

Matter of Felicio v Connetquot Cent. Sch. Dist. of Islip

2017 NY Slip Op 31052(U)

May 3, 2017

Supreme Court, Suffolk County

Docket Number: 08339-2016

Judge: William G. Ford

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 38 - SUFFOLK COUNTY

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PRESENT:

HON. WILLIAM G. FORD
JUSTICE SUPREME COURT

Motion Submit Date: 06/01/17
Motion Seq #: 001 Mot D

In the Matter of the Application of
ANTHONY F. FELICIO, JR., as President of
the Connetquot Teacher's Association, Inc.,

Petitioner,

For Relief Pursuant to Article 78 of the New
York Civil Practice Law and Rules

-against-

CONNETQUOT CENTRAL SCHOOL
DISTRICT OF ISLIP,

Respondent.

PETITIONER'S COUNSEL:
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In consideration of the following papers in connection with the following application currently pending before the Court:

1. Notice of Petition dated August 24, 2016; Verified Petition dated August 24, 2016 and supporting papers;
2. Verified Answer dated November 14, 2016; Affirmation in Opposition to the Petition dated November 14, 2016; Affidavit in Opposition to the Petition dated September 24, 2016; Memorandum of Law in Opposition to the Petition dated November 14, 2016 and supporting papers;
3. Reply Affirmation in Further Support of the Petition dated December 12, 2016; it is

ORDERED that this special proceeding commenced by the Verified Petition pursuant to CPLR Article 78 seeking an order vacating, setting aside or annulling an administrative

determination denying unredacted production or access to records of respondent Connetquot Central School District is determined in accord with the following.

Factual Background

This matter is before the Court on petitioner Anthony F. Felicio, Jr.'s ("petitioner") application via Verified Petition seeking review of respondent Connetquot Central School District ("school district" or "respondent") decision granting in part and denying in part two requests for production of or access to school district records pursuant to the New York Freedom of Information Law, Public Officers Law Article 6, more commonly referred to as FOIL.

More specifically, petitioner sought via two separate requests the production of any and all emails by and between the district's superintendent Lynda Adams and the districts STEM chairperson Mary Loesing from March 21 to March 23, 2016; and between Loesing and assistant superintendent Dean Mittleman from March 22 through April 4, 2016. Petitioner made these requests on April 4 and April 16, 2016 respectively.

Respondent acknowledged receipt of petitioner's records access requests on April 8 and April 25, 2016 respectively. In correspondence dated May 4, 2016, the district's FOIL records process officer Andrea B. Wilson granted the applications in part and denied them in part. They were granted to the extent that the district provided petitioner, the president of the Connetquot teacher's union, approximately 53 pages of material responsive to the two FOIL requests. The requests were denied to the extent that the material produced was in redacted form.

Summary of the Parties' Respective Positions

The district based its redactions on two separate exemptions expressly provided in the FOIL statute, contending that the redactions were made to preserve and protect "intra-agency and inter-agency material which were not statistical or factual tabulations, date, instructions to staff that affect the public, final agency policy or determinations, or external audits ..." under Pub. Off. L. § 87(2)(b). The district also justified its redactions to prevent an "unwarranted intrusion into personal privacy" of its employees under Pub. Off. L. § 87(2)(g).

Petitioner has therefore commenced this special proceeding arguing that respondent's redactions and assertions of exemptions are arbitrary and capricious, abuse of discretion and unsupported by law and should be set aside. Petitioner argues that respondent, by rendering part compliance with his requests has waived applicability of any FOIL exemptions. Additionally, petitioner argues that the district's reliance on the exemptions is conclusory in nature, and that respondent fails to meet its burden of establishing specified and particularized reasons justifying redaction.

In response, the district advances that the redactions fall into two separate and distinct categories. In the first category, the district argues that the inter-agency/intra-agency material was speculative discussion amongst district employees concerning school curriculum or educational programs (policymaking) which were in non-final form and were part of the internal

deliberative process. Thus the district contends that disclosure to the public would work a chilling effect and inhibit full, free, and frank discussion amongst its employees. In the second category falls what the district categorizes as off-duty and non-work related substance of emails between its employees, which if revealed could be an embarrassing invasion of personal privacy.

Submitted in opposition to the Petition, respondent offers the redacted emails produced in response to petitioner's FOIL requests. Given the respondent's redactions, to the best efforts of this Court, these emails by, between and among Loesing, Mittleman, and Adams appear to deal with school curriculum and educational course planning concerns. Some of the correspondence deals with the district's concerns of outdated and surplus science textbooks and acquisition of science course planning materials for grades K through 5.

