

Matter of Jewish Press Inc. v Brooklyn Coll.

2020 NY Slip Op 31650(U)

May 26, 2020

Supreme Court, Kings County

Docket Number: 523962/2019

Judge: Peter P. Sweeney

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 73

Index No.: 523962/ 2019
Return Date: 1-13-20

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In re Application of
THE JEWISH PRESS INC.,
Petitioner,

for a Judgment under Article 78 of the
Civil Practice Law and Rules

DECISION/ORDER

-against-

BROOKLYN COLLEGE,

Respondent.

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The following papers numbered 1 to 3 were read on this petition and cross motion:

Papers:	Numbered:
Notice of Petition/Petition	
Affirmations/Affidavits/Memo of Law.....1.....
Notice of Cross-Motion	
Affirmations/Affidavits/Memo of Law.....2.....
Reply Affirmations/Affidavits/Memo of Law...3.....

Upon the foregoing papers, the petition and cross-motion are decided as follows:

The Petitioner, THE JEWISH PRESS INC., brought this proceeding pursuant to New York Civil Practice Law and Rules ("CPLR") Article 78, the New York Public Officers Law § 89 et seq. (the "Freedom of Information Law" or "FOIL"), and CPLR § 3001 for a judgment vacating, overruling and prohibiting the enforcement of the final administrative decision dated July 2, 2019; directing Respondent to provide Petitioner with access to all denied documents; awarding Petitioner its costs and attorneys' fees pursuant to Public Officers Law § 89(4)(c); and awarding Petitioner such other and further relief as the Court deems just and proper. The Respondent BROOKLYN COLLEGE cross-moves for a judgment pursuant to CPLR 3211 of the

New York Civil Practice Law and Rules dismissing this Article 78 Petition for failure to state a claim upon which relief can be granted, and for any and all such other and further relief as this Court deems just and proper. The petition and cross-motion are consolidated for disposition.

Background:

On April 22, 2019, Petitioner sent a FOIL request to Brooklyn College requesting disclosure of three sets of documents:

(i) All records pertaining to Complaints by employees regarding anti-Semitism or anti-Zionism, made to either the school itself, the EEOC, New York City Human Rights Commission, or the New York State division of human rights. These records shall include but not be limited to, the actual complaint any investigation, findings and determination's [sic];

(ii) All records pertaining to Complaints by students regarding anti-Semitism or anti-Zionism, made to either the school itself, the EEOC, New York City human rights commission, or the New York State division of human rights. These records shall include but not be limited to, the actual complaint[,], any investigation, findings and determination's [sic]; and

(iii) All records pertaining to religious accommodation requests either by employees or students. These rockers[sic] shall include but not be limited to the actual request and any findings or determinations.

On June 7, 2019, Brooklyn College responded that it had no responsive documents to Petitioner's first request and denied Petitioner's second and third requests pursuant to POL § 87(2)(a) claiming that the documents were protected from disclosure by the Federal Family Educational Rights and Privacy Act ("FERPA" a/k/a the "Buckley Amendment"), a federal statute that protects the confidentiality of students' education records.

On June 17, 2019, Petitioner appealed Respondent's decision regarding the second and third requests and its appeal was denied. On November 1, 2019, Petitioner commenced the instant CPLR Article 78 proceeding challenging the Respondent's final determination and

seeking a judgment directing Respondent to provide the requested documents. Petitioner also seeks costs and attorneys' fees.

Discussion:

Pursuant to POL § 87(2)(a), a party is not obligated to disclose documents "specifically exempted from disclosure by state or federal statute" in response to a FOIL request. Respondent contends that disclosure of the materials requested in items (ii) and (iii) are "specifically exempted from disclosure" by the Family Educational Rights and Privacy Act of 1974 (20 U.S.C. § 1232g), commonly known as the Buckley Amendment and FERPA. The Court disagrees.

FERPA provides in relevant part as follows:

No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of releasing, or providing access to, any personally identifiable information in education records other than directory information, or as is permitted under paragraph (1) of this subsection, unless—

- (A) there is written consent from the student's parents specifying records to be released, the reasons for such release, and to whom, and with a copy of the records to be released to the student's parents and the student if desired by the parents, or
- (B) except as provided in paragraph (1)(J), such information is furnished in compliance with judicial order, or pursuant to any lawfully issued subpoena, upon condition that parents and the students are notified of all such orders or subpoenas in advance of the compliance therewith by the educational institution or agency.

