

**Matter of Condon v Inter-Religious Found. for
Community Org., Inc.**

2008 NY Slip Op 33100(U)

November 10, 2008

Supreme Court, New York County

Docket Number: 406703/07

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: GISCHE
Justice

PART 10

CONDON, RICHARD J.

INDEX NO. 406704/07

MOTION DATE _____

- v -
LUCIUS WALKER, JR.

MOTION SEQ. NO. 05

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

PAPERS NUMBERED
FILED
NOV 17 2008
COUNTY CLERK'S OFFICE
NEW YORK

**motion (s) and cross-motion(s)
decided in accordance with
the attached decision/order**

Dated: 11/10/08

J. GISCHE
HON. JUDITH J. GISCHE J.S.C.
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Supreme Court of the State of New York
County of New York: IAS Part 10

-----X

In the Matter of

Richard J. Condon,

Petitioner,

-against-

The Inter-Religious Foundation for
Community Organization, Inc.

Respondent.

-----X

In the Matter of

Richard J. Condon,

Petitioner,

-against-

Lucius Walker, Jr.

Respondent.

-----X

Hon. Judith J. Gische, Present

Decision/Order
Index # 406703/07
Seq # 005

FILED
NOV 17 2008
COUNTY CLERK'S OFFICE
NEW YORK

Pursuant to CPLR 2219(A) the following numbered papers were considered by the Court in connection with petitioner's motions:

PAPERS	NUMBERED
<u>Index #406703/07</u>	
OSC, AER affirm. Dated 9/02/08.....	1,2
PH affirm. In Opp. Dated 9/16/08, exhibit.....	3
AER affirm. In Reply dated 9/22/08.....	4
 <u>Index #406704/07</u>	
OSC, AER affirm. Dated 9/02/08.....	1,2
PH affirm. In Opp. Dated 9/16/08, exhibit.....	3
AER affirm. In Reply dated 9/22/08.....	4

Upon the foregoing papers the decision and order of court is as follows:

In these two related proceedings, the petitioner has moved to hold each of the respondents in contempt for failing to comply with subpoenas. Those motions have not yet been submitted to the court and will likely be withdrawn by petitioner due to procedural infirmities. Petitioner now moves in each proceeding for permission to proceed on "redacted" transcripts in new contempt motions that it expects to bring. Respondents oppose the motions to redact. Since the motions to redact are substantially identical, the court consolidates them for consideration and determination in this single decision.

By decision of this court dated January 11, 2008, this court upheld the viability of subpoenas issued by petitioner in connection with an investigation of persons working for the Department of Education. The decision was upheld on appeal.

In connection with the subpoenas, on February 7, 2008, respondent Reverend Lucius Walker ("Walker") appeared and gave testimony on behalf of himself and respondent Interreligious Foundation for Community Organization, Inc. ("IFCO"). Petitioner's claims that respondents are guilty of contempt is in large part based upon the testimony given at such time. The current and pending contempt motions do not include any transcript of the actual testimony given by Walker on February 7, 2008.

In the instant motions, petitioner seeks permission to include a redacted form of the transcript in its motions for contempt. Petitioner has described the information that it seeks to redact. The transcript is not presently before the Court. Petitioner has,

however, offered the transcript to the court for *in camera* review. Petitioner has not provided the transcript to respondents' attorneys, either in connection with this motion or the underlying contempt motion.

For the reasons that follow, the motions to "redact" the transcript are denied.

The remedy that petitioner seeks is to completely eviscerate information from the transcripts of the testimony taken on February 7, 2008. In redacting such information, petitioner seeks to keep it not only from the public, but from respondents as well. Indeed, petitioner has not even agreed to give respondents any meaningful limited access to the transcripts for the purposes of determining a position to these redaction motions. Despite respondents' agreement that the transcript would be kept confidential during the pendency of the redaction motion, petitioner would only permit a 30 minute chaperoned read through at its own offices.

Petitioner claims that the information it seeks to redact is the "names of certain individuals and a particular address." The reasons that petitioner gives for the redaction is that it is still in the midst of an investigation and that redaction is necessary "to protect the integrity of the investigation and/or to protect the privacy of the individuals." In only the most general terms, petitioner claims that there exists the possibility of witnesses tailoring their testimony if such information is made public. Finally, petitioner is concerned about privacy issues and that Walker and/or the named individuals "could be subject to unwanted and unnecessary attention and/or harassment."

Under the Uniform Rules of the Trial Courts § 216.1, the court may seal a court

record upon a written finding of good cause, taking into account the harm to the parties and the interest of the public. Good cause is not defined in the court rule. It has been held, however, to amount “to nothing more than a legislative recognition that a sealing order should clearly be predicated upon a sound basis or legitimate need to take judicial action.” Gryphon Domestics VI, LLC v. APP International Finance Company BV, 28 AD2d 3d 322 (1st dept. 2006). Generally the courts have been reluctant to allow the sealing of court records. This is in part due to the constitutional presumption that the public is entitled to access to court proceedings. Thus, any order denying access must be narrowly tailored to serve compelling objectives, such as a need for secrecy that outweighs the public’s right to access. Gryphon Domestics VI, LLC v. APP International Finance Company BV at 113.