Other emails however, deal with an under-enrolled advanced placement Chemistry course in the district's high school. In an effort to preserve the course for offering in the 2017-2018 academic year, district teachers apparently lobbied the student body with hopes of increasing enrollment. Those efforts were partly successful with a list of prospective enrollee students having been identified.

However, the district's administration noted that those same students would cancel enrollment from other advanced placement courses, putting them into jeopardy. In the backdrop of this situation, parents attended a board of education meeting armed with course enrollment figures which allegedly disclosed student's identities. The district, in an abundance of caution, was concerned that this information implicated privacy rights codified in the federal Family Educational Rights & Privacy Act, 20 U.S.C. § 1232 *et seq.* In light of this concern, Loesing advised the teachers against lobbying students for course enrollment and reminded them of student's privacy rights and concerns. It is this communique which appears to have drawn petitioner's attention, as the source of the parents information was the source of inquiry by petitioner. The FOIL requests subject to this proceeding then closely followed.

Standard of Review

As an initial matter, as regards FOIL myriad courts have recognized that the Legislature enacted FOIL to provide the public with a means of access to governmental records in order to encourage public awareness and understanding of and participation in government and to discourage official secrecy" (*Matter of Alderson v. New York State Coll. of Agric. & Life Sciences at Cornell Univ.*, 4 NY3d 225, 230 [2005]). An administrative agency's records "are presumptively open to public inspection, without regard to need or purpose of the applicant" (*Matter of Buffalo News v. Buffalo Enter. Dev. Corp.*, 84 NY2d 488, 492 [1994]; *Beechwood Restorative Care Ctr. v Signor*, 5 NY3d 435, 440-41, 842 NE2d 466, 469 [2005]).

Accordingly, FOIL "[e]xemptions are to be narrowly construed to provide maximum access, and the agency seeking to prevent disclosure carries the burden of demonstrating that the requested material falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access" (*Matter of Capital Newspapers Div. of Hearst Corp. v. Burns*, 67 NY2d 562, 566; see *Matter of Town of Waterford v. New York State Dept. of Envtl. Conservation*, 18 NY3d 652, 657; *Matter of Data Tree, LLC v. Romaine*, 9 NY3d 454, 462,

[2007]; *Ortiz v Zugibe*, 144 AD3d 919, 920, 41 NYS3d 125, 126 [2d Dept 2016]).

The administrative agency's showing in asserting a FOIL exemption requires articulation of "particularized and specific justification for denying access" (*Matter of Dilworth v. Westchester County Dept. of Correction*, 93 AD3d 722, 724, 940 NYS2d 146). "Conclusory assertions that certain records fall within a statutory exemption are not sufficient; evidentiary support is needed" since FOIL is "based on a presumption of access to the records" calling for disclosure rather than concealment on occasions where the agency fails to sustain its burden to demonstrate that a statutory exemption applies (*Matter of Westchester Rockland Newspapers v. Kimball*, 50 NY2d 575, 580; *Baez v Brown*, 124 AD3d 881, 882–83, 1 NYS3d 376, 379 [2d Dept 2015], *lv to appeal dismissed*, 26 NY3d 981, 40 NE3d 571 [2015]).

The issue of whether a particular document is exempt from disclosure under the Freedom of Information Law, the oft-stated standard of review in CPLR article 78 proceedings, i.e., that the agency's determination will not be set aside unless arbitrary or capricious or without rational basis, is not applicable" (*see Matter of New York Comm. for Occupational Safety & Health v. Bloomberg*, 72 AD3d 153, 158, 892 NYS2d 377; *Prall v New York City Dept. of Corr.*, 129 AD3d 734, 735, 10 NYS3d 332, 334 [2d Dept 2015]).

Discussion

Turning to the merits of the pending application, the District has asserted two exemptions putatively justifying their redaction of records responsive to petitioner's FOIL requests. The first exemption was to protect the internal deliberative process and free, full and frank discussions of opinion amongst district employees on non-final matters. Additionally, respondent has argued that some redactions were made to protect matters of pure speculation and those other communications that did not present factual statements or matters. It is settled that this FOIL exemption "protects against the disclosure of 'inter-agency or intra-agency materials', predecisional memoranda or other nonfinal recommendations prepared to assist an agency decision maker" (*Matter of Akras v. Suffolk County Dept. of Civ. Serv.*, 137 A.D.2d 523, 523, 524 NYS2d 266, Pub. Off. L. § 87[2][g]) whose express purpose is "to allow individuals within an agency to exchange their views freely, as part of the deliberative process, without the concern that those ideas will become public" (*Matter of New York Times Co. v. City of N.Y. Fire Dept.*, 4 NY3d 477, 488; *Madera v Elmont Pub. Lib.*, 101 AD3d 726, 727, 957 NYS2d 129, 131 [2d Dept 2012]). Further, although the term "inter-agency materials" is not defined under the FOIL statute, New York's courts have construed this term to mean "deliberative material," i.e., communications exchanged for discussion purposes not constituting final policy decisions (*Russo v Nassau County Community Coll.*, 81 NY2d 690, 699 [1993]).

