Matter of Jewish Press v Kingsborough Community Coll.
2020 NY Slip Op 31948(U)
June 22, 2020
Supreme Court, New York County
Docket Number: 159039/2019
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. EILEEN A. RAKOWER **PART 6**
Justice

In re Application

THE JEWISH PRESS, INC.,

Petitioner,

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

-against-

KINGSBOROUGH COMMUNITY COLLEGE and THE CITY UNIVERSITY OF NEW YORK,

Respondents.

INDEX NO. 159039/2019

MOTION DATE
MOTION SEQ. NO. 1
MOTION CAL. NO.

DECISION

The following papers, numbered 1 to _____ were read on this motion for/to

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answer — Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: Yes X No

Petitioner The Jewish Press, Inc. ("Petitioner" or "JPI") commenced this proceeding pursuant to Article 78, of the Civil Practice Law and Rules ("CPLR"), 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 May 24, 2019; directing Respondents Kingsborough Community College ("KCC") and The City University of New York ("CUNY") (collectively, "Respondents") to provide Petitioner with access to all denied documents; and awarding Petitioner its costs and attorneys' fees pursuant to Public Officers Law ["POL"] § 89(4)(c). Respondents filed an answer.

Factual Background

On November 30, 2018, Michael Goldstein ("Mr. Goldstein"), an employee of KCC, filed a complaint with the New York State Division of Human Rights ("SDHR"). Mr. Goldstein alleged that CUNY and KCC discriminated against him because of his religion in violation of New York State Human Rights Law. Additionally, "several other employees of KCC made complaints of anti-Semitism directly to KCC concerning

similar facts to those under investigation by the SDHR, which included allegations of a pattern of anti Semitism by the college." (Verified Answer at 31). In March 2018, "KCC began an internal investigation into those complaints." (Verified Answer at 31; Affidavit of Julie Block-Rosen ["Ms. Block-Rosen's Affidavit"], at 5).

On April 7, 2019, JPI filed a FOIL request with KCC, a constituent community college of CUNY. CUNY is a public corporation organized and existing under New York law. Petitioner sought the following categories 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] ("Request 1");
>
> (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] ("Request 2"); 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 ("Request 3").

By email dated May 9, 2019, KCC's Record Access Officer ("RAO") Julie Block-Rosen denied the FOIL request (Verified Petition, Exhibit "2"). CUNY denied Request 1, stating, "The College has no substantiated complaints regarding anti-Semitism or anti-Zionism filed by employees. To the extent that you request information on unsubstantiated complaints, the request is denied under § 87(2)(g) of the New York State Public Officers Law since that information is not final agency policy or determinations." CUNY denied Requests 2 and 3 under POL § 87(2)(a) which excludes information from FOIL requests that are specifically exempted from disclosure by state or federal statute. CUNY asserted that the material requested contained student information that is protected under the Federal Family Education Rights and Privacy Act ("FERPA") and that disclosure would constitute an unwarranted invasion of

privacy under POL § 87(2)(b). Further, CUNY stated that there were no reasonable means to retrieve the information sought by Request 3. (Verified Petition, Exhibit "2").

On May 9, 2019, JPI appealed the May 9, 2019 denial to the "Records Appeal Officer." JPI claimed *inter alia* that the statute specifically excluded "statistical or factual tabulations of data" and therefore the information should be supplied. JPI also argued that any personal information that would be in violation of FERPA could be redacted as it still constituted factual tabulations of data. (Verified Petition, Exhibit "3"). In response to the raised burden of locating records, JPI referred to POL § 89(3)(a), which states that a request cannot be denied because it is burdensome or voluminous.

On May 24, 2019, CUNY's FOIL Appeals Officer, who is also CUNY's Interim General Counsel and Senior Vice Chancellor for Legal Affairs, denied Petitioner's appeal with respect to Requests 2 and 3.

As for Request 1, CUNY distinguished the request into complaints made to external agencies such as the SHDR, and complaints made to the college, or internal complaints. CUNY affirmed the denial of disclosure as to the complaints made to external agencies, asserting that disclosure would interfere with ongoing investigations. As to internal complaints, CUNY remanded the determination to the RAO, with instructions to disclose "responsive records related to open matters with redactions," by June 24, 2019. (Verified Petition, Exhibit "4"). CUNY wrote, "The FOIL statute excludes from exemption 'statistical or factual tabulation or data' and the Court of Appeal has determined that 'a witness statement'" such as a complaint constitutes "factual data insofar as it embodies a factual account of the witness's observations."

