

**Sell v New York City Dept of Educ.**

2014 NY Slip Op 31340(U)

May 23, 2014

Sup Ct, New York County

Docket Number: 101291/13

Judge: Joan B. Lobis

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

Index Number : 101291/2013  
**SELL, PETER**  
 vs  
**NYC DEPARTMENT OF EDUCATION**  
 Sequence Number : 001  
 ARTICLE 78

PART \_\_\_\_\_  
 INDEX NO. \_\_\_\_\_  
 MOTION DATE 12/23  
 MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to 4, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). 1  
 Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). 2,3  
 Replying Affidavits \_\_\_\_\_ | No(s). 4

Upon the foregoing papers, it is ordered that this motion is

**THIS MOTION IS DECIDED IN ACCORDANCE  
WITH THE ACCOMPANYING MEMORANDUM DECISION**

**THIS MOTION IS DECIDED IN ACCORDANCE  
WITH THE ACCOMPANYING MEMORANDUM DECISION  
and Order**

**FILED**

MAY 27 2014

**NEW YORK  
COUNTY CLERK'S OFFICE**

Dated: 5/23/14

Joan B. Lobin, J.S.C.

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

1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

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

PETER SELL,

Petitioner,

Index No. 101291/13

-against-

Interim Decision and Order

NEW YORK CITY DEPARTMENT OF EDUCATION and  
COURTENAYE JACKSON-CHASE, General Counsel of the  
New York City Department of Education,

**FILED**

Respondents.

MAY 27 2014

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

NEW YORK  
COUNTY CLERKS' OFFICE

Petitioner Peter Sell, a mathematics teacher employed by the New York City Department of Education, moves pursuant to Article 78 of the Civil Practice Law and Rules and the Freedom of Information Law (FOIL), Public Officers Law § 84, et seq., for an order directing Respondents to disclose documents related to an investigation of the scoring for the January 2008 Mathematics A Regents Examination ("Regents Examination") at the Manhattan Center for Science and Mathematics ("MCSM"). Respondents New York City Department of Education and Courtenaye Jackson-Chase, the General Counsel for the New York City Department of Education (collectively, "DOE") oppose the petition. For the following reasons, the Court issues this interim order requesting that the documents be provided for an *in camera* review, with the exception of documents already in possession of the Petitioner.

Petitioner alleges that during the scoring of Regents Examination at MCSM, J. David Jimenez, the principal of MCSM, and Charles Kwan, the assistant principal of mathematics, complained that the scoring rubrics used by the Scoring Committee were too strict. On January 28, 2008, Mr. Kwan allegedly directed two members of the Scoring Committee to rescore

examinations with scores in the low 80s using different rubrics to increase the numbers of students passing with distinction, a score of 85 or higher. On May 3, 2008, Mr. Sell requested the Office of the Special Commissioner of Investigation ("SCI") to investigate allegations of misconduct by Principal Jimenez and Mr. Kwan. On May 14, 2008, SCI referred the complaint to the Office of Special Investigations ("OSI") of the DOE. The investigation was completed in August 2009. The allegations of misconduct were not substantiated.

In February 2013, Petitioner made a request pursuant to FOIL for the investigation report and records from the OSI case. By letter dated May 1, 2013, Respondents denied Mr. Sell's FOIL request, relying on Public Officers Law Sections 87(2)(b), 87(2)(d), 87(2)(g), 87(2)(h), 89(2)(b)(iv), and 89(2)(b)(v). Petitioner appealed the decision, but the appeal was also denied. The DOE, however, modified its original position. On appeal, Respondents only relied on Public Officers Law Sections 87(2)(b), 87(2)(g), and 89(2)(b)(iv) and (v), exemptions for disclosures that invade personal privacy and that include inter-agency and intra-agency materials, respectively. Petitioner now brings this Article 78 petition seeking the disclosure of the requested documents.

Mr. Sell argues that the blanket denial of his FOIL request indicates a failure by Respondents to comply with the law. He asserts that any claim that the documents fall within Section 89(2)(b)(iv) is conclusory. Petitioner concedes that records can be withheld if disclosure would result in personal or economic hardship to the subject party and is not relevant to the work of the agency, but he contends that both clauses must be applicable to make the paragraph operative. He claims that the documents concern the scoring of the Regents Examination, which

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is relevant to the work of the DOE, and, as a result, the Section 89(2)(b)(v) exemption does not apply.

