

<b>Matter of Lindell v Board of Educ. of the Connetquot Cent. Sch. Dist. of Islip</b>
2019 NY Slip Op 31696(U)
May 24, 2019
Supreme Court, Suffolk County
Docket Number: 10919/2016
Judge: Martha L. Luft
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Short Form Order

Index No. 10919/2016

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 50 - COUNTY OF SUFFOLK

P R E S E N T:

Hon. Martha L. Luft  
Acting Justice Supreme Court

**COPY**

DECISION AND ORDER  
CASE DISPOSED

\_\_\_\_\_<sup>x</sup>  
In the Matter of the Application of BRAD  
LINDELL, as Vice President of the  
Connetquot Teachers Association, Inc.,

Plaintiff,

**PETITIONER'S ATTORNEY**  
Bernard T. Callan, Esq.  
320 Carleton Ave, Suite 2000  
Central Islip, NY 11722

-against-

The Board of Education of the Connetquot  
Central School District of Islip, and  
Connetquot Central School District of Islip,

**RESPONDENTS' ATTORNEY**  
Guercio & Guercio, Esqs.  
77 Conklin Street  
Farmingdale, NY 11735

Respondents.

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

\_\_\_\_\_<sup>x</sup>

**ORDERED**, that the redactions contained in Exhibit "E" to the affidavit of Andrea B. Wilson dated April 18, 2017 ("Wilson Affidavit") are revised in accordance with this order and the attached copy of the documents in Exhibit "E" to the Wilson affidavit, which is incorporated by reference herein; and it is further

**ORDERED**, that the petitioner's application for attorneys fees is denied.

This is an Article 78 proceeding challenging the respondents' ("School District") denial of a request for documents made pursuant to the Freedom of Information Law, NY

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Public Officers Law (“POL”) Section 87, *et seq.* (“FOIL”) and the School District’s subsequent redactions of portions of the requested documents. The redacted documents were provided as Exhibit “E” to the Wilson affidavit submitted in opposition to the Article 78 petition (“Exhibit “E” Documents”).

This court considered the Article 78 proceeding and issued an order dated November 6, 2017 which rejected several of the respondent’s defenses and granted the petition insofar as it required the production of the unredacted version of the Exhibit “E” Documents for an *in camera* review and proof that the individuals interviewed were provided assurances of confidentiality.

The Exhibit “E” Documents are a compilation of interviews and written statements involved in an investigation of a complaint against then school board member Nick Ferraioli. Specifically, the investigation was to determine whether a verbal altercation which took place on school property during a recess of a school board meeting constituted harassment under the School District’s Code of Conduct.

In reviewing the propriety of the redactions the court considered: (1) the respondent School District’s policies (“School District Policy” or “Policy”) as provided to the court; (2) the assurances of confidentiality given in the witness interviews; and (3) the FOIL statute (Public Officers Law Section 87 *et seq.*, or “POL”) and case law establishing proper exemptions from disclosure under the FOIL statute.

### **SCHOOL DISTRICT POLICY**

The Respondent School District submitted the affidavit of Andrea B. Wilson (“Supplemental Wilson Affidavit”) with the unredacted Exhibit “E” Documents. Attached to the Supplemental Wilson Affidavit is the purported School District Policy concerning confidentiality. However, this confidentiality policy was not in effect at the time of the interviews at issue. The interviews took place between August 25 and October 7, 2016. The policy indicates, however, that it was adopted in its current form on March 7, 2017.