In May 2019, KCC "engaged the law firm Jackson Lewis, P.C. to investigate these internal claims of discrimination concerning facts similar to those under investigation by the SDHR." Respondents state that KCC began sending documents to Jackson Lewis on May 15, 2019." KCC "provided Jackson Lewis with all documents it had collected in connection with its initial, unfinished investigation of the incidents, including materials related to the SDHR investigation." KCC "was investigating whether any policies were violated, and subsequently Jackson Lewis is seeking to determine if any employees violated CUNY/KCC policies, or federal, state, or local laws." KCC states that "Jackson-Lewis's investigation is ongoing." KCC further states, "Based on the outcome of Jackson Lewis investigation, it is possible that KCC employees would face disciplinary action." (Verified Answer at 44-45; Ms. Block-Rosen's Affidavit at 5-6). Ms. Block-Rosen states, "In the investigative files that KCC turned over to Jackson Lewis, a document states that 'the complainants specifically requested to remain anonymous.'" (Ms. Block-Rosen's Affidavit at 7).

On June 24, 2019, KCC's RAO produced 127 pages of documents "pertaining to complaints that were deemed to be unsubstantiated" in redacted form, and withheld the remainder claiming attorney-client privilege. (Verified Petition, Exhibit "6"). Ms. Block withheld documents pertaining to ongoing matters, explaining that the release of this information "could have a prejudicial impact on [the] pending investigations, and therefore, the disclosure of such records would be inconsistent with public policy, which supports the rights of the parties to a fair and impartial investigation." Specifically, KCC's RAO "withheld records related to a pending employee complaint to the New York State Division of Human Rights ('SDHR') that was, at the time, under investigation by the SDHR" and "records relating to an ongoing internal investigation of anti-Semitism." (Verified Answer at 29).

On June 26, 2019, Petitioner appealed the June 24, 2019 decision. (Verified Petition, Exhibit "7"). Petitioner claimed, "Foil (sic) does not exempt records merely because they are 'unsubstantiated' or because they relate to an ongoing matter, unless that matter is judicial in nature and is demonstrably prejudiced by release of said records" and that "[n]either factors are present here."

By letter dated July 10, 2019, CUNY denied the appeal, asserting that the RAO appropriately redacted the 127 pages of documents "pertaining to unsubstantiated employee complaints filed by the College" on personal privacy grounds, and properly withheld those responsive documents pertaining to open, ongoing investigations. (Verified Petition, Exhibit "8"). As for the latter, CUNY explained:

> As explained by the College to this Office, the disclosure of information related to an open investigation could impede the investigative process by, among other things, the noncooperation of witnesses and tailored testimony. Even more, disclosure of such information could have a chilling effect on the willingness of witnesses and victims to report such conduct in the future. Thus, in the College's view, the disclosure of such information during the pendency of an investigation does not serve the public interest of ensuring that the College conducts a fair and impartial investigation. The College made its determination by conducting the balancing test on a case-by-case basis. The Office believes that the College's proffered rationale was reasonable under the circumstances.

On July 31, 2019, SDHR determined that there was no evidence that CUNY engaged in religious discrimination, and found there was "no probable cause" in the matter than had been commenced by Mr. Goldstein. (Verified Answer, Exhibit "H").

Mr. Goldstein did not appeal the No Probable cause Determination. (Verified Answer at 54).

On September 17, 2019, after exhausting its administrative means, JPI filed the instant Article 78 proceeding to compel disclosure of the requested documents, to the extent they remain improperly undisclosed or redacted. Respondents filed their Verified Answer on December 6, 2019. Oral argument had been scheduled on April 21, 2020. In light of the pandemic, oral argument did not proceed and the decision will be decided on the papers.

Legal Standards

In keeping with its purpose of promoting open government and public accountability, FOIL imposes a broad duty upon government officials to make records available to the public. (*See Gould v. New York City Police Dep't*, 89 NY2d 267, 274 [1996] [citing POL §84]). All agency records are therefore "presumptively available for public inspection and copying, unless they fall within 1 of 10 categories of exemptions, which permit agencies to withhold certain records." (*Hanig v. State Dep't of Motor Vehicles*, 79 NY2d 106, 108 [1992] [citations omitted]). "Those exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption (Public Officers Law § 89 [4] [b])." (*Hanig*, 79 NY2d at 109). "[T]o invoke one of the exemptions of section 87 (2), the agency must articulate particularized and specific justification for not disclosing requested documents." (*Gould*, 89 NY2d at 275).

