

**Friends of Playground 89 v New York City Dept. of
Educ.**

2014 NY Slip Op 31137(U)

May 2, 2014

Supreme Court, New York County

Docket Number: 101563/2013

Judge: Joan B. Lobis

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JOAN B. LOBIS
Justice

PART 6

FRIENDS OF PLAYGROUND 89,

INDEX NO. 101563/2013

Petitioner,

MOTION DATE 03/07/14

- v -

MOTION SEQ. NO. 001

THE NEW YORK CITY DEPARTMENT OF EDUCATION,

MOTION CAL. NO.

Respondent.

The following papers were read on this motion for summary judgment.

Notice of Motion/ Order to Show Cause - Affidavits - Exhibits _____

PAPERS NUMBERED

1

Answering Affidavits - Exhibits _____

2, 3

Replying Affidavits _____

4, 5

THIS MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION

THIS MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION + ORDER

FILED

MAY 02 2014

Dated: April 30, 2014

COUNTY CLERK'S OFFICE
NEW YORK


JOAN B. LOBIS, J.S.C.

- 1. CHECK ONE:
- 2. CHECK AS APPROPRIATE:.....MOTION IS
- 3. CHECK IF APPROPRIATE:

- CASE DISPOSED
- NON-FINAL DISPOSITION
- GRANTED DENIED GRANTED IN PART OTHER
- SETTLE ORDER SUBMIT ORDER DO NOT POST
- FIDUCIARY APPOINTMENT REFERENCE

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6**

-----X
FRIENDS OF PLAYGROUND 89,

Petitioner,

-against-

THE NEW YORK CITY DEPARTMENT OF EDUCATION,

Respondent.
-----X

JOAN B. LOBIS, J.S.C.:

In this Article 78 proceeding, Friends of Playground 89 (FP89) petitions the Court for an order directing Respondent New York City Department of Education (DOE) to comply with a June 2013 request to release documents pursuant to New York's Freedom of Information Law ("FOIL"). In compliance with a so-ordered stipulation, the Respondent released all of the requested documents, with redactions, to the Petitioner. Petitioner now submits a supplemental affidavit raising two disputed issues, and seeking an order compelling the DOE to release unredacted versions of the documents. The DOE opposes the petition. For the following reasons, the petition is granted to the extent set forth below.

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On December 18, 2013, the Petition was submitted to the Court without opposition.

On December 20, 2013, this Court granted the petition on default, which was entered on January 7, 2014. Unbeknownst to the Court, the parties had agreed to extend Respondent's time to answer. After the default judgment was signed, the parties contacted the Court. I agreed to vacate the order and so ordered a stipulation submitted by the parties. In the stipulation, the Respondent agreed to provide documents requested pursuant to FOIL, unless the documents were exempt, prior to the submission of an answer. The stipulation also established a briefing schedule including a

supplemental affidavit in support of the petition, if the documents did not satisfy Petitioner's demands. Shortly after releasing the requested documents, Respondent sent an email to Petitioner citing the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232(g) and N.Y. Public Officers Law Section 87(2)(b) as a basis for redacting information contained in the documents. Respondent claimed that the "term personally identifiable information includes information that is linkable to a specific student and would allow 'a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty.'"

In its supplemental papers, FP89 claims that it received documents responsive to its FOIL request that were improperly redacted. Among the documents provided by the DOE are correspondence between parents and the DOE, and injury reports from the playground. FP89 alleges that: 1) the DOE has improperly redacted non-exempt data, specifically email addresses and the names of individuals in responsive emails, and 2) that the DOE has improperly redacted the description of injuries from injury reports. Petitioner contends that FERPA does not apply because it governs the release of information contained in "education records," and the DOE's documents were not education records. FP89 maintains that the redacted emails do not relate to students at all, that some names that were redacted were of a Community Board representative, and that the emails were written by parents in their capacity as members of an organization, including the PTA Executive Board, which it states is only tangentially related to the student body as a whole.

FP89 asserts the DOE also has not met its burden under Section 87(2)(b) of the Public Officers Law to show that the redactions are necessary to protect against an unwarranted invasion of personal privacy. Petitioner claims that the documents were written by people in the school community writing to government agencies, making recommendations and commenting on public issues. Petitioner concedes that sometimes redacting an email address may be necessary but not the name of the sender. FP89 requests that if the emails are not provided, that a log with the redacted information be provided.

