

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

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In the Matter of an Article 78 Proceeding

CAMILLO M. SANTOMERO,

Petitioner,

-against-

Index No. 2008-25405

BOARD OF EDUCATION of the BEDFORD  
CENTRAL SCHOOL DISTRICT, SUSAN ELION  
WOLLIN, as President of the Board of Education of the  
Bedford Central School District, CAROLE LACOLLA,  
as District Clerk of the Board of Education of the Bedford  
Central School District and DR. DEBRA JACKSON,

Assigned To:

Hon. Barbara Zambelli, A.J.S.C.

Respondents.

---

**MEMORANDUM OF LAW  
IN OPPOSITION TO MOTION**

**I. PRELIMINARY STATEMENT**

Respondents, the Board of Education of the Bedford Central School District (the "Board of Education"), Susan Elion Wollin, as President of the Board of Education, Carole LaColla, as District Clerk of the Board of Education, and Dr. Debra Jackson (collectively, the "Respondents"), submit this Memorandum of Law in opposition to Petitioner's motion, ostensibly made pursuant to this Court's Order dated April 30, 2009, seeking a further Order: (i) directing the Board of Education to produce, in unredacted form, all of the additional documents that were produced by Respondents in redacted form on June 23, 2009 (the "Additional Records"); (ii) alternatively, directing the Board of Education to submit the Additional Records to the Court, in unredacted form, for *in camera* review; and (iii) awarding prevailing party attorney's fees to Petitioner pursuant to Public Officers Law § 89(4)(c). As discussed below, Petitioner is not entitled to any of the foregoing relief.

## II. ARGUMENT

### POINT I

#### **PETITIONER'S CONTENTION THAT THE ADDITIONAL RECORDS SHOULD BE PRODUCED IN THEIR ENTIRETY, WITHOUT REDACTION, IS GROUNDESS AND SHOULD BE REJECTED**

Petitioner argues that all of the Additional Records should be produced in their entirety, without redaction, because Respondents have not met their burden of demonstrating the applicability of any FOIL exemptions. This argument is meritless. As set forth at length in paragraphs 2 through 16 of the accompanying Phillips Affirmation, Respondents satisfied their burden to articulate a "particularized and specific justification" for the redactions made on the Additional Records. Matter of Capital Newspapers Div. of Hearst Corp., 67 N.Y.2d 562, 566, 505 N.Y.S.2d 576, 665 (1986). In short, the vast majority of Additional Records consist of emails in which intra-agency material was redacted. In the few instances where redactions were made based upon attorney-client privilege and personal privacy, the documents in question generally indicate they were sent to/from counsel (see, e.g., \*512-517), or they quite obviously contain job performance evaluations or other exempt material (see, e.g., \*312-320). Petitioner never requested that each redacted word, phrase and paragraph of text in the Additional Records be associated with a particular FOIL exemption, nor is such a tabulation necessary to identify the grounds for the redactions that were made.

Furthermore, Respondents' instant opposition papers include, for this Court's *in camera* review, copies of each document specifically identified by Petitioner as allegedly containing non-exempt material. (Phillips Affirm., Exhibit D). Courts have recognized that *in camera* submission is "a proper procedure" by which an agency can demonstrate the grounds for

withholding access to particular records. Miller v. New York State Department of Transportation, 58 A.D.3d 981, 871 N.Y.S.2d 489, 493 (3d Dep't 2009) (citing Matter of Gould v. New York City Police Department, 89 N.Y.2d 267, 653 N.Y.S.2d 54 (1996); Matter of Xerox Corp. v. Town of Webster, 65 N.Y.2d 131, 490 N.Y.S.2d 488 (1985); Matter of M. Farbman & Sons v. New York City Health & Hospitals Corp., 62 N.Y.2d 75, 476 N.Y.S.2d 69 (1984)). Respondents submit that *in camera* review of the documents in question will confirm that the redactions made in them were appropriate under applicable case law. (Phillips Affirm., ¶¶ 17-46). Although Respondents maintain that *in camera* review of all 519 Additional Records is unnecessary, Respondents stand ready to submit unredacted copies of same in the event the Court deems this necessary to evaluate the applicability of the exemptions claimed by Respondents.