The Supplemental Wilson Affidavit alleges that School District Policy required the witness statements to be kept confidential. Assuming the March, 2017 provisions provided to the court bear a resemblance to that which was in effect at the time of the interviews, the Supplemental Wilson Affidavit quotes only a portion of the applicable

confidentiality policy<sup>1</sup>. The language contained in the Supplemental Wilson Affidavit is quoted below in italics. The portions of the School District Policy excluded from her affidavit, are in plain text, with some provisions of the missing text highlighted in bold:

**Confidentiality**

*It is the District's policy to respect the privacy of all parties and witnesses to complaints of harassment, hazing, and/or bullying. To the extent possible, the District will not release the details of a complaint or the identity of a complainant or the individuals against whom a complaint is filed to any third parties who do not need to know such information.*

However, because an individual's need for confidentiality must be balanced with the District's legal obligation to provide due process to the accused, to conduct a thorough investigation, or to take necessary action to resolve the complaint, the District retains the right to disclose the identity of parties and witnesses to complaints in appropriate circumstances to individuals with a need to know. **The staff member responsible for investigating complaints will discuss confidentiality standards and concerns with all complainants.**

**If a complainant requests that his/her name not be revealed** to the individual(s) against whom a complaint is filed, the staff member responsible for conducting the investigation **shall inform** the complainant that:

1. The request may limit the district's ability to respond to his/her complaint;
2. District policy and federal law prohibit retaliation against complainants and witnesses;
3. The District will attempt to prevent any retaliation; and
4. The District will take strong responsive action if retaliation occurs.

**If the complainant still requests confidentiality after being given the notice above, the investigator will take all reasonable steps to investigate**

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<sup>1</sup>If this assumption is incorrect, respondent shall move to renew based upon having failed to provide the correct policy in effect at the time.

and respond to the complaint consistent with the request as long as doing so does not preclude the District from responding effectively to the harassment and preventing the harassment of other students or employees. [Emphasis supplied].

Accordingly, this full recitation of the School District Policy concerning confidentiality indicates that: (1) confidentiality is not assured; (2) the interviewee must be told that confidentiality is not assured; and (3) the interviewee must request confidentiality.

**EVIDENCE AS TO WHETHER ASSURANCES OF CONFIDENTIALITY WERE GIVEN**

None of the interview reports contained in the unredacted Exhibit “E” Documents indicates that the confidentiality provisions of the Policy were explained fully to the interviewees as was required by the provisions quoted above. Significantly, none indicates that the interviewee requested confidentiality, as also was required. Even in the law enforcement context (which this is not) and pursuant to POL 87(2)(e)(iii), sources and information may be withheld only upon a specific showing of an express promise of confidentiality to the source, or a finding that, under the circumstances of the particular case, the confidentiality of the source or information can reasonably be inferred. *Friedman v. Rice*, 30 N.Y.3d 461, 473, 68 N.Y.S.3d 1 (2017).

The Respondent School District has submitted the affidavit of Gail Santo (“Santo Affidavit”), the Director of Pupil Services who conducted the interviews, presumably for *in camera* review. The Santo Affidavit lists the persons she interviewed and attests that it is her general practice “to advise and emphasize that the information provided will be kept confidential to the extent possible and that to the extent possible their interview will not be disclosed to the accused.” Although not particularized in the reports of their interviews, the Santo Affidavit indicates that she made these statements to each of the interviewees. Ms. Santo does not assert that any of the interviewees requested confidentiality. Without any indication that the interviewees requested or a clear indication that each of them was promised confidentiality, the School District Policy standing alone does not prohibit disclosure of the Exhibit “E” Documents.

Notwithstanding, whatever confidentiality assurances Ms. Santo may have given, they would “not affect... the applicability of any [FOIL] exemption.” *Washington Post Co. v. NY State Ins. Dep’t*, 61 N.Y.2d 557, 567, 475 N.Y.S.2d 263 (1984). “[A] promise of confidentiality is all but meaningless; unless one or more of the grounds for denial

appearing in the Freedom of Information Law may appropriately be asserted, the record must be made available.” Op. of the Comm. on Open Gov’t, FOIL-AO-7931, Oct 26, 1993, *citing, Washington Post Co. v. NY State Ins. Dept.*

Since neither the School District policy nor the Santos affidavit established FOIL exemptions, the court eliminated them from consideration as to the proper redactions. The court now turns to the School District’s contention that two FOIL exemptions justify the redacted version of the Exhibit “E” Documents. The first claimed exemption is the intra-agency materials exemption and the second is the unwarranted invasion of privacy exemption. Each is reviewed below.