Mr. Sell maintains that the public interest in the disclosure of the information outweighs any privacy interests. He asserts that even though the claims against Principal Jimenez and Mr. Kwan were not substantiated, the public has a compelling interest in ascertaining why the allegations were not substantiated. In support of his position, Petitioner provides sections of an investigative report from OSI, in which he identifies alleged violations of rating guidelines.

Petitioner argues that the inter-agency and intra-agency exemption does not apply. He claims that in so far as the documents contain witness statements, these statements are factual in nature and not covered by the exemption. He claims that correspondence between the DOE and high-level state officials can be released, even though it is an intra-agency communication, because the documents were used as a basis for the OSI investigator's final determination.

Mr. Sell requests that the Court undertake an *in camera* inspection, and that Respondents furnish a sufficiently detailed analysis of the responsive documents. Mr. Sell requests litigation costs under Public Officers Law Section 89(4)(c). He asserts that the Respondents did not have a reasonable basis for withholding the records. Finally, he requests that the Court order Respondents to disclose the non-exempt portions of the OSI investigation reports and related documents pertaining to the unsubstantiated allegations.

In opposition, the DOE claims the records were denied because i) the allegations were unfounded, and, as a result, disclosure would constitute an unwarranted invasion of personal privacy, ii) the details and statements provided to OSI were reported in confidence, and iii) because the documents constitute inter-agency and intra-agency communication. Respondents concede that under Thomas v. Department of Education, 103 A.D.3d 495 (1st Dep't 2013), disclosure cannot be denied in full just because an allegation was not substantiated.

Respondents maintain that privacy interests outweigh the interests of the public when the subject of investigations has not been found to do any wrongdoing. Respondents contend that the private information in the investigative file is inextricably intertwined with the factual record and cannot be redacted. DOE claims that Mr. Sell would be able to identify many of the individuals investigated or interviewed in the records. DOE asserts that disclosure of the investigative file would have a harmful effect on the efficacy of OSI's investigations as it would decrease the likelihood that witnesses would report wrongdoing.

Respondents claim that they do not need to produce any documents that the Petitioner already possesses or that are inter-agency and intra-agency materials. They argue that the allegations of misconduct are not factual tabulations and are exempt from disclosure. They maintain that even though objective information may be disclosed, that opinions, ideas, or advice exchanged as part of the consultative or deliberative process between agencies is exempt from disclosure. Lastly, the DOE contends that an *in camera* review is not necessary as the documents are completely exempt.

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In reply, Petitioner reasserts that information can only be withheld if it is not relevant to the ordinary work of the agency. He contends that the public interest outweighs the privacy interests at stake in disclosure. Mr. Sell avers that the only personal data requested are the names and titles of individuals involved in grading the Regents Examination. He affirms that the Committee on Open Government has repeatedly held that releasing records that are related to a public employee's official duties and performance is a permissible invasion of privacy. Petitioner claims that Respondents have not demonstrated that economic or personal hardship would result from the release of information.

Mr. Sell asserts that Respondents must release the documents even if he is already in possession of some of them. He affirms that he has never received a copy of the records pursuant to an alternative discovery device or FOIL. Petitioner contests Respondents' position that witness statements are not subject to disclosure if the facts are intertwined with opinions. Petitioner states that opinions may be redacted, but the witness statements are not the type of deliberative materials protected by inter-agency or intra-agency exemption. Petitioner contends that pre-decisional materials can be disclosed once an agency has relied upon them as a basis for the final determination. Petitioner claims that it not possible to tell which documents should be disclosed without an *in camera* review.

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)).

Section 87(2)(b) of the Public Officers Law allows for an agency to deny access to records if they would constitute an unwarranted invasion of personal privacy under Section 89(2). Section 89(2)(b)(iv) exempts "disclosure of information of a personal nature when disclosure would result in economic or personal hardship to the subject party and such information is not relevant to the work of the agency requesting or maintaining it." Section 89(2)(b)(v) exempts "disclosure of information of a personal nature reported in confidence to an agency and not relevant to the ordinary work of such agency[.]" The Court of Appeals has held that disclosure is exempt only "if there is both proof of such hardships and it is established that the records sought are not relevant or essential to the ordinary work of the agency[.]" Gannet Co., Inc. v. Monroe, 45

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N.Y.2d 954, 956 (1978). If none of the enumerated personal privacy exemptions of Public Officers Law Section 89(2)(b) apply, then the Court must decide “whether any invasion of privacy here is ‘unwarranted’ by balancing the privacy interests at stake against the public interest in disclosure of the information.” N.Y. Times Co. v. N.Y. Fire Dep’t., 4 N.Y.3d 477, 485 (2005).

Section 87(2)(g) exempts disclosure of documents that are inter-agency or intra-agency materials which are not statistical or factual tabulations. The exemption only applies to “‘deliberative material,’ i.e. communications for discussion purposes not constituting final policy decisions[.]” Russo v. Nassau Cty. Comm. College, 81 N.Y.2d 690, 699 (1993). Factual observations are not exempt from disclosure, even in documents issued before final decision.” Mothers on the Move, Inc. v. Messer, 236 A.d.2d 408, 410 (2d Dep’t 1997) (internal citations omitted).

Neither Section 89(2)(b)(iv) or (v) of the Public Officers Law are applicable. Both sections feature conjunctive requirements that must be met for the exemption to apply. See Gannett Co., Inc., 45 N.Y.2d at 956. The documents are relevant to the ordinary work of the DOE in so far as they relate to an investigation into the performance of MCSM’s administrators’ official duties and the grading of the Regents Examination. Respondents claim that because the allegations are unsubstantiated, releasing the documents would constitute an unwarranted invasion of personal privacy. Nonetheless, there is a significant public interest in knowing whether there has been a violation of the requirements for the administration of the Regents Examination. Respondents have also not shown that the documents fall squarely within the ambit of Section 87(2)(g) of the

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Public Officers Law. Witness statements might include factual observations that are not exempt from disclosure.

If Petitioner already possesses a copy of the documents, “a court may uphold an agency’s denial of the petitioner’s request under FOIL for a duplicate copy as academic. However, the burden of proof rests with the agency to demonstrate that the petitioner’s specific requests are moot.” Moore v. Santucci, 151 A.D.2d 677, 678 (2d Dep’t 1989). Respondents have provided links to several documents Petitioner requested that are already publicly available, and Petitioner attached 29 pages of requested documents to his petition. The Court does not need to order the DOE to provide records that are publicly available or that Petitioner already possesses.

Petitioner also requests litigation costs. Pursuant to Section 89(4)(c)(i) of the Public Officers Law, the Court may assess reasonable attorney’s fees and other litigation costs reasonably incurred by a petitioner if the agency had no reasonable basis for denying access. In this matter, Petitioner is a pro se litigant. As Petitioner does not have an attorney, attorney’s fees are not available.

In Thomas v. Department of Education, a similar case involving MCSM and an investigation into an administrator’s performance, the First Department held that the “matter should be remanded to the article 78 court for an *in camera* inspection of the documents to determine if redaction could strike an appropriate balance between personal privacy and public interests and which material could be properly disclosed . . . . The court should also determine whether portions of the documents may be exempt from disclosure as intra- or inter-agency records

that are not statistical or factual data.” Thomas, 103 A.d.3d at 499-500. See Gould, 89 N.Y.2d at 275 (“If 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 of representative documents and order disclosure of all nonexempt, appropriately redacted material.”). In this matter, an *in camera* review is necessary to determine what documents should and should not be disclosed or redacted. Accordingly, it is

ORDERED that the Petition is granted in so far as Respondents must supply the Court with all the requested records for an *in camera* inspection within 30 days of the date of this decision and order, with the exception of documents already in possession of the Petitioner; and it is further

ORDERED that the DOE shall provide a log detailing the types of documents, contents, risks associated with the documents, information that should be redacted, and specific exemptions relied upon to the Court for an *in camera* inspection in conjunction with the records.

Dated: *May 23*, 2014

**FILED**  
MAY 27 2014  
NEW YORK  
COUNTY CLERK'S OFFICE

ENTER:

*JBL*  
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JOAN B. LOBIS, J.S.C.