POL § 87(2)(b) allows "an agency to deny access to a document, or portion of a document, if disclosure 'would constitute an unwarranted invasion of personal privacy.'" (*Thomas v New York City Dept. of Educ.*, 103 AD3d 495, 496-97 [1st Dept 2013]). "What constitutes an unwarranted invasion of personal privacy is measured by what would be offensive and objectionable to a reasonable [person] of ordinary sensibilities." (*Thomas*, 103 AD3d at 497-497, *quoting Matter of Beyah v Goord*, 309 AD2d 1049, 1050 [3d Dept 2003]). POL § 89(2)(b) provides "[a]n unwarranted invasion of personal privacy includes, but shall not be limited to seven specified kinds of disclosure." Where none of the specified kinds of disclosure 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." (*Thomas,* 103 AD3d at 496-497). 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."

Moreover, "an agency responding to a demand under [FOIL] may not withhold a record solely because some of the information in that record may be exempt from disclosure. Where it can do so without unreasonable difficulty, the agency must redact the record to take out the exempt information." (*Matter of Schenectady County Socy. for the Prevention of Cruelty to Animals v. Mills*, 18 NY3d 42, 45 [2011]). "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." (*Gould*, 89 NY2d at 275).

"Public Officers Law § 89(3) places the burden on petitioner to reasonably describe the documents requested so that they can be located." (*Mitchell v. Slade*, 173 A.D.2d 226, 227 [1st Dept. 1991] [citations omitted]). "When an agency is unable to locate documents properly requested under FOIL, Public Officers Law § 89(3) requires the agency to 'certify that it does not have possession of [a requested] record or that such record cannot be found after a diligent search.'" (*Rattley v. New York City Police Dep't*, 96 NY2d 873, 875 [2001]). "The statute does not specify the manner in which an agency must certify that documents cannot be located." (*Rattley*, 96 NY2d at 875). "Neither a detailed description of the search nor a personal statement from the person who actually conducted the search is required." (*Id.*). Further, "FOIL does not require any entity to prepare any record not possessed or maintained by such entity." (*Covington v Russo*, No. 402817/08, 2010 WL 2158247 [Sup Ct, NY County 2010]; *See Brown v New York City Police Department*, 264 AD2d 558, 561-562 [1st Dept 1999] ["an agency has no duty to create documents that are not in existence...") (citations omitted]; *see also* POL § 89(3) [providing that "[n]othing in this Article shall be construed to require any entity to prepare any record not possessed or maintained by such entity"]).

Turning to the specific exemptions that are relevant to this proceeding, POL § 89(2)(a) exempts from disclosure records that "are specifically exempted from disclosure by state or federal statute." Here, Respondents contend that disclosure of the records that are responsive to Requests 1 and 2 "are specifically exempted from disclosure" by FERPA.

FERPA was legislated to protect student privacy. (76 Fed. Reg., 75,064, 75,610 [Dec. 2, 2011]). The 2008 amendments to FERPA expanded the definition of protected information to include, "Other 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 personal knowledge of the relevant circumstances, to identify the student with reasonable certainty…" (34 C.F.R. 99.3 [2018]).

FERPA prohibits educational institutions from disclosing personal identifying information ("PII") of students found in or constituting education records, absent the written consent of a parent, or of the student if the student is age 18 or older, a subpoena or court order, or the applicability of some other exception. (20 U.S.C. § 1232g[d]). FERPA defines educational records to include: "those records, files, documents, and other materials which - (i) contain information directly related to the student; and (ii) are maintained by an educational … institution." (20 U.S.C. § 1232g[a][4][A]).

FERPA provides that federal funds for educational programs shall be withheld from an educational institution that violates FERPA. (20 U.S.C. § 1232g[b][2]). Specifically, FERPA states in pertinent 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]).

"The United States Department of Education ('USDOE') has emphasized that 'FERPA is a privacy statute, and no party has a right under FERPA to obtain information from education records except parents and eligible students.'" (*Huseman v New York City Dept. of Educ.*, 2016 NY Slip Op. 30959[U], *7 [NY Sup Ct, New York County 2016], citing to 73 Fed. Reg. 74,806, 78,834 [Dec. 9, 2008]). "Although FERPA's implementing regulations include a de-identification provision which permits an educational agency such as the DOE to release education records

without consent after removal of all personally identifiable information, it also requires the educational agency to make 'a reasonable determination that a student's identity is not personally identifiable, whether through single or multiple releases, and taking into account other reasonably identifiable information." (*Id.* at *7-8, citing 34 CFR. § 99.31 [b]).

