

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, :
 :
 -against- :
 :
SAMANTHA SHADER, :
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 :
 Defendant. :
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MEMORANDUM & ORDER
ON MOTION FOR DISCLOSURE
OF GRAND JURY RECORDS

DOCKET No. 20-cr-202

DORA L. IRIZARRY, United States District Judge:

By an indictment returned by a grand jury of this district and filed on June 11, 2020, Defendant Samantha Shader (“Defendant”) was charged with use of explosives in violation of 18 U.S.C. § 844(f)(1), arson in violation of 18 U.S.C. § 844(i), using an explosive to commit a felony in violation of 18 U.S.C. § 844(h)(1), arson conspiracy in violation of 18 U.S.C. § 844(n), use of a destructive device in violation of 18 U.S.C. § 924(c)(1)(B)(ii), civil disorder in violation of 18 U.S.C. § 231(a)(3), and possessing and making a destructive device in violation of 18 U.S.C. §§ 5861(d) and (f). Indictment, Dkt. Entry No. 9. These charges arose from Defendant’s alleged participation in a protest demonstration and her alleged Molotov cocktail attack on police officers who were sitting in a marked police vehicle on the evening of May 29, 2020.

On June 18, 2020, Defendant moved for “access to records and papers used in connection with the constitution of the Master and Qualified Jury Wheels in this district, pursuant to the Fifth and Sixth Amendments to the United States Constitution and the Jury Selection and Service Act (“JSSA”), 28 U.S.C. §§ 1867(a) and (f).” Motion to Inspect Grand Jury Records (“Def.’s Mot.”), Dkt. Entry No. 11 at p. 1. Defendant also moved to dismiss the indictment simply alleging that the grand jury selection procedures violated “Title 28 of the United States Code,” and requested

leave to supplement the motion upon inspection of the requested records.¹ *Id.* at 3. On July 7, 2020, the government opposed Defendant's motion to dismiss the indictment (*see*, FN. #1 below) and consented to some of Defendant's inspection requests but opposed others. Response to Motion to Inspect Grand Jury Records ("Govt. Resp."), Dkt. Entry No. 12.

For the reasons set forth below, Defendant's inspection requests are granted in part and denied in part. In addition, a protective order as to the disclosed documents is issued herein.

DEFENDANT'S MOTION

As an initial matter, Defendant's motion is timely, having been made seven (7) days after indictment. 28 U.S.C. § 1867(a); *United States v. Saipov*, 2020 WL 915808, at *6-7 (S.D.N.Y. Feb. 26, 2020) (collecting cases). Defendant claims her right to a grand jury that represents a fair cross-section of the community may have been compromised because the indictment was returned by a grand jury sitting in Central Islip, as opposed to Brooklyn, after the courthouses were closed in March and most members of the public were under a stay at home order due to the COVID-19 pandemic ("COVID-19"). Def.'s Mot. at 1. To determine whether she has a meritorious challenge to the grand jury selection procedures, Defendant seeks twenty-three (23) categories of records purportedly relating to the constitution of the district's Master and Qualified Jury Wheels listed in Attachment 1 to the declaration of Defendant's expert, Jeffrey Martin. *See*, Def's Mot., Exh. A.

As noted by the government in its response, Defendant's motion appears to be premised on certain mistaken assumptions. Defendant apparently has assumed that the grand jury that

¹ By Electronic ("ECF") Order issued on June 19, 2020, the Court denied Defendant's motion to dismiss the indictment as insufficient and improperly made because it did not set forth the grounds for the motion nor was it accompanied by a memorandum of law. The Government has opposed the motion to dismiss the indictment as baseless and premature, but without objection to Defendant timely renewing the motion after inspecting the requested documents. To be clear, at this time, Defendant's motion for dismissal of the indictment is denied without prejudice to renew after inspecting the grand jury records to which she will have access pursuant to this Memorandum and Order. *See*, 28 U.S.C. § 1867(a) and F.R.Crim.P. 12(b)(3)(A)(v). The Court need not address this prong of Defendant's motion further herein.

returned her indictment was selected and empaneled after the courthouses were closed and New York State authorities issued stay at home orders to prevent the spread of COVID-19. The government asserts (and the Court has no reason to disagree) that the grand jury that returned the indictment here was empaneled in the Central Islip, Long Island Courthouse in October 2019, months before the start of the pandemic, and its members were selected from a list of residents from all five (5) counties that comprise the Eastern District of New York. Govt. Resp. at p. 2.

The Fifth and Sixth Amendments to the Constitution guarantee a criminal defendant trial by a jury selected from a fair cross-section of the community and this guarantee has been extended to grand juries by the JSSA. *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975); *United States v. LaChance*, 788 F.2d 856 (2d Cir. 1986), *cert. den.* 479 U.S. 883 (1986); *United States v. Brown*, 116 F.3d 466 (2d Cir. 1997) (unpublished summary order). Notably, “[i]t is well-settled that neither the jury selection statute nor the Constitution requires that jurors be drawn from an entire district.” *United States v. Bahna*, 68 F.3d 19, 24 (2d Cir. 1995) (citing cases); 28 U.S.C. § 1861 (“...all litigants in Federal courts entitled to a trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or *division* wherein the court convenes.”) (emphasis added).

The Government further notes that this grand jury sat regularly on Thursdays from October 10, 2019 through March 12, 2020, the last day on which it was able to achieve a quorum, until June 11, 2020. Govt. Resp. at 3. Due to COVID-19, the grand jury did not sit between March 13, 2020 and June 10, 2020; however, it was able to achieve a quorum on June 11, 2020, the date the indictment was returned in this case. *Id.* As such, the COVID-19 pandemic appears not to have impacted the selection of qualified jurors as speculated by Defendant.

Defendant does not seek any personal identifying information for the individuals listed in the records maintained by the Clerk of the Court. Def.'s Mot. at p. 2. The government agrees that identifying information, including, but not limited to names, addresses, telephone numbers, full dates of birth, or social security numbers, should not be provided to the parties or disclosed to the public. Govt. Resp. at p. 2, FN. #3. The Court concurs with the parties, and such identifying information shall not be disclosed to the parties. *See, United States v. Gotti*, 2004 WL 32858, at *10-11 (S.D.N.Y. 2004); *United States v. Hansel*, 70 F. 3d 6, 8 (2d Cir. 1995) (*per curiam*).

The government maintains that Defendant is entitled to access only a limited set of data, and not all the information she seeks, to assess whether the Grand Jury was selected at random from a fair cross-section of the community. Govt. Resp. at p. 4. Accordingly, the government consents to granting Defendant access to information concerning the county of residence, zip code, age, and race. *Id.* at p. 5. As to the remaining information, the government contends that much of the requested information pertains to stages in the jury selection process that follow the creation of the Master Jury Wheel or information related to the Master Jury Wheel and Qualified Jury Wheel that does not go to the question of whether the grand jury was selected from a cross-section of the community. *Id.* at p. 6. In addition, the government argues that Defendant's requests for information regarding any effects of COVID-19 on the district's Jury Plan or the selection of grand juries is irrelevant because, as discussed above, the grand jury at issue here was empaneled in October 2019 and has remained empaneled, despite the pandemic. *Id.*

The Court concurs with the government. Defendant is entitled to access to some, but not all the information requested. Title 28 U.S.C. § 1867(f) provides, in pertinent part:

The contents of records or papers used by the jury commission or clerk in connection with the jury selection process shall not be disclosed, except . . . as may be necessary in the preparation or presentation of a motion under subsection (a), (b), or (c) of this section The parties

in a case shall be allowed to inspect, reproduce, and copy such records or papers at all reasonable times during the preparation and pendency of such a motion.

The Supreme Court unequivocally has held that “[t]his provision makes clear that a litigant has essentially an unqualified right to inspect jury lists. It grants access in order to aid parties in the ‘preparation’ of motions challenging jury-selection procedures. Indeed, without inspection, a party almost invariably would be unable to determine whether he has a potentially meritorious challenge.” *Test v. United States*, 420 U.S. 28, 30 (1975) (*per curiam*). “Moreover, ‘[b]ecause the right of access to jury selection records is ‘unqualified,’ a district court may not premise the grant or denial of a motion to inspect upon a showing of probable success on the merits of a challenge to the jury selection provisions.” *United States v. Pirk*, 281 F. Supp.3d 342, 343 (W.D.N.Y. 2017) (quoting, *United States v. Royal*, 100 F.3d 1019, 1025 (1st Cir. 1996) and collecting cases).

Nonetheless, access to materials under the JSSA is not unfettered. *See, United States v. Davis*, 2009 WL 637164, at *16 (S.D.N.Y. Mar. 11, 2009) (“[T]here is no absolute right of access to all materials relating to grand jury selection.”). A defendant’s unqualified right encompasses “only such data as [a defendant] needs to challenge the jury selection process.” *United States v. Pirk*, 281 F. Supp.3d at 344. “[T]he JSSA is not a license for litigants to rummage at will through all jury-related records maintained by the Clerk of Court.” *Id.* (quoting *United States v. Savage*, 2012 WL 4616099, at *5 (E.D.Pa. Oct. 2, 2012). “Moving Defendants do not have an absolute right of access to all materials relating to the grand jury selection; numerous courts have held that only the Master List from which the grand jury was selected need be turned over,” *United States v. Gotti*, 2004 WL 32858, at *11 (S.D.N.Y. 2004) (citations omitted; collecting cases). “The Master List is sufficient to comply with the Supreme Court’s decision in *Test* because ‘[i]t is not

the actual selection of the grand jury which would constitute the violation but whether the jury was selected ‘at random from a fair cross section of the community.’” *Id.* (quoting *United States v. Nichols*, 248 F. Supp.2d 1027, 1034 (D.Kan. 2003) (in turn quoting 28 U.S.C. § 1861)). The Court concurs with the government as to those items it maintains should not be disclosed for the reasons stated in the government’s response. *See*, Govt.’s Resp. at p. 6.

RULING ON DEFENDANT’S MOTION

Defendant’s motion for disclosure of Grand Jury records is granted in part and denied in part. The requests granted or denied are itemized below. The number next to the request corresponds to its number in Attachment 1 of Exhibit A to Defendant’s motion. For ease of reference, where necessary, the request is set forth exactly as stated in Defendant’s Attachment 1.

REQUESTS GRANTED

1. The Jury Plan for the Eastern District of New York currently in effect and, if different in any respect, at the time grand jurors were summoned in this case. This Plan is believed to be the “Jury Selection Plan (As amended October 30, 2006)” effective October 30th, 2006. **[This request may be moot. As the government notes in its Response at pp. 2-3, and 6, it responded to this request in its responsive brief stating that the Jury Selection Plan of this Court (“Jury Plan”), last amended on October 30, 2006, was in effect and was utilized at the time the Grand Jury in this case was empaneled.**

See, https://img.nyed.uscourts.gov/files/local_rules/juryplan.pdf.]

5. A confirmation that the grand jury in this case was selected from the entire District or, if not, a description of the basis and selection for the grand jury in this case. **[This request too may be moot as the government noted in its responsive brief that the**

Grand Jury was selected from the entire district pursuant to the Jury Plan. Govt. Resp. at pp. 2-3, 6].

8. The date when the Master Jury Wheel that was used to summon grand jurors in this case was refilled as described in the Jury Plan Section 5. **[Also likely moot as responded to by the government. See, Govt. Resp. at p. 6].**

13. The date when the grand jurors were summoned in this case. **[Also likely moot as responded to by the government. See, Govt. Resp. at p. 6].**

15. The Master Jury Wheel data as described in the Jury Plan Section 5 in electronic and accessible form that includes Juror Number, Race, Gender, Hispanic Ethnicity, Year of Birth, Zip Code, City, County and Jury Division. ***Identifying information, including, but not limited to, names, addresses, telephone numbers, full dates of birth, or social security numbers, shall not be provided to the parties or disclosed to the public.***

20. The source of data in electronic form for the Master Jury Wheel used to summon grand jurors in this case as described in the Jury Plan Section 4 (voter registration list and list from the New York State Department of Motor Vehicles). The data should include, as available, Race, Gender, Hispanic Ethnicity, Year of Birth, Zip Code, City, County and Jury Division but not any personal information or information that could be used to identify any individual such as Name or Street Address. ***Identifying information, including, but not limited to, names, addresses, telephone numbers, full dates of birth, driver's license numbers, Non-Driver New York State ID numbers, or social security numbers, shall not be provided to the parties or disclosed to the public.***

REQUESTS DENIED

All other requests are denied for the reasons stated above. In addition, as to requests 2 and 3 that seek information as to the impact of COVID-19 on the Jury Plan or selection of the grand jury relevant herein, the Court relies on the discussion *supra*. Moreover, any Administrative Orders issued by the Chief Judge of the Court as they relate to grand and petit juries during the COVID-19 pandemic are accessible by counsel on the Court's public website.

PROTECTIVE ORDER

Pursuant to 28 U.S.C. § 1867(f), the documents produced pursuant to this Memorandum and Order are subject to the Protective Order set forth below. *See, United States v. Pirk*, 281 F. Supp.3d at 346-47 (W.D.N.Y. 2017).

CONCLUSION

For the reasons set forth above, Defendant's motion for inspection of grand jury records is granted in part and denied in part and her motion to dismiss the indictment is denied, without prejudice to renew after inspection of said grand jury records.

Furthermore, it is hereby **ORDERED** that the Clerk of the Court, as the custodian of the grand jury records, shall provide to the defense and the government in this case, as soon as practicable, the grand jury records relating to the instant indictment as set forth above in this Memorandum and Order. Defense counsel is directed to serve a copy of this Memorandum and Order upon the Clerk of the Court as soon as practicable but no later than five (5) business days from the date of this Order.

PROTECTIVE ORDER

The disclosure of these materials is subject to the following protective order.

1. The materials may be used only in connection with the preparation and/or litigation of a motion in this case challenging the District's jury selection procedures. The materials may not be used for purposes of jury selection, trial, or any other matter other than the preparation and/or litigation of a motion in this case challenging the District's jury selection procedures.

2. The materials either must be returned to the Court at the commencement of jury selection or counsel must certify that the materials have been destroyed and that no materials have been retained in any duplicative form.

3. The Clerk of the Court shall file a sealed copy of the records on the docket for purposes of maintaining a record of the production.

4. Consistent with [28 U.S.C. § 1867\(f\)](#), the materials may not be disclosed, shown or distributed in any manner to third parties. Similarly, the materials may only be disclosed to individuals who have a need to view the materials for purposes of the defined scope of the production, as set forth above.

5. Defendant shall not possess the materials at any time, except when reviewing the materials with counsel. The materials may not be carried into or reviewed in any jail facility. The materials may be reviewed by Defendant, if in custody, by whatever appropriate requested arrangements can be made to facilitate any such review, including video or audio conference procedures that have been utilized during the current COVID-19 pandemic.

6. Any attorney who accesses the materials is personally responsible not only for his or her compliance with this Protective Order, but also his or her client's compliance with the

requirements of this Protective Order and compliance by any staff member or other person who is shown the materials consistent with the parameters of this Memorandum and Order.

Penalties: Counsel and Defendant are reminded that “[a]ny person who discloses the contents of any record or paper in violation of this subsection may be fined not more than \$1,000 or imprisoned not more than one year, or both.” [28 U.S.C. § 1867\(f\)](#).

SO ORDERED.

DATED: Brooklyn, NY
July 17, 2020

/s/ _____
DORA L. IRIZARRY
United States District Judge