### **ALLEGED EXEMPTIONS FROM DISCLOSURE UNDER FOIL**

#### **(1) Intra-Agency Materials**

POL 87 (2)(e)(iv) provides an exemption for intra-agency materials, unless such materials are, *inter alia*, factual data or final agency determinations. In other words, FOIL requires that factual data and final agency determinations be released. This intra-agency exemption applies only to deliberative materials, i.e., communications exchanged for discussion purposes not constituting final policy decisions. *Mothers on the Move, Inc. v. Messer*, 236 A.D.2d 408, 410, 652 N.Y.S.2d 773, 775 (2d Dept 1997).

“Factual data” is defined as objective information, in contrast to opinions, ideas or advice, which are exempt intra-agency materials. *Matter of Johnson Newspaper Corp. v. Stainkamp*, 94 A.D.2d 825, 463 N.Y.S.2d 122 (3d Dept 1983) *aff’d*, 61 N.Y.2d 958, 475 N.Y.S.2d 272 (1984); *Matter of Miracle Mile Assocs. v. Yudelson*, 68 A.D.2d 176, 417 N.Y.S.2d 142 (4th Dept 1979). Witness statements and reports such as contained in the unredacted Exhibit “E” Documents have been held to constitute factual data insofar as they embody factual accounts of the witnesses’ observations and not impressions, recommendations or opinions. *Ingram v Axelrod*, 90 A.D.2d 568, 456 N.Y.S.2d 146 (3d Dept 1982); *New York 1 News v. Office of the President of the Borough of Staten Island*, 231 A.D.2d 524, 647 N.Y.S.2d 270 (2d Dept 1996). These witness statements are distinguished from those which may be specifically exempted from disclosure because they are for law enforcement purposes. *Gould v. NYC Police Dep’t.*, 89 N.Y.2d 267, 653 N.Y.S.2d 54 (1996). Thus, factual accounts of witnesses’ observations contained in Exhibit “E” Documents are not exempt and cannot be redacted.

**(2) Unwarranted Invasion of Privacy**

The School District argues that production of the unredacted Exhibit “E” Documents would constitute an unwarranted invasion of the privacy of those who gave statements to Ms. Santo and, therefore, should not be disclosed.

POL 89 (2)(b)(v) provides that unwarranted invasions of privacy include but are not limited to:

- i. disclosure of employment, medical or credit histories or personal references of applicants for employment;
- ii. disclosure of items involving the medical or personal records of a client or patient in a medical facility;
- iii. sale or release of lists of names and addresses if such lists would be used for solicitation or fund-raising purposes;
- iv. 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;
- v. **disclosure of information of a personal nature reported in confidence to an agency and not relevant to the ordinary work of such agency ;**
- vi. information of a personal nature contained in a workers' compensation record, except as provided by section one hundred ten-a of the workers' compensation law; or
- vii. disclosure of electronic contact information, such as an e-mail address or a social network username, that has been collected from a taxpayer under section one hundred four of the real property tax law. [Emphasis supplied.]

The only exemptions listed above which arguably could apply are the highlighted provisions of subsections (iv) and (v). Both subsections require that in order for the exemption to apply, the information sought would need to be not relevant to the “work” or the “ordinary work” of the School District. In this regard, the court has taken judicial notice that School District Policy 5300 (the Code of Conduct) states in the introduction

that it is adopted to foster civility and mutual respect, a purpose which seems to the court to be relevant to the “ordinary work” of the School District. District Policy 5300 also indicates that the Code of Conduct is applicable to School Board members. In fact, the stationary on which the interview reports were provided includes what apparently is the School District’s motto: “Academic Excellence, Creativity, **Mutual Respect** and Self Reliance.” Thus, since the investigations conducted under Policy 5300 are “relevant to the ordinary work of the agency,” the interviews are not protected from disclosure under the seven unwarranted invasion of privacy exemptions listed in POL 89 (2)(b)(v). *New York 1 News*, 231 A.D.2d at 525-6 (“[b]ecause employee discipline is clearly relevant to the work of the agency, access to the records should be granted.”).