The US DOE has cautioned that "[t]he simple removal of nominal or direct identifiers, such as name and SSN (or other ID number) does not necessarily avoid the release of personally identifiable information." (*Id.*) Further, FERPA regulations define "'personally identifiable information' broadly to encompass not only a student's name, address, date of birth, but also information that is linkable to a specific student that 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.'" (*Id.*)

POL § 87(2)(e)(i) exempts from disclosure records which are "compiled for law enforcement purposes and which, if disclosed, would interfere with law enforcement investigations or judicial proceedings." This exemption applies to civil law enforcement investigations as well as criminal investigations. (*See Matter of Madeiros v. New York State Educ. Dept,* 30 NY3d 67, 75-76 [2017]). However, "There is no statutory blanket exemption for investigative records, even where the allegations of misconduct are 'quasi criminal' in nature or not substantiated, and the ability to withhold records under FOIL can only be based on the effects of disclosure in conjunction with attendant facts." (*Thomas v New York City Dept. of Educ.*, 103 AD3d 495, 498 [1st Dept 2013][involved a request for the investigative report relating to Petitioner's complaint against the administrators of the public school where Petitioner was employed]).

In *Madeiro*s, a decision cited by Respondents, the Court held that that New York State Education Department's "audit plans targeted at ferreting out improper and potentially illegal or fraudulent reporting of costs by preschool special education providers and "were compiled for law enforcement purposes" and "necessary to prevent interference with a law enforcement investigation" and therefore exempt from disclosure under POL 807(2)(e)(i). (*Id.* at *76-77). The Court explained, "The municipalities in question, by virtue of having submitted plans pursuant to which audits could be conducted, were plainly contemplating impending audits of preschool program providers for which they bore financial responsibility" and "the redactions at issue fit squarely within the exemption permitting an agency to deny access to records compiled for law enforcement purposes where their disclosure would interfere with an investigation." (*Id.*). (*See also Legal Aid Soc'y v New York City Police Dep't*, 274 AD2d 207, 213 [1st Dept], *app. denied*, 95 NY2d 95 [disclosure of police records to defendant in pending criminal prosecution would interfere with that proceeding]).

POL § 87(2)(g) exempts from disclosure records which "are inter-agency or intra-agency materials which are not: i. statistical or factual tabulations or data; ii. instructions to staff that affect the public; iii. final agency policy or determinations; iv. external audits, including but not limited to audits performed by the comptroller and the federal government..." The Court of Appeals has explained that "[t]he point of the intra-agency exception is to permit people within an agency to exchange opinions, advice and criticism freely and frankly, without the chilling prospect of public disclosure." (*New York Times Co. v. City of New York Fire Dept*, 4 NY3d 477, 488 [N.Y. 2005]).

Discussion

Request 1

Request 1 is for "any complaints by employees regarding anti-Semitism or anti-Zionism made to KCC, the New York City Human Rights Commission, the EEOC, or the New York State Division of Human Rights." (Verified Petition, Exhibit "1").

On June 24, 2019, Respondents produced "records related to complaints that were deemed 'unsubstantiated' by the KCC" in redacted form. Respondents redacted the records under the personal privacy exemption of POL § 87(2)(b) because they contained PII that would reveal the identity of the parties. Respondents determined that the production of the documents without redaction would not serve the public interest.

In their Verified Answer, Respondents state that "at the time Petitioner made its FOIL request, there was an ongoing external investigation of an employee's complaint of anti-Semitism, and an ongoing internal investigation of several employee complaints of anti-Semitism, all arising from similar facts." Respondents state, "CUNY/KCC properly withheld documents related to these ongoing investigations pursuant to Pub. Off. Law 87(2)(e)(i) (the law enforcement exemption), as disclosure of the documents would have interfered with the (1) SDHR's investigation, and (2) the internal investigation, which was conducted, first by KCC, and then by Jackson Lewis." (Verified Answer at 59).