## **POINT II**

### **PETITIONER'S LEGAL ARGUMENTS REGARDING ACCESS ARE ERRONEOUS**

#### **A. The Intra-Agency Exemption Applies To Non-Factual Material**

The overwhelming majority of redactions in the Additional Records were made to withhold intra-agency material in emails circulated among members of the Board of Education. (Phillips Affirm., ¶ 15). Petitioner objects to a number of these redactions by mischaracterizing the material in question as factual in nature. Petitioner's argument, however, misapprehends the parameters of the intra-agency exemption.

FOIL defines intra-agency materials as records that are not: "[i] statistical or factual tabulations or data; [ii] instructions to staff that affect the public; [iii] final agency policy or

determinations; [or] [iv] external audits, including but not limited to audits performed by the comptroller and the federal government.” Public Officers Law § 87(2)(g).

The terms “factual tabulations” and “data” are not defined within the FOIL statute. However, case law and advisory opinions issued by the Committee on Open Government have clarified that “factual data” means “objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making.” Gould v. New York City Police Department, 89 N.Y.2d 267, 277, 653 N.Y.S.2d 54, 58 (1996). See also Advisory Opinion AO-10259 (Aug. 11, 1997) (“[T]hose portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld”).<sup>1</sup>

This distinction must be drawn with a view toward advancing the underlying purpose of the intra-agency exemption, which is “to permit people within an agency to exchange opinions, advice and criticism freely and frankly, without the chilling prospect of public disclosure.” Matter of New York Times Company v. City of New York Fire Department, 4 N.Y.3d 477, 488, 796 N.Y.S.2d 302, 308 (2005). See also Miller v. New York State Department of Transportation, 58 A.D.3d 981, 871 N.Y.S.2d 489, 493 (3d Dep’t 2009).

Applying this legal standard here, the redactions made on the documents identified by Petitioner were entirely appropriate. (Petitioner’s Br., pp. 7-8). As stated, each of the documents in question has been produced without redaction for *in camera* review. Each document is individually addressed in the accompanying opposition papers submitted by Respondents. By way of example, record \*1-2 was redacted only to the extent that it contained the opinions and

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<sup>1</sup> Copies of all cited Advisory Opinions of the Committee on Open Government are collectively reproduced in Appendix 1 to this Memorandum of Law.

thoughts of its authors, who were members of the Board of Education. (Grossman Affid., ¶ 2). Factual information was not redacted. The same is true with respect to records \*78-81, which Petitioner breaks out into two different items, even though they relate to the same subject matter.<sup>2</sup>

In other instances, Petitioner has deliberately mischaracterized a document, such as records \*271 and 275 and \*460-461, which Petitioner purports to label as "meeting agenda." (Petitioner's Br., pp. 7-8). In fact, records \*271 and 275 are the same document: an email from Barbara Grossman, who until recently was a member of the Board of Education, to the other members of the Board of Education. Record \*460-461 is a typewritten outline. Clearly, neither document remotely resembles a meeting agenda for the Board of Education, which are prepared by the District Clerk and published prior to every Board meeting.<sup>3</sup>

In sum, Respondents submit that the redactions for intra-agency material in the documents identified in Petitioner's brief were entirely appropriate under applicable law.

**B. Intra-Agency Communications  
Within A FOIL Agency**

Petitioner further argues that certain documents among the Additional Records should be produced without redaction because they were sent to teachers and/or administrators within the Bedford Central School District. (Petitioner's Br., p. 5-6). In particular, Petitioner identifies

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<sup>2</sup> Similarly, Petitioner erroneously cites records \*405-406 twice on the same list of documents (Petitioner's Br., pp. 7, 8) and separately identifies records \*271 and \*275, even though they obviously are the same document. (*Id.*). This appears to have been done to create the false appearance that a greater number of documents are in dispute than is actually the case.

<sup>3</sup> Meeting agendas of the Board of Education are readily available online. For example, see <http://www.bedford.k12.ny.us/files/filesystem/Agenda%20September%2030.pdf>, a copy of which is reproduced in Appendix 2 to this Memorandum of Law.

records \*63, 79 and \*302. Petitioner cites no legal authority in support of this argument because there is none.

The provisions of FOIL are applicable to the records of an "agency," which is defined in the statute to mean:

any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature.

Public Officers Law § 86(3).