In a case such as this, “where none of the seven specifications [in POL 89(2)(b)(v)] is applicable, a court must decide whether any invasion of privacy ... is unwarranted by balancing the privacy interests at stake against the public interest in [the] disclosure of the information”. *Matter of Harbatkin v. New York City Dept. of Records & Info. Servs.*, 19 N.Y.3d 373, 380, 948 N.Y.S.2d 220 (2012); *Matter of NY Times v. City of New York Fire Dept.*, 4 N.Y.3d 477,480, 796 N.Y.S.2d 302, 306 (2005); *Thomas v. New York City Dep't of Educ.*, 103 A.D.3d 495, 497, 962 N.Y.S.2d 29, 31–32 (1st Dept 2013). However, the section does not create a blanket exemption. POL 89(2)(c)(i) provides that “[u]nless otherwise provided by this article, disclosure shall not be construed to constitute an unwarranted invasion of personal privacy pursuant to paragraphs (a) and (b) of this subdivision...when identifying details are deleted.” *Id.* The standard to be applied is whether the release of information will “be offensive and objectionable to a reasonable [person] of ordinary sensibilities.” *Gannett Satellite Info. Network, Inc. v. Cty. of Putnam*, 142 A.D.3d 1012, 1018, 37 N.Y.S.3d 299, 305 (2d Dept 2016).

## CONCLUSIONS

Each of the witnesses interviewed by Ms. Santo reported their observations of the events in question. As set forth above, their objective observations are required to be disclosed under the factual data provisions of POL 87(2)(e)(iv). The redactions of this information have been eliminated except where the invasion of privacy balancing test requires the redaction of the names of students, complainants and witnesses who were members of the general public.

In determining the appropriate redactions, the court has applied a balancing test and has weighed the privacy interests of the witnesses and of the persons referred to by the interviewees against the public interest in full disclosure. Since Dr. Lindell, the Vice

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President of the Connetquot Teachers' Association, made a FOIL request and is the petitioner seeking full disclosure, the report of his interview is to be disclosed, except for the redactions resulting from the privacy concerns of those persons he mentioned in his statement. Further, since Dr. Lindell is suing in his capacity as an officer of the Teachers' Association and since Mr. Felicio is the President of the Teachers' Association who also made a FOIL request regarding the same Exhibit "E" Documents, the report of his interview is to be released in the same manner as Dr. Lindell's. Since both are seeking full disclosure, references to Dr. Lindell and Mr. Felicio and their actions in all the witnesses' interviews are to be disclosed.

Witness Milynn Augulis was a school board member. Since other school board members' names were not redacted by the School District (Nick Ferraioli and Craig Armando) the Court has determined that she had no privacy interest in her observations of the public conduct of another board member. In any event, the School District failed to omit her name in one portion of her statement, so that any exemption the School District was claiming was waived.

Further applying the balancing test, as School District security personnel, Mr. Hughes and Mr. Flynn, had no privacy interest in their reports of an incident which occurred while they were on duty. The redactions of their names have been eliminated.

### LEGAL FEES

POL 89 (4)(c)(i) and (ii) provide that the reasonable attorney's fees and other litigation costs reasonably incurred may be assessed where an Article 78 petitioner challenging a denial has substantially prevailed, when the respondent had no reasonable basis for denying access or where the agency failed to respond to a request or appeal within the statutory time. Here, the School District did provide access and some appropriate redactions. There is no allegation of untimeliness. The petitioner did not so "substantially prevail" as to warrant an award of attorney's fees.

ENTER

Date: May 24, 2019  
Riverhead, New York

  
MARTHA L. LUFT, A.J.S.C.

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FINAL DISPOSITION

NON-FINAL DISPOSITION