Respondents contend that, "Even though the SDHR's investigation was no longer ongoing as of the date of the filing of this Petition, the operative date for FOIL requests is the date the FOIL request was made, i.e., April 7, 2019. See FOIL-AO-10181 (June 27, 1997)." (Verified Answer at 61). Petitioner responds that "Respondents [have] stated that some investigations into anti-Semitism have been concluded." Petitioner

contends, "At this time, those concluded cases have no basis to be withheld, and the Court should compel Respondents to produce those records to Petitioner."

Petitioner contends that "[t]he law enforcement exemption to FOIL pursuant to POL § 87(2)(e)(i) is inapplicable to the case at bar because the records requested were not compiled for law enforcement purpose" and "there is no reason to assume they interfere with law enforcement investigations or judicial proceedings." Petitioner contends that "none of the information requested has been compiled for law or judicial proceeding, but rather were complaints made to KCC regarding anti-Semitism or anti-Zionism" and the investigation being conducted by Jackson Lewis "lacks any nexus to a 'law enforcement investigation.'" Petitioner contends that Respondents cannot demonstrate that disclosure of the requested records would "interfere with a law enforcement investigation or judicial proceeding, considering that those do not exist." Petitioner contends that withholding the records would permit KCC "to shield complaints solely because it has retained outside counsel to review them, would be tantamount to granting agencies a license shield important documents from public view and essentially abrogate FOIL."

As the SHDR proceeding is now completed, there can no longer be any interference with the investigation and Respondents are directed to produce the requested records as they relate to the SHDR matter.

Further, Respondents have failed to demonstrate that the employee complaints that were subject to the internal investigation by KCC and which are now being reviewed by Jackson Lewis would "interfere with a law enforcement investigation or judicial proceeding" and therefore the exemption under POL §87(2)(e) is inapplicable. The complaints should be produced with the names and other identifying information of individuals redacted.

Request 2

Request 2 is for "any complaints by students regarding anti-Semitism or anti-Zionism made to KCC, the New York City Human Rights Commission, the EEOC, or the New York State Division of Human Rights." (Verified Petition, Exhibit "1").

In its Petition, JPI maintains that, assuming FERPA applies to the student complaints, JPI is entitled to disclosure with redactions, while Respondents maintain that they are under no obligation to furnish redacted student records. Respondents contend that the "US DOE expects education institutions such as CUNY/KCC to

determine whether information it is considering disclosing can be linked back to specific students, and if so, disclosure would constitute a violation of FERPA." Respondents contend, "Given the extensive PII contained in the documents pertaining to the student complaints, and likely also in any documents pertaining to reasonable accommodation requests, it is not possible to ensure that a reasonable person in the KCC community would not be able to identify the students at issue." Respondents contend that they therefore "properly withheld the requested documents pursuant to Pub. Officers Law 87(2)(a) because disclosure would violate FERPA." (Verified Answer at 81).

CUNY submits an affidavit from KCC's RAO, Ms. Block-Rosen. Ms. Block-Rosen states:

> The documents related to student complaints of anti-Semitism contain personal identifying information protected by the Federal Family Educational Rights and Privacy Act (FERPA), and, even with redactions, reasonable members of the KCC community would be able to identify the students involved. These documents, which contain complaints, investigations conducted pursuant to the complaints, and the determinations, are highly fact specific, and present unique sets of circumstances. That is, they contain unique narratives and actions taken by the complaining students. Further, the documents contain the names of the teachers or administrators complained of, the department the teacher or administrators work in, the identities of the co-workers/supervisors. If the alleged respondents, the identities of one complainant's other teachers, and a student witness. In addition, one of the student complaints alleged discrimination related to a program only offered to a small cohort of students. Accordingly, even with redactions, reasonable members of the KCC community would be able to ascertain the identity of the students with reasonable certainty.

Petitioner responds that the "information that can easily be redacted before disclosure of the requested documentation, thus protecting the privacy of the students" and "[i]t is unreasonable to think that complaints relating to anti-semitism (sic) and anti-Zionism, would necessarily identify the complainant after redacting basic information."

In the recent Kings County Article 78 proceeding of *JPI v. Brooklyn College*, No. 523962/2019, 2020 WL 2789921 (N.Y.Sup., May 26, 2020), the Honorable Peter P.

Sweeney, J.S.C., Petitioner made the identical FOIL demand to Brooklyn College. Judge Sweeney held that requested student complaints regarding anti-Semitism or anti-Zionism do not "fall within the definition of 'education records' as that term has been construed." Judge Sweeny wrote:

> 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) … 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.

