



**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER**

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In the Matter of the Application of
CAMILLO M. SANTOMERO,

DECISION & ORDER

Index No. 08-25405

Petitioner,

For a Judgment and Order Pursuant to Article 78
of the Civil Practice Law and Rules,

-against-

**BOARD OF EDUCATION OF THE BEDFORD
CENTRAL SCHOOL DISTRICT, SUSAN ELION
WOLLIN, as President of the BOARD OF
EDUCATION OF THE BEDFORD CENTRAL
SCHOOL DISTRICT, CAROLE LACOLLA, as
District Clerk of the BOARD OF EDUCATION OF
THE BEDFORD CENTRAL SCHOOL DISTRICT
and DR. DEBRA JACKSON,**

Respondents.

-----x
ZAMBELLI, J.A.

The following papers numbered 1-9 read on this petition for relief pursuant to CPLR

Article 78:

PAPERS NUMBERED

Notice of Petition, Verified Petition, Exhibits A - F &
Memorandum of Law
Verified Answer, Jackson Affidavit, Wollin Affidavit,
Memorandum of Law
Reply Memorandum of Law & Santomero Affidavit

1-4

5-8

9

Upon the foregoing papers it is ordered and adjudged that the petition is disposed of as follows:

Petitioner Camillo M. Santomero ("petitioner"), a resident of Bedford, New York, brings this Article 78 proceeding against respondents Board of Education of the Bedford Central School District ("Board"), Susan Elion Wollin, as President of the Board of Education of the Bedford Central School District ("President"), Carole LaColla, as District Clerk of the Board of Education of the Bedford Central School District ("Clerk") and Dr. Debra Jackson ("Jackson"), (collectively, "respondents"), seeking an annulment of respondents' final determination of August 7, 2008 which denied petitioner's request for access to records he requested on June 12, 2008 pursuant to Public Officers Law Article 6 (Freedom of Information Law ("FOIL")) and seeking an order directing respondents to provide petitioner with such records. Petitioner also seeks an order directing respondents to pay his reasonable attorney's fees and costs in this proceeding.

Pursuant to an Employment Agreement dated July 10, 2006, the Board hired Jackson as Superintendent of the Bedford Central School District to serve from July 1, 2006 through June 30, 2011. Less than a year later, in June of 2007, the Board and Jackson entered into a Settlement Agreement and Mutual Release ("Settlement") (Verified Petition, Exhibit B). Pursuant to the Settlement, the parties agreed, inter alia, that Jackson would tender her registration effective June 30, 2008 and until that date the terms of the Employment Agreement would remain in full force and effect (Settlement, ¶¶ 2, 3); that in addition to Jackson's salary and benefits payable through June 30, 2008, the Board agreed

to pay her \$850,000 no later than June 30, 2007 and further agreed to provide her and her family with continued health care coverage (medical and dental) for the remainder of her life at no cost to her (Id., ¶ 4(a), (b)), and that the Board would provide Jackson with "good references" and "reasonably assist her in connection with her efforts to find a new position" (Id., ¶10). The Agreement also contained indemnity and confidentiality clauses (Id., ¶14, 15).

As to why the parties were entering into a Settlement culminating in Jackson's resignation, the Settlement itself only states that "Whereas, a certain dispute has arisen between the Superintendent and the Board with regard to the superintendent's performance of her duties, and Whereas, the Board desires to terminate the services of the Superintendent" (Id., p. 2)¹.