Petitioner also contends that the DOE improperly redacted the description of injuries in various injury reports. The injury reports were produced by the DOE and referred to as the Online Occurrence Reporting System Reports and Comprehensive Injury Reports ("OORS reports"). It argues that the bodily location of an injury is not personally identifiable information. Petitioner maintains that under FERPA these documents should not be redacted. It claims that without personal knowledge of the relevant circumstances, it is not possible to identify a student based on the redacted information in the OORS reports.

In answering the petition, the DOE argues that it is permitted to redact parents' names, contact information, and other personal information from an email that is not exempt from disclosure. DOE asserts that FERPA prohibits disclosure of the names of students and parents, and that Section 87(2)(a) of the Public Officers Law exempts records that are specifically exempt by state or federal statute. DOE maintains that education records are any records that relate to a student and are maintained by an educational agency or institution. It claims that FERPA allows the release of education records without consent if personally identifiable information is removed.

Though FERPA allows for the disclosure of directory information, the DOE contends that this is subject to public notice and opt-out procedures, which in this case were never provided as the DOE has not designated the emails as directory information.

The DOE claims that the parents' names would also be exempt by Public Officers Law Sections 87(2)(b) and 89(2)(b), as the release of names, addresses, and emails addresses is information of a personal nature that would result in an unwarranted invasion of personal privacy. It argues that the records sought do not fall neatly into the categories enumerated by Section 89(2)(b) but that there is no public interest to justify the requested disclosure of names and personal information. DOE maintains that it is not required to create new records, in particular a log with information that was redacted.

Respondent also claims that FERPA prohibits the DOE from disclosing the information regarding students' injuries that was in the OORS reports. DOE contends that the bodily location of injuries is exempt under FERPA because it constitutes personally identifiable information in education records. DOE states that the OORS reports are education records. It asserts that a person simply aware that a student had been involved in an accident on a playground on a certain date could determine what injury a student received based on the reports. Furthermore, it argues that if a person was aware that a student had an injury, such as seeing a classmate with their arm in a sling, he or she could identify the student through the report. DOE maintains that FOIL allows for the withholding of a record in its entirety when exempt by federal statute. Though DOE chose not to withhold the entire document, it redacted the personally identifiable information.

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Respondent argues that the personal privacy exemption, Section 89(2)(b) of the Public Officers Law, exempts the information as well. Though the reports do not fall under one of the categories, the Public Officers Law does not limit privacy exemptions to just those categories. It claims that the information was of a personal nature reported in confidence to an agency and is not relevant to the ordinary work of the agency, which would make the information exempt under Section 89(2)(b)(v) as well.

In reply, Petitioner provides the affidavit of Laurie Frey, the co-president of Friends of Playground 89. Ms. Frey claims that the communications that were redacted address a public issue and were not of individuals communicating strictly in a parental capacity. She claims that the names redacted are of representatives of school organizations, including PTA officers. In support, she provides examples of unredacted emails in her possession that show that the emails were sent by PTA officers, not just members of the community. She avers that PTA officers illegitimately used their authority and discretion of their public office to initiate a reconstruction of Playground 89 and to secure funds for this purpose. She claims that many of the alleged injuries that are not documented have been used by parents to advance an agenda to redesign the park.

In an Article 78 proceeding, the Court reviews agency decisions to determine whether an action violates lawful procedures, is arbitrary or capricious, or is affected by an error of law. E.g., Pell v. Bd. of Educ., 34 N.Y.2d 222, 231 (1974); Roberts v. Gavin, 96 A.D.3d 669, 671 (1st Dep't 2012). Where an issue is limited to "pure statutory interpretation," a court is not required to defer to an administrative agency but rather should consider the plain language of the statute. E.g., Dunne v. Kelly, 95 A.D.3d 563, 564 (1st Dep't 2013); see also County of Westchester v. Bd. of

Trustees, 9 N.Y.3d 833, 835-36 (2007) (administrative agency's regulations must not conflict with state statute or that statute's underlying purposes).