Judge Sweeney directed Brooklyn College to compile documents in response to Petitioner's second request and a log identifying the PII of students. Judge Sweeney directed that the documents be submitted to a Special Referee for an *in camera* inspection to ensure that the PII is redacted from the documents. Judge Sweeney stated that at the *in camera* inspection, Brooklyn College "may raise all arguments as to what information constitutes 'personally identifiable information' within the meaning of the law." Once the documents were redacted, Brooklyn College would provide them to the Petitioner.

Here, the Court directs Respondents to compile documents in response to Request 2 and a log identifying the PII of students for this Court to review *in camera*. The Court will also determine whether "reasonable members of the KCC community would be able to ascertain the identity of the students with reasonable certainty."

Request 3

Request 3 was for "records pertaining to religious accommodation requests either by employees or students." (Verified Petition, Exhibit "1").

With respect to Request 3, Respondent provided the affidavit of Julie Block-Rosen, the RAO for KCC. Ms. Block-Rosen states:

> KCC 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 KCC. 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. Given that these two offices did not have any responsive documents, in practice the requests are made informally. That is, religious accommodations are arranged between the student or employee 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 teachers to make arrangements to make up the work. Similarly, should a teacher need to miss a class due to religious observance he or she would generally contact his or her supervisor. Such arrangements could be executed in oral conversations with no documentation, or they could be conducted over email.

Ms. Block-Rosen further states:

> Since there is no centralized records related to religious accommodations, to respond to Petitioner's request KCC/CUNY would need to search the emails of every employee and student.

> KCC has approximately 2,500 employees, 10,000 degree students, and 5,000 high school students. Such a search would likely include numerous key words, including the names of many holidays in the various religions. Moreover as many of the documents would contain student personally identifying information, at the very least they would need to be redacted to exclude student, names, email address, and other identifying information. Requiring that Respondents undertake such a search of every student and faculty's email for the last five years would be unreasonably burdensome.

Respondents' response to Request 3 is sufficient. Petitioner has failed to "show by more than speculation that all responsive documents were not produced." *Mitchell v. Slade*, 173 AD2d 226, 227 [1st Dept 1991]. Additionally, Respondents have shown that a further search would be unduly burdensome.

Attorneys' Fees

Pursuant to POL § 89(4)(c), a Court may award reasonable attorney's fees and litigation costs incurred where a party has "substantially prevailed" and when the agency "failed to respond to a request or appeal within the statutory time"; and the agency had no "reasonable basis" for denial. The Court of Appeals has stated, "[p]ursuant to FOIL's fee-shifting provision, a court may award reasonable counsel fees and litigation costs to a party that 'substantially prevailed' in the proceeding if the court finds that (1) 'the record involved was, in fact, of clearly significant interest to the general public,' and (2) 'the agency lacked a reasonable basis in law for withholding the record' (Public Officers Law § 89 [4] [c]). Only after a court finds that the statutory prerequisites have been satisfied may it exercise its discretion to award or decline attorneys' fees." (*Beechwood Restorative Care Ctr. v. Signor*, 5 NY3d 435, 441 [2005]). "However, even if these elements are met, an award of counsel fees remains within the discretion of the Court." (*Matter of Herald Co., Inc. v Feurstein*, 3 Misc 3d 885, 898 [Sup Ct 2004]). Further, "[e]ven in cases where documents are ultimately required to be disclosed, the agency may be found to have had a reasonable basis for initially denying access." (*The E.W. Scripps Co. v New York City Police Dept.,* 2019 N.Y. Slip Op. 32626[U], 8 [N.Y. Sup Ct, New York County 2019][citations omitted]).

Viewing the requests in their entirety, and within the Court's discretion, the application for attorney's fees is denied.

Wherefore, it is hereby

ORDERED that in response to Request 1, Respondents are directed to produce the employee complaints that were subject to the internal investigation by KCC in redacted form within 20 days. The names and other identifying information of individuals are to redacted from the documents; and it is further

ORDERED that Respondents are directed to produce the requested records as they relate to Mr. Goldstein's New York State Division of Human Rights matter within 20 days; and it is further

ORDERED that Respondents shall compile documents in response to Request 2 and a log identifying the PII of students for this Court to review *in camera* within 30 days; and it is further

ORDERED that Petitioner's application for attorneys' fees is denied.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

Dated: JUNE 22, 2020

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION