

**Nitkewicz v Carter**

2007 NY Slip Op 32680(U)

July 31, 2007

Supreme Court, Suffolk County

Docket Number: 0028311/2006

Judge: Peter Fox Cohalan

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**SUPREME COURT - STATE OF NEW YORK  
I.A.S. TERM, PART XXIV - SUFFOLK COUNTY**

PRESENT:

Hon. PETER FOX COHALAN

-----x  
EDWARD J. NITKEWICZ,

Petitioner,

-against-

SUE CARTER, As President of the Special Education Parent Teacher Association of South Huntington School District No. 13, ANGELINA LIBARDI, As First Vice President of the Special Education Parent Teacher Association of South Huntington School District No. 13, JACKIE OLTEDAL, As Second Vice President of the Special education Parent Teacher Association of South Huntington School District No. 13 AND the SPECIAL EDUCATION PARENT TEACHER ASSOCIATION OF SOUTH HUNTINGTON SCHOOL DISTRICT NO. 13,

Respondents.

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CALENDAR DATE: January 17, 2007  
MNEMONIC: Mot D.; C/Disp

PLTF'S/PET'S ATTORNEY:

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Commack, NY 11725

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Upon the following papers numbered 1 to 72 read on this petition to compel discovery \_\_\_\_\_; Notice of Motion/Order to Show Cause and supporting papers 1-31; Notice of Cross-Motion and supporting papers \_\_\_\_\_; Answering Affidavits and supporting papers 32-46; Replying Affidavits and supporting papers 47-64; Other 65-72; and after hearing counsel in support of and opposed to the motion it is,

**ORDERED** that this petition in the nature of a special proceeding or mandamus brought against the respondent, Special Education Parent Teachers Association of South Huntington School District No. 13 (hereinafter SEPTA), seeking a list of its members along with the memberships' postal and e-mail addresses pursuant to General Associations Law §13 is hereby decided as follows.

Petitioner, Edward J. Nitkewicz, an attorney appearing pro se, is the parent of an eight (8) year old special needs child suffering from autism and is also a member of SEPTA. SEPTA, is a not-for-profit unincorporated association loosely affiliated with the South Huntington School District, organized to promote and support the welfare of a particular class or group of special needs children in the South Huntington School District with special education requirements. The petitioner who has been extremely active within the organization has also been highly critical of the policies and procedures within the organization and claims

to have been denied direct access to the membership. SEPTA claims that the petitioner has been given the opportunity to voice his views and opinions and SEPTA has offered to distribute the petitioner's letter to the membership and his request for the membership to contact the petitioner by letter or e-mail. The petitioner declined the accommodation and in response has demanded the membership list of SEPTA, along with the mailing addresses and e-mail listings of the membership. SEPTA refused and this lawsuit ensued.

The petitioner commenced this special proceeding in the nature of mandamus, pursuant to General Associations Law §13 which provides for an action or proceeding against an unincorporated association, seeking the membership list of SEPTA and postal addresses and e-mail listings of the membership. SEPTA opposes the requested relief for direct access to the association's membership list arguing that confidentiality and privacy concerns should be paramount and that the privacy of the parents and family members should be respected, and this private information should not be available for public display. The petitioner subsequent to the initiation of this lawsuit volunteered for and became the chairman of fund-raising for SEPTA and claims to need the membership list for fund-raising purposes. SEPTA argues that the petitioner is now using that volunteer position as an opportunity to gain access to the membership list previously denied him.

For the following reasons, the petitioner's application for the membership list as well as the postal addresses and e-mail listings of the members is denied, except to the extent that SEPTA provide the petitioner with a venue to promote his message at SEPTA's meetings and the distribution, through SEPTA, of any relevant material or policy considerations of concern to the membership which the petitioner seeks to address to the membership. In all other respects the petition is denied and the action is dismissed.

This is a case of first impression with little, if any, decisional law on the subject confronting the Court as to whether or not a member of an association is entitled to the membership list, addresses and e-mails of the members in order to communicate directly with the membership his divergent views and policy disagreements with the association's executive committee. SEPTA is a specialty organization comprised of parents and teachers of children who require "Special Education" classes. Obviously, there is concern that the public presentation of the membership list, along with the addresses and e-mail listings of the parents would result in a public identification within the community of the parents and children with special needs.

It has been said that one of the most important aspects of the right to freedom of association is the right to privacy in one's associations. In a discussion of the constitutional implications of this membership list, American Jurisprudence 2<sup>nd</sup> Constitutional Law §544 states:

"Because compelled disclosure of the identities of an organization's members or contributors may have a chilling effect on the organization's contributors as

well as on the organization's own activity, the First Amendment requires that a compelling state interest be shown before a court may order disclosure of membership in an organization engaged in the advocacy of particular beliefs."

This right to privacy has been extensively discussed, yet there is a paucity of case law in New York on the right to ban access to the membership lists as well as addresses and e-mail listings of an organization so closely associated with special needs children. A review of the papers submitted in support of and in opposition to the petition indicates this case to be fact specific with little case law cited either in support or contrary to the petition.

The Constitution of the United States protects two (2) types of individual privacy interests that have been identified as an individual interest in avoiding disclosure of personal matters or an interest in confidentiality [See, *Whalen v. Roe*, 429 US 589, 97 S Ct. 869, 51 L Ed2d 64 (1977)] and an associational interest or privilege. The Supreme Court has recognized a First Amendment associational privilege against disclosing membership lists wherein it stated in *NAACP v. Alabama*, 357 US 449, 78 S Ct 1163, 2 L Ed2d 1488 (1958):

"It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute [an] effective... restraint on freedom of association."

This premise of confidentiality of membership lists is set forth in 16B CJS (Corpus Juris Secundum) Constitutional Law §1021 (updated 2007) wherein it is stated:

"The right to associational privacy derives from the rights of an organization's members to advocate their personal points of view in the most effective way. Thus, groups which are engaged in activities which are neither illegal or subversive are protected in their rights of free and private association. Compulsory disclosure of the names of the members of an organization may infringe constitutionally protected rights, where such organization is engaged in the advocacy of particular beliefs, and where identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance."

Here, in the case at bar, rightly or wrongly, some parents of special needs children may feel stigmatized by the requirements of special education schooling and while

membership in SEPTA provides support and a forum for their concerns, parents, teachers and most importantly, the children have the right not to be publicly identified as in need of special education and assistance. The petitioner's attempts to contact these parents have been met with resistance by the SEPTA parents who have rebuffed his attempted communications to them. SEPTA gave him an opportunity to speak at their monthly meeting, provided the petitioner with the opportunity to send his message through organizational channels and showed a willingness to provide a mass e-mailing to the membership with contact information and petitioner's e-mail provided for further communication. These attempts to provide the petitioner with a forum to express his views and message were rejected and the petitioner continues to seek the membership list.

In **Spetalieri v. Kavanaugh**, 36 F. Supp2d 92 (N.D. NY 1998), the Court stated:

"The Fourteenth Amendment 'protects an individual's right to control the nature and extent of information released about that individual.' **Bloch v. Ribar**, 156 F 3d 673, 683 (6<sup>th</sup> Cir. 1998) [citing **Whalen**, 429 US 589, 97 S Ct 869, 51 L Ed2d 64; **Nixon v. Adm'r of Gen. Servs.**, 433 US 425, 97 S Ct 2777, 53 L Ed2d 867 (1977)]. While 'a constitutional right to non-disclosure of certain types of private information exists, not all disclosures of private information will trigger constitutional protection.' *Id.* The right to privacy applies only to 'personal matters.' **Barry**, 712 F2d at 1559."

The **Spetalieri**, Court went on to say:

"In **Paul v. Davis**, 424 US 693, 96 S Ct 1155, 47 L Ed2d 405 (1976) and **Roe v. Wade**, 410 US 113, 93 S Ct. 705, 35 L Ed2d 147, the Supreme Court stated that 'the personal rights found in [the Fourteenth Amendment] guarantee of personal privacy must be limited to those which are 'fundamental' or 'implicit in the concept of ordered liberty' as described in **Palko v. Connecticut**, 302 US 319, 58 S Ct 149, 152, 82 L Ed 288 (1937).' **Paul**, 424 US 693, 96 S Ct at 1166. 'The activities detailed as being within this definition [include] ... matters relating to marriage, procreation, contraception, family relationships, and child rearing and education. In these areas it has been held that there are limitations on the States' power to substantively regulate conduct..."

The petitioner's request for the membership list of SEPTA would invade the very privacy of these family relationships by placing within the public domain the names and identities of both the family and children requiring special needs within the school district. See, **Borzillieri v. American Nat. Red Cross**, 139 F.R.D. 284 (W.D. NY 1991). Such a result could have a negative effect on the families' participation in SEPTA's membership and advocacy of its ideas and programs, issues on which the petitioner seeks to promote a more aggressive stance within the school district.

On the other hand, to deny or preclude the petitioner a reasonable means to effectively communicate with and disseminate information of interest to his fellow SEPTA members could lead to executive committee censorship of information to the membership, and constrict criticism of SEPTA's policies and actions and of those in leadership positions by SEPTA's individual members. Such a result would be contrary to SEPTA's premise of the free flow of ideas to the parents of the children involved and the promotion and support for programs and strategies between these families and the school district itself. **New York Veteran Police Association v. New York City Police Pension Fund**, 92 AD2d 772, 459 NYS2d 770 (1<sup>st</sup> Dept. 1983) rev'd on other grounds 61 NY2d 659, 472 NYS2d 85 (1983). For those reasons, the Court finds that while SEPTA's membership lists are confidential and subject to the privacy rights of those on it, the petitioner should have access to the membership list to provide for a free flow of ideas through the organization and leave it to each individual family if further contact with the petitioner is warranted. **Avallone v. Riverside Democrats, Inc.**, 25 AD2d 378, 269 NYS2d 573 (1<sup>st</sup> Dept. 1966). The respondent was prepared to allow the petitioner unfettered access to the membership list under the auspices of a SEPTA mailing. This appears to the Court to be a reasonable approach which adequately takes into account the concern for each families' privacy right with the petitioner's right to promote a free exchange of ideas. See, **Javits v. Investors League Inc., et al.**, 92 NYS2d 267 (1949); 14 NY Jur. Business Relationships §391.

Ultimately, SEPTA gave each individual member the responsibility and freedom to make a choice on whether to contact the petitioner or not. The freedom to choose is also the freedom not to choose to participate in the petitioner's policy issues.

Accordingly, the petitioner's request for access to SEPTA's membership list as well as the postal addresses and e-mail listings of its members is denied. However, the petitioner shall have access to promote his views and ideas within reason through SEPTA's mailing processes without direct access to the SEPTA's membership list. In all other regards, the petition is denied and dismissed.

The foregoing constitutes the decision of the Court.

Dated: July 31, 2007



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J.S.C.