Under FOIL, "government records are 'presumptively open,' statutory exemptions are 'narrowly construed,' and the City must articulate a 'particularized and specific justification' for nondisclosure." N.Y. Civ. Liberties Union v. Schenectady, 2 N.Y.3d 657, 661 (2004) (citing Gould v. N.Y. City Police Dep't, 89 N.Y.2d 267, 274 (1996)). The agency seeking to prevent disclosure has the burden to establish the applicability of an exemption. Gould, 89 N.Y.2d at 275 (citing Hanig v. Dep't of Motor Vehicles, 79 N.Y.2d 106, 109 (1992)). Withholding disclosure requires that "the material requested falls squarely within the ambit of one of these statutory exemptions." Gould, 89 N.Y.2d. at 275 (citing Fink v. Lefkowitz, 47 N.Y.2d 567, 571 (1979)). New York Public Officers Law Section 87(2) states that "[e]ach agency shall, in accordance with its published rules, make available for public inspection and copying all records" unless they fall under one of the Section 87(2) exemptions.

Under Section 87(2)(a) an agency may deny access to records if they are specifically exempt from disclosure by state or federal statute. Section 87(2)(b) allows for exemptions if disclosure would constitute an unwarranted invasion of personal privacy under the provisions of Section 89(2)(b). When a document does not fit one of the enumerated provisions of Section 89(2)(b), the Court must determine if an invasion of privacy is unwarranted "by balancing the privacy interests at stake against the public interest in disclosure of the information." The New York Times Co. v. NY Fire Dept., 4 N.Y.3d 477 (2005).

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FERPA sets out the conditions for the availability of funds to educational agencies or institutions, including privacy requirements for student records. 20 U.S.C.A. § 1232g(a). Under FERPA, education records are defined as materials that contain information directly related to a student and are maintained by an educational agency or institution or by a person acting for such agency or institution. *Id.* § 1232g(a)(4)(A). Section 1232g(b)(1) forbids the release of education records, or personally identifiable information contained in the records of students without the written consent of their parents to any individual, agency, or organization. Part 99 of Title 34 of the Code of Federal Regulations implements FERPA. The Code of Federal Regulations defines personally identifiable information as including “information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have knowledge of the relevant circumstances, to identify the student with reasonable certainty.” 34 C.F.R. § 99.3.

The Court is not persuaded that any of the emails are considered educational records under FERPA. The emails are not directly related to students, many not mentioning students in any way. Though releasing identifying details in an email could constitute an invasion of privacy, Petitioner’s suggestion that many emails were written by PTA officers shows a public-interest purpose for disclosure. There is a legitimate public interest in knowing how the PTA secures public funds and how they use their authority in constructing public spaces. Nonetheless, not every email is necessarily between a PTA officer and the DOE. Furthermore, other emails directly identify an individual as being the parent of a student, whose name was redacted. The New York Court of Appeals has held that “[i]f the court is unable to determine whether withheld documents fall entirely within the scope of the asserted exemption, it should conduct an *in camera* inspection

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of representative documents and order disclosure of all nonexempt, appropriately redacted material.” Gould, 89 N.Y.2d at 275; see also Xerox Corp. v. Webster, 65 N.Y.2d 131, 133 (1985). Therefore, the Court orders that the emails be submitted in full for *in camera* inspection with a log identifying which emails include the names of PTA officials and the specific exemptions relied upon to exempt redacted information in an email.

Based on the facts of this matter, the redacted sections of the OORS reports are covered under FERPA. The redacted sections include information that is directly related to students and is maintained by an educational institution. The information would allow a reasonable person in the school community to identify the student with reasonable certainty. As FERPA is a federal statute, Public Officers Law Section 87(2)(a) allows for the exemption of the redacted sections of the OORS reports from disclosure. Accordingly, it is

ORDERED that the petition is granted in part; it is

ORDERED that the redacted information in the OORS reports is exempt from disclosure; it is further

ORDERED that the Department of Education shall supply the Court with all the requested records within 30 days of the date of this decision, order, and judgment, and it is further

ORDERED that the Department of Education shall provide a log detailing the risks associated with particular emails and specific exemption relied upon to the Court for *in camera* inspection in conjunction with the records.

Dated: April 30, 2014

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JOAN B. LOBIS, J.S.C.