Apparently having obtained a copy of the Settlement, petitioner sent an email to the Clerk on June 12, 2008 with the subject "FOIL Request" requesting "any and all records relating to the 'certain dispute' between the Bedford Central Board of Education and Superintendent of Schools, Dr. Debra Jackson that resulted in her termination agreement." (Verified Petition, Exhibit C). By letter dated July 10, 2008, the Clerk denied petitioner's request stating, "the release of these records constitutes an unwarranted invasion of privacy and your request implicates a confidential matter." (Verified Petition, Exhibit D). By email

¹Petitioner's papers refer to the September, 2007 arrest of the Principal of Bedford Hills Elementary School on charges accusing the Principal of failing to report allegations of the rape of a nine year-old-girl. The Principal was allegedly made aware of the allegations in December, 2006 or January, 2007 but failed to notify then Superintendent Jackson or state officials (Verified Petition, ¶ 8, Exhibit A). Petitioner does not expressly allege a connection between the Agreement and this incident; however, by the otherwise unexplained inclusion of this incident in his motion papers, he implicitly suggests, without support, that one exists.

dated July 18, 2008, petitioner notified the clerk that he was appealing her decision (Verified Petition, Exhibit E). Thereafter, by letter dated August 7, 2008, the President notified petitioner that his appeal was denied on the grounds that disclosure of the requested documents would constitute an unwarranted invasion of privacy, citing Public Officers Law §§ 87(2)(b); 89(2)(b)(i) (Verified Petition, Exhibit F).

Petitioner argues that he is entitled to the production of the documents because respondents have failed to establish that the documents are exempt from disclosure under FOIL. As to respondents' contention that providing the records would result in an unwarranted invasion of privacy, petitioner submits that this contention is conclusory and insufficient to meet respondents' burden to demonstrate that the requested material qualifies for exemption. Petitioner notes that the Board failed to claim that charges were ever threatened or filed against Jackson and argues that disclosure is justified due to countervailing public policy considerations involving expenditure of substantial taxpayer funds and the conduct of the Board as well as Jackson. Petitioner also disputes respondents' argument that the documents are exempt from disclosure as intra-agency material.

Respondents argue that the documents are exempt from disclosure because they reasonably interpreted petitioner's request as seeking disclosure of the draft disciplinary charges that were the basis of the "certain dispute" between the Board and Jackson. Because those charges were never formally served and no final determination was ever rendered on them, respondents submit that as a matter of law, records relating to non-final or non-substantiated disciplinary charges against a public employee may be withheld from disclosure under FOIL based upon that statute's intra-agency and privacy exemptions.

Respondents offer to submit the draft disciplinary charges to this Court for in camera inspection.

In reply, petitioner argues that while respondents allege that draft disciplinary charges exist, they failed to aver that no other relevant records existed. Petitioner submits that he was a former member of the Board of Education, and in his experience, when disciplinary charges are considered, more documents are created than just the draft charges and the Settlement Agreement. Petitioner also submits that respondents need to make clear what the draft disciplinary charges are and argues that he should be granted leave to conduct discovery to determine whether other materials exist.

FOIL imposes a broad duty of disclosure upon governmental agencies (see Public Officers Law §84; Matter of Mothers on the Move, Inc. v. Messer, 236 A.D.2d 408, 409 (2d Dept. 1997)). All agency records are presumptively available for public inspection and copying unless they fall within one of the enumerated exceptions which permit agencies to withhold certain records (Matter of Mothers on the Move, Inc. v. Messer, supra). The provisions of FOIL are to be liberally construed, and exemptions narrowly interpreted so as to ensure maximum public access to the records of government (Id.). The agency bears the burden of demonstrating that the requested material qualifies for exemption (Id.).

An initial matter is the scope of the documents covered by petitioner's request. Respondents assert that one responsive document - the draft disciplinary charges - exists. Petitioner asserts that based upon his experience as a former Board of Education member that other documents must exist; but while describing general categories of documents, such as "notes, memoranda, etc." on the settlement relating to its cost/benefits, petitioner

does not refer to any specific document by name. However, respondents did not deny the existence of other documents aside from the draft disciplinary charges. Accordingly, this Court interprets the request as broader than just the draft disciplinary charges. The request encompasses all documents, including but not limited to, the draft disciplinary charges, notes, memorandum and/or correspondence (including e-mail) regarding the same as well as any document referring to the incident referred to by the phrase "certain dispute" in the Settlement. Consistent with the spirit of FOIL, the phrase should be broadly construed in considering whether a particular document falls within its ambit, with the presumption being on the side of inclusion. To the extent that the draft disciplinary charges is in fact the only responsive document, respondents should certify that fact in their response (see Public Officers Law §89(3)(a)).

Turning to respondents' arguments regarding applicable exemptions, respondents assert two basis for why the requested documents are exempt from disclosure - as intra-agency materials and as materials if, which disclosed, would constitute an unwarranted invasion of personal privacy. Public Officers Law §87(2)(g) exempts from disclosure intra-agency materials which 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. The exemption applies only to deliberative materials, ie. communications exchanges for discussion purposes not constituting final policy decisions (Matter of NY 1 News v. Office of the President of Borough of Staten Island, 231 A.D.2d 524, 525 (2d Dept. 1996)). Factual observations are not exempt from disclosure even in documents issued before final decision (Id.). Opinion and recommendations prepared by agency personnel may be

exempt from disclosure as pre-decisional material which was prepared to assist an agency decision maker to arrive at a decision (Matter of Mothers on the Move, Inc. v. Messer, supra). Exempting such material serves the purpose of protecting the deliberative process of government by ensuring that persons in an advisory role can freely express their opinions to agency decision makers (Id.).

Also exempt from disclosure under FOIL are records which if disclosed would constitute an unwarranted invasion of personal privacy (Public Officers Law §87(2)(b)). In determining whether documents can be disclosed while preserving an individual's right to privacy, the Court may consider whether redaction of identifying information would protect that interest (see Matter of Gould v. N.Y.C. Police Dept., 89 N.Y.2d 267, 275 (1996); Matter of N.Y. Civil Liberties Union v. N.Y. Police Dept., 20 Misc.3d 1108 (Sup. Ct. N.Y. Co. 2008)).

As to the draft disciplinary charges, as these charges were never formally filed and proven against Jackson, they are exempt from production pursuant to FOIL as their disclosure would constitute an unwarranted invasion of privacy as defined by Public Officers Law §87(2)(b) (see Matter of LaRocca v. Bd. of Ed. of the Jericho Union Free School District, 220 A.D.2d 424, 427 (2d Dept. 1995); Matter of Western Suffolk Bd. Of Coop. Ed. Svcs. v. Bay Shore Union Free Sch. Dist., 250 A.D.2d 772, 773 (2d Dept. 1998)). Such documents containing unproven disciplinary charges are also exempt as intra-agency memoranda which contain non-final agency determinations (see Sinicropi v. Co. of Nassau, 76 A.D.2d 832, 833 (2d Dept. 1980)). Accordingly, respondents properly denied petitioner's

FOIL request as to the draft disciplinary charges.²

However, to the extent that petitioner's request is not limited to the draft disciplinary charges, if such other records do not exist, respondents must provide a certification to that effect pursuant to Public Officers Law §89(3)(a). Otherwise, if other records exist that are responsive to petitioner's request, the records must be produced unless a FOIL exemption applies. In the event respondents possess other responsive documents for which they claim a FOIL exemption applies, the parties' attorneys are directed to appear for a conference in this matter on Tuesday, April 14, 2009 at 10:00 am at Courtroom 203 of the Westchester County Courthouse, 111 Martin Luther King Jr. Blvd., White Plains, New York 10601.

Lastly, the Court denies petitioner's request for discovery in this matter. The general rule is that discovery is antithetical to the purposes of a special proceeding (see Cox v. J.D. Realty Assocs., 217 A.D.2d 179, 184 (1st Dept. 1995)). In this case, the respondents have been directed to certify whether the draft disciplinary charges are the only documents responsive to the request and to produce any other responsive documents unless they are protected by a FOIL exemption. There is no reason to believe that respondents will not comply with this directive of the Court.

²As the Court has found that respondents had a reasonable basis for denying petitioner access to these records, petitioner's request for attorney's fees in this matter is denied (Public Officers Law §89 (4)(c)(i)).

This decision constitutes the Order and Judgment of the Court.

Dated: White Plains, New York
March , 2009


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A.J.S.C.

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