A school district clearly constitutes an "agency" under this statutory definition. See Advisory Opinion AO-7842 (Aug. 4, 1993) ("[A] school district or school board would clearly constitute an 'agency'"); see also Gould, 89 N.Y.2d at 278, 653 N.Y.S.2d at 59 (observing that the New York City Police Department "is indisputably an 'agency' for FOIL purposes"); Advisory Opinion AO-8037 (Dec. 28, 1993) ("[A]n 'agency' is a governmental entity performing a governmental function"). The teachers, administrators and individual members of a board of education for a particular school district are necessarily part of a single agency for purposes of FOIL, since an entity like a school district can only act through its authorized employees and agents. See Advisory Opinion AO-10748 (Apr. 9, 1998) ("[T]he exception pertains to communications between or among state or local government officials at two or more agencies . . . or communications between or among officials at one agency . . .") (emphasis added).

In sum, Petitioner's suggestion that "not every teacher within the Bedford school system should be considered a member of the agency" for purposes of FOIL lacks any basis in law and should be rejected. (Petitioner's Br., p. 6).

**C. Inadvertent Disclosure Does Not Result In Waiver**

Petitioner argues that any exemption applicable to certain documents was waived because they were disseminated to non-agency third parties. The only such documents actually in question are records \*444-445, which comprise an email that was inadvertently sent to a third party. (Wollin Affid., ¶ 3). It is well established that an agency's right to claim an exemption is not waived by such inadvertent disclosure. See Miller, 58 A.D.3d at 983, 871 N.Y.S.2d at 492; Matter of Scaccia v. New York State Division of State Police, 138 A.D.2d 50, 530 N.Y.S.2d 309 (1988); McGraw-Edison Co. v. Williams, 133 Misc.2d 1053, 509 N.Y.S.2d 285, 286 (Sup. Ct. Albany Cty. 1986).

Although Petitioner identifies several other "third party" documents, his objections miss the mark. Records \*156 and \*463 are the same document: an email from Mark Slivka to the then-current members of the Board of Education. This document was produced with only two lines of redaction for opinions related to Mr. Slivka by Mark Betz (identified in the email as "Mark B."). Mr. Betz is the Assistant Superintendent for Business and Administrative Services for the Bedford Central School District. (Phillips Affirm., ¶ 26). The redacted opinions that Assistant Superintendent Betz imparted to Mr. Slivka were conveyed at a time when Mr. Slivka was a member of the Board of Education. The intra-agency exemption is therefore applicable.

Record \*302 email is an email sent only to the other members of the Board of Education that related the substance of a telephone call with Brian Davidson, who is the Assistant Principal of the Fox Lane High School in the Bedford Central School District. (Phillips Affirm., ¶ 29). As stated above, such communications are subject to the intra-agency exemption under FOIL's definition of the term "agency." Record \*334 contains only slight redactions to eliminate information of a purely personal nature that was not responsive to Petitioner's FOIL request.

In sum, Petitioner's arguments as to the accessibility of these so-called "third-party" documents are unsound and legally unavailing.

**D. Subjective Material In Performance Evaluations  
May Be Withheld**

Petitioner argues that records \*312-320, which comprise former Superintendent Jackson's annual job performance evaluation dated May 21, 2007, must be produced in its entirety. It is well recognized, however, that the subjective aspects of an employee's performance evaluation may be withheld as inter-agency material and under FOIL's personal privacy exemption. See, e.g., Advisory Opinion AO-12396 (Dec. 7, 2000) ("[T]he reviewer's subjective analysis or opinion of how well or poorly the standards or duties have been carried out or the goals have been achieved . . . could be withheld, both as an unwarranted invasion of personal privacy and under § 87(2)(g), on the ground that it constitutes an opinion concerning performance"); Advisory Opinion AO-8126 (Feb. 28, 1994). This was the only information redacted on records \*312-320, and therefore Petitioner's argument must be rejected.

Petitioner's reliance upon New York 1 News v. Office of President of Borough of Staten Island, 231 A.D.2d 524, 647 N.Y.S.2d 270 (2d Dep't 1996), is misplaced. The records at issue in New York 1 News related to a disciplinary matter in which the employee had been found guilty. In such instances, case law holds that FOIL's personal privacy exemption is inapplicable, and documents relating to the disciplinary investigation and findings are accessible under FOIL. See LaRocca v. Board of Education of Jericho Union Free School District, 220 A.D.2d 424, 632 N.Y.S.2d 576 (2d Dep't 1995). Here, the annual performance evaluation set forth in records \*312-320 obviously is not a disciplinary investigation or finding of guilt. As Petitioner is well aware, no disciplinary charges were ever preferred against former Superintendent Jackson.



Moreover, another document among the Additional Records establishes that a draft of the Settlement Agreement between the Board of Education and former Superintendent Jackson was prepared as early as May 1, 2007. See Record \*486-481 (stamped "Draft Document Dated May 1, 2007"). Additional documents, including but not limited to records \*503-504, demonstrate that the Board of Education and former Superintendent Jackson were discussing her separation from employment substantially prior to May 21, 2007. Thus, contrary to Petitioner's speculation, Dr. Jackson's May 21, 2007 performance evaluation could not have been "relied upon as a basis for the Board's decision in regard to Jackson's continued employment." (Petitioner's Br., p. 8).

### **POINT III**

#### **PETITIONER'S REQUEST FOR PREVAILING PARTY ATTORNEY'S FEES SHOULD BE DENIED**

Petitioner continues to press for an award of attorney's fees as a prevailing party, notwithstanding his inability to satisfy any of the stringent statutory criteria for obtaining such relief. Under Public Officers Law § 89(4)(c), a court may, in its discretion, award reasonable counsel fees and costs to a party that "substantially prevailed" in a proceeding if: (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." (McKinney's 2009). Here, Petitioner has not shown that he has "substantially prevailed" in this proceeding and obtained access to records of "clearly significant interest to the general public" which the Board of Education had no "reasonable basis in the law" to withhold. (See Phillips Affirm., ¶¶ 47-52; Wollin Affid., ¶ 2).

Petitioner cites a number of case authorities in support of his argument for attorney's fees, all of which are distinguishable. In Cross-Sound Ferry Services Inc. v. Department of Transportation, 219 A.D.2d 346, 634 N.Y.S.2d 575 (3d Dep't 1995), the Appellate Division affirmed only that portion of an attorney's fee award that was based upon the agency's failure to provide any substantive response to the petitioner's FOIL request. Instead, the agency ignored the petitioner's first request and answered a later request by producing a redacted document without any explanation for the redactions. See Cross-Sound Ferry, 219 A.D.2d at 351, 634 N.Y.S.2d at 578.

Powhida v. City of Albany, 147 A.D.2d 236, 542 N.Y.S.2d 865 (3d Dep't 1989), is also distinguishable. The case arose from the actions of a police officer who entered the petitioner's home, without permission and while on-duty, to conduct a termite inspection (this was the officer's part-time job). The petitioner lodged a complaint about the officer's conduct and ultimately sought access to records relating to the incident. After the petitioner commenced litigation, all of the requested documents were released. Under these circumstances, the Appellate Division affirmed the lower court's award of attorney's fees. Powhida simply does not resemble the instant matter, either with respect to the nature of the records at issue, the relief obtained by the petitioner, or the agency's response to the petitioner's FOIL request.

Petitioner cites a federal case, Ajluni v. F.B.I., 947 F.Supp. 599 (N.D.N.Y. 1996), purportedly to illustrate the interpretation of the statutory language, "substantially prevailed." This language also appears in the Freedom of Information Act ("FOIA"). See 5 U.S.C. § 52(a)(4)(E). However, Petitioner's reliance upon federal case law interpreting that provision is misplaced because the respective attorney's fees provisions found in FOIL and FOIA are

otherwise materially different.<sup>4</sup> By way of example, in Henry Schein, Inc. v. Eristoff, 35 A.D.3d 1124, 827 N.Y.S.2d 718 (3d Dep't 2006), the Appellate Division upheld the lower court's finding that the petitioner had not substantially prevailed even though the agency produced an additional 101 pages of records after the commencement of litigation and was later directed to produce another 17 pages of records by court order. Thus, the standard for "substantially prevailing" under FOIL is higher than under federal law, and therefore New York must be deemed controlling.

Finally, Petitioner cites Katz v. Department of Justice, 498 F.Supp. 177 (S.D.N.Y. 1979), in an effort to characterize the Additional Records as having significant public importance. Katz, however, involved records concerning the FBI's covert surveillance and investigation of an individual in the 1950s for allegedly having connections with Communist Party. The court found that this information was important to "the collective knowledge of our society and the Government's activity in it." Katz, 498 F.Supp. at 185. The Additional Records in the instant matter do not implicate similar concerns. They are, for the most part, emails containing the thoughts and opinions of a group of unpaid volunteers who provide a public service to their

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<sup>4</sup> The attorney's fee provision of FOIA, set forth at 5 U.S.C. § 552(a)(4)(E), provides in relevant part:

- (i) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.
- (ii) For purposes of this subparagraph, a complainant has substantially prevailed if the complainant has obtained relief through either --
  - (I) a judicial order, or an enforceable written agreement or consent decree; or
  - (II) a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial.

5 U.S.C. § 552(a)(4)(E).

community, and who are answerable to the local electorate for their collective decisions. This fact appears to be lost upon Petitioner, who continues to pursue this litigation as if the Additional Records actually contained information analogous to that sought by the petitioner in Katz.

**III. CONCLUSION**

For the reasons set forth above, Petitioner's motion should be denied in its entirety, and Respondents should be awarded such other and further relief as may be just and proper.

Dated: White Plains, New York  
October 1, 2009

**KEANE & BEANE, P.C.**

By:



Edward J. Phillips  
Attorneys for Respondents  
445 Hamilton Avenue, 15<sup>th</sup> Floor  
White Plains, New York 10601  
(914) 946-4777

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

In the Matter of an Article 78 Proceeding

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-against-

BOARD OF EDUCATION of the BEDFORD  
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**AFFIDAVIT  
IN OPPOSITION  
TO MOTION**

Index No. 2008-25405

Assigned To:

Hon. Barbara Zambelli, A.J.S.C.

STATE OF NEW YORK )

)SS.:

COUNTY OF WESTCHESTER )

**SUSAN ELION WOLLIN**, being duly sworn, deposes and says:

1. I am the President of the Board of Education of the Bedford Central School District (the "Board of Education"), and am named in that capacity in the above-captioned proceeding. I submit this Affidavit in opposition to Petitioner's motion "pursuant to 4/30/09 Order." In particular, the purpose of this Affidavit is to address certain questions that Petitioner has raised concerning several of the additional documents produced by Respondents on June 23, 2009 in connection with Petitioner's FOIL request (the "Additional Records").

2. Record \*12 is an anonymous note, dated-stamped November 16, 2006, that mentions the "no confidence vote" taken by members of the teacher's union for the Bedford

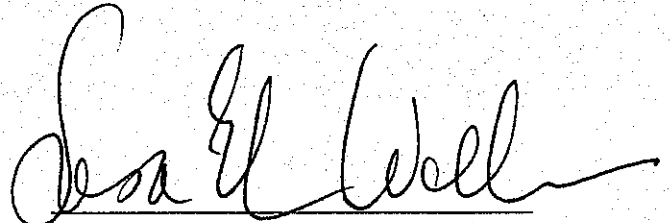
Central School District. In or around November 2006, representatives of the union appeared at a public, televised meeting of the Board of Education and read a prepared statement announcing the results of their members' "no confidence vote." The vote stemmed from the controversy involving the arrest of a former Bedford Hills Elementary School principal for failing to report allegations that a 9-year old girl had been raped. Both the "no confidence vote" and the arrest were the subject of widespread media coverage and discussion with the Bedford community.

3. Records \*444-445 contain an email that I sent to the other members of the Board of Education concerning former Superintendent Debra Jackson. Inadvertently, I also sent this email to a personal friend, Janice Goldklang, at [JGoldklang@randomhouse.com](mailto:JGoldklang@randomhouse.com). Almost immediately after sending the email, I realized my mistake and promptly advised Ms. Goldklang to disregard the email.

4. Records \*460-461 contain notes I prepared for an executive session Board of Education meeting with an attorney relating to former Superintendent Jackson's job performance. The notes reflected my personal thoughts and highlighted matters that I wished to discuss with counsel.

5. Record \*517 is an email that was sent to me from John H. Gross, Esq., who formerly served as the Board of Education's counsel and who was personally involved advising the Board with respect to the Settlement Agreement reached with former Superintendent Jackson. The email appears to attach a document described as "Resignation Agreement – April 2007 JHG.doc." I have searched my computer and other records and have been unable to retrieve this attachment or a copy thereof.

WHEREFORE, for the reasons set forth in the accompanying opposition papers, I respectfully submit that Petitioner's motion should be denied, and Respondents should be awarded such other and further relief as the Court deems just and proper.

  
SUSAN ELION WOLLIN

Sworn to before me this  
29<sup>th</sup> day of September, 2009

  
Notary Public

MARY LOU CAVALIERE  
Notary Public, State of New York  
No