Although redaction is not expressly mentioned in the court rule regarding sealing, the same kinds of considerations have been held to apply to redaction of records before the court. Danco Laboratories Limited v. Chemical Workers of Gedeon Richter, Limited, 274 AD2d 1, 8 (1st dept. 2000). While redaction is generally considered a less restrictive alternative to sealing an entire court record, it still requires appropriate legal justification before it is permitted. See: Carpinello, Public Access to Court Records in New York: The Experience Under Uniform Rule 216.1 and the Rule’s Future in a world of Electronic Filing, 66 Albany Law Review 1089, 1119 (2003).

The burden of showing the right to sealing or redaction of a record rests with the proponent. Once the burden is satisfied, then the court must balance the competing

interests of the parties and the public. Mancheski v. Gabelli Group Capital Partners, 39 AD3d 499, 502 (2nd dept. 2007).

Here, the redaction sought will have a deleterious impact on respondents, because petitioner seeks not only permission to keep the information from the purview of the public, but also from respondents themselves. Contempt is a serious remedy. Respondents risk fine or imprisonment or both. The underlying basis for the contempt is the testimony given. Here the information being redacted is either in questions put to, or answers given by, respondents. Walker has a right to this information in order to prepare a defense.

The first department case in Gryphon Domestics VI, LLC v. APP International Finance Company BV is particularly instructive. In that case, the Appellate Division reversed a trial court order of sealing initially made upon a representation that disclosure of information to defendants and the public would hamper the plaintiff's ability to negotiate a fair agreement with defendants. The appellate court held that records and/or court documents should not be sealed when it prevents opposing counsel from fully discussing with their clients all of the relevant information in the case so as to properly formulate a defense to the action. Gryphon Domestics VI, LLC v. APP International Finance Company BV at 326. At bar, respondents should likewise have full access to the transcript so that they can formulate a defense to the very serious contempt claims petitioner seeks to bring against them. It bears noting that contempt carries possible criminal consequences, which makes it even more important that

information be forthcoming.

Petitioner has not otherwise made a showing that the information needs to or should be kept from the public. The showing by petitioner on these motions is vague and made only in conclusory terms. While this case has garnered media attention, petitioner has not shown that disclosure of the names of potential persons associated with the investigation will put those people at risk of physical harm. Danco Laboratories Limited v. Chemical Workers of Gedeon Richter, Limited, 274 AD2d 1(1st dept. 2000). The claim of potential harm and/or harassment is pure conjecture. Notwithstanding the media attention to their investigation, there is no information from which the court can draw a conclusion that redacting the omitted names will protect the parties from harassment. In this regard, petitioner admits that six of the sixteen names it seeks to redact have already appeared in news articles. Yet there is no information that anyone identified in the news coverage has been threatened or harassed and no facts from which the court can conclude that such conduct will occur in the future.

The remaining justification for redaction advanced by petitioner is that revealing the identity of the names of parties and an address will compromise an ongoing investigation. This claim, however, can be made with respect to any ongoing investigation, and therefore, a particularized basis from which the court can draw such a conclusion is necessary. See: Colgate Scaffolding & Equipment Corp. v. York Hunter City Services, Inc. 14 AD3d 345 (1st dept. 2005); Schiller v. City of New York, 252 FRD 204 (SDNY 2008). Here, the necessary factual basis is absent. To the extent that

the redaction of an address for respondent Walker himself is sought, it is unclear why disclosure of this information would compromise the investigation. With respect to the proposed redaction of the names, petitioner has not indicated that they are of persons who are otherwise targets of the investigation and/or, if so, that such persons do not know themselves to be targets. Petitioner has not, by even broad category, described the redacted names in any way, nor has petitioner asserted that it has reason to believe these parties had any contact with Walker. Respondents in this case have never been the targets of the investigation, which concerns claims of misconduct within the Department of Education. Moreover petitioner is not seeking to redact Walkers' actual testimony, only particular names. It is simply unclear to the court how the proposed redaction is justified due to petitioner's fear that testimony will be tailored.

Although petitioner has offered to permit the court to review the record *in camera*, such inspection will not shed any more light on these issues. Because the court is not familiar with who the people are, whether and to what extent information about them may constitute a defense to the contempt, and/or what their role in the investigation might be, simply permitting the Court to read the names will not provide any further support for petitioner's application.

Accordingly the motions to redact are denied. This constitutes the decision and order of the Court.

Dated: New York, NY
November 10, 2008

FILED
NOV 17 2008
SO ORDERED:
J.G. J.S.C.
COUNTY CLERK'S OFFICE
NEW YORK