20 U.S.C. § 1232g(b)(2).

Contrary to Respondent's contention, without parental consent, FERPA only precludes disclosure of "education records" which is defined as "information directly related to a student" and "maintained by an educational agency or institution or by a person acting for such agency or

institution” (20 U.S.C. § 1232g[a][4][A][i-ii]; 34 C.F.R. § 99.3). Notwithstanding the statute’s expansive definition of the term “education records”, FERPA has been interpreted as only protecting disclosure of “records relating to an individual student’s performance” (*Culbert v. City of New York*, 254 A.D.2d 385, 387, 679 N.Y.S.2d 148, 150, citing *Red & Black Publ. Co. Inc. v. Bd. of Regents*, 262 Ga. 848, 427 S.E.2d 257; *Bauer v. Kincaid*, 759 F.Supp. 575, 589). Relying on *Culbert*, the Court in *Jacobson v. Ithaca City Sch. Dist.*, 53 Misc. 3d 1094, 39 N.Y.S.3d 908 held that “to constitute an educational record, information must relate to an individual student’s educational performance”... and “must be kept in the student’s individual file by a central registrar or custodian” (53 Misc. 3d at 1094, 39 N.Y.S.3d at 908 [citations omitted]). Clearly, the documents demanded in items numbered (ii) and (iii) of the Petitioner’s FOIL request do not fall within the definition of “education records” as that term has been construed and since the Petitioner is agreeing to accept disclosure of these documents redacted for “personally identifiable information” of the students referred therein, reliance on POL §87(2)(a) does not provide a basis to avoid disclosing the documents

With respect to item (iii) of Petitioner’s FOIL request, Respondent annexed to its motion the affidavit of Tony Thomas, the Records Access Officer for Brooklyn College, who stated as follows:

Brooklyn College does not maintain centralized records of religious accommodation requests. Neither the Office of Human Resources, the Office of Equal Opportunity, the Office of Academic Affairs, nor the Office of Student Affairs maintains these records. There is no form that students or faculty seeking such requests submit to Brooklyn College. Pursuant to CUNY policy, students, may submit such requests to the Office of Student Affairs, employees may submit such requests to the Office of Human Resources, or such requests can be made informally. Here, neither the Office of Student Affairs nor the Office of Human Resources had any responsive documents, demonstrating that, in practice, religious accommodation requests are made informally.

That is, religious accommodations are arranged between the student requesting the religious accommodation, and the faculty member or supervisor granting or denying the request. For example, should a student miss a school day due a religious holiday, the student would contact his or her professors to make arrangements to make up the work. Similarly, should a professor need to miss a class due to religious observance he or she would generally contact his or her supervisor. Such arrangements could be made in oral conversations with no documentation, or they could be conducted over email.

This is a satisfactory response to item (iii) of the FOIL request and Petitioner has failed to show other than by more than speculation that responsive documents exist (*see Morgan v. Nassau Cty. Police Dep't*, 197 A.D.2d 579, 579, 604 N.Y.S.2d 756; *Mitchell v. Slade*, 173 A.D.2d 226, 569 N.Y.S.2d 437; *Matter of Corbin v. Ward*, 160 A.D.2d 596, 554 N.Y.S.2d 240). Respondent correctly contends that it would be unduly burdensome to require the creation of documents in order to comply with the request.

The issue of whether the Petitioner is entitled to costs and attorneys' fees will have to await a final determination of the proceeding.

For all of the above reasons, it is hereby

ORDERED the Respondent is directed to compile all the documents responsive to item (ii) of Petitioner's demand within 45 days of service of this order. The Respondent shall prepare a log of all information contained in the documents which Respondent maintains contain "personally identifiable information" of students. The documents will then be submitted to a Special Referee/Judicial Hearing Officer for an in camera inspection to ensure that all "personally identifiable information" of students is redacted from the documents. The parties will be notified when this matter has been assigned to a Special Referee/Judicial Hearing Officer. At the in camera inspection, the Respondent may raise all arguments as to what information constitutes "personally identifiable information" within the meaning of the law. Once the

documents have been properly redacted, they will be promptly provided to the Petitioner; and it is further

ORDERED, that the issue of whether the Petitioner is entitled to costs and attorneys' fees will be decided at the conclusion of the proceeding.

This constitutes the decision and order of the Court.

Dated: May 26, 2020



PETER P. SWEENEY, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020