The district has also claimed that certain portions of the requested documents present personal communication of its employees on purely personal matters, unrelated to work duties or matters which would unreasonably intrude on those employee's personal privacy. FOIL does permit an administrative agency to exempt or deny access to requested records if disclosure "would constitute an unwarranted invasion of personal privacy" which has been defined as "what would be offensive and objectionable to a reasonable [person] of ordinary sensibilities"

(*Matter of Beyah v. Goord*, 309 AD2d 1049, 1050, 766 NYS2d 222 [3d Dept. 2003]; *Thomas v New York City Dept. of Educ.*, 103 AD3d 495, 496–97, 962 NYS2d 29, 31 [1st Dept 2013]). The personal privacy exemption incorporates a nonexhaustive list of categories of information that the Legislature has determined would constitute unwarranted invasions of personal privacy if disclosed (see Public Officers Law § 89[2][b]). In the absence of any proof establishing the applicability of any enumerated categories, the determination of whether disclosure of the information sought constitutes an unwarranted privacy invasion requires a “balancing [of] the privacy interests at stake against the public interest in disclosure of the information” (*McFadden v Fonda*, 148 AD3d 1430 [3d Dept 2017]; *Matter of Harbatkin v. New York City Dept. of Records & Info. Servs.*, 19 NY3d 373, 380; *Livson v Town of Greenburgh*, 141 AD3d 658, 661, 34 NYS3d 612, 615 [2d Dept 2016]).

It is undisputed that respondent’s assertion of exemptions requires a, specific and particularized showing to be successful. As noted above, this Court reviewed the redacted documents produced by respondent. However, the redactions and the subject matter which respondent has sought to protect loom large in this Court’s analysis. Contrary to respondent’s contention against *in camera* review of FOIL disclosure, our appellate courts have repeatedly cautioned that the proper procedure for respondent to sustain its burden of establishing concrete support of asserted exemptions in the abstract is to submit the records in question for *in camera* inspection by the court (see *Matter of Gould v. 984 New York City Police Dept.*, 89 NY2d at 275, *Matter of Xerox Corp. v. Town of Webster*, 65 NY2d 131, 133 [1985]; *Matter of M. Farbman & Sons v. New York City Health & Hosps. Corp.*, 62 NY2d at 83; *Miller v New York State Dept. of Transp.*, 58 AD3d 981, 983–84, 871 NYS2d 489, 493 [3d Dept 2009]; see also *Thomas v New York City Dept. of Educ.*, 103 AD3d 495, 499, 962 NYS2d 29, 33 [1st Dept 2013][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]).

Conclusion

Accordingly, this Court is of the view that respondent has asserted exemptions, but by its redaction of the pertinent and material substance, has at the same time sought this Court’s order justifying its part disclosure on faith. Put differently, this Court has been deprived the relevant and material information to make a reasoned judgment on whether the material sought to be protected is truly inter-agency or intra-agency or otherwise pure personal information properly withheld under the FOIL statute. Without this information, this Court would only be speculating whether respondent has properly discharged its duty under FOIL.

Therefore this Court holds that the Petition brought pursuant to CPLR Article 78 concerning respondent’s partial denial of records access under FOIL is granted in part. Specifically, a full determination on whether the exemptions respondent has asserted properly apply or not cannot be made, absent review of the unredacted emails sought.

Accordingly, it is

Accordingly, it is

ORDERED that respondent produce *in camera* to this Court for review in chambers a complete unredacted set of the emails previously provided to petitioner **no later than June 30, 2017**; and it is further

ORDERED that petitioner serve a copy of this memorandum and decision with notice of entry on respondent on or before June 5, 2017.

The foregoing constitutes the decision and order of this Court.

Dated: May 3, 2017
Riverhead, New York



WILLIAM G. FORD, J.S.C.

FINAL DISPOSITION

NON-FINAL DISPOSITION