action in the public interest upon stated findings" (§190.85(1)(c)).

County Law §700, entitled "District attorney; powers and duties", includes the following:

"6. The district attorney must maintain a written record of all indictments pending in the courts of the county in which he shall have been elected or appointed. Such record shall contain the name of each person indicted, the crime charged, the date on which the indictment was returned, the disposition of the indictment and such other information as the court may direct. At the expiration of his term, the district attorney must deliver this record to his successor in office.

7. The district attorney shall keep and preserve all records now or hereafter in his care or custody or under his control and all records, books and papers relating to the functioning of his office or the performance of his duties. No such record, book or paper shall be destroyed or otherwise disposed of, except pursuant to law. At the expiration of his term, the district attorney shall, within sixty days, turn over all such records, books or papers to his successor in office.” (underlining added)

Pursuant to FOIL (Public Officers Law Article VI), this is to request records reflecting the functioning and performance of the Erie County district attorney’s office with respect to public corruption complaints filed with it by members of the public each year from 2017 to the present – these being the years in which elected Erie County District Attorney John Flynn has been in office – and, specifically, as to each of these 4 years:

- (1) records reflecting the number of public corruption complaints the district attorney received;
- (2) records reflecting the number of public corruption complaints the district attorney dismissed without presentment to grand juries;
- (3) records reflecting the number of public corruption complaints the district attorney presented to grand juries that did not result in indictments;
- (4) records reflecting the number of public corruption complaints the district attorney presented to grand juries that resulted in indictments, the names of those indicted, the court index/docket numbers, and the disposition of the indictments pursuant to County Law §700.6;
- (5) records reflecting the number of public corruption complaints the district attorney presented to grand juries that resulted in grand jury reports – and the court index/docket numbers thereof pursuant to Criminal Procedure Law §190.85, §190.90 and County Law §700.7;
- (6) records reflecting the number of public corruption complaints from which the district attorney’s office recused itself – and how such complaints were handled;
- (7) manuals, guides, and other records setting forth the policies and procedures of the district attorney’s office in instances of conflicts of interests of the district attorney or assistant district attorneys, *to wit*, financial interest and professional, political, and social relationships;

- (8) manuals, guides, and other records of the district attorney's office setting forth its procedures for handling public corruption complaints, as, for example:
- (a) a requirement that public corruption complaints be handled by its designated "Public Integrity Unit":
<https://www2.erie.gov/da/index.php?q=public-integrity-unit>;
 - (b) a requirement that such complaints be submitted in writing, with a signed attestation that false statements are punishable under Penal Law §175.30 and/or §210.45:
<https://www2.erie.gov/da/index.php?q=public-integrity-complaint-form>;
 - (c) a requirement that such complaints be acknowledged, in writing;
 - (d) a requirement that the complainant be notified of the disposition of the complaint, in writing;
 - (e) a requirement for preliminary investigation of each complaint not determined to be facially lacking in merit – with such preliminary investigation consisting, *at minimum*, of an interview of the complainant, under oath, and an examination of the documentary evidence the complainant has furnished and/or proffered in substantiation of the complaint;
 - (f) a requirement that each facially-meritorious complaint validated by preliminary investigation as supported by (1) the "rules of evidence" specified by Criminal Procedure Law §190.30; and (2) evidence determined to be "legally sufficient" and "competent and admissible", specified by Criminal Procedure Law §190.65, be presented to the grand jury – with the complainant called to testify before the grand jury in support of the complaint and with his/her evidence pursuant to Criminal Procedure Law §190.50(2);
 - (g) the preservation/retention policy for public corruption complaints and records of the district attorney's actions with respect thereto.
- (9) records as to the number of grand jury indictments that the Erie County district attorney has obtained against "a public servant" and persons "acting in concert with a public servant" pursuant to Penal Law §496 ("The Public Trust Act") – and the names of those indicted thereunder, the court index/docket numbers, and the dispositions of the indictments pursuant to County Law §700.6.

Additionally, please furnish the mailing/e-mail address of the Erie County grand jury through which it can receive communications directly from members of the public, unobstructed by the district attorney, in furtherance of its duty pursuant to Article I, §6 of the New York State Constitution and Criminal Procedure Law Article 190 – and the name, phone number, mail, and e-mail address of the Erie County Commissioner of Jurors.

Pursuant to Public Officers Law §89.3, your response is required “within five business days” of your receipt of this request. Kindly e-mail it to me at elena@judgewatch.org.

Thank you.

cc: Erie County District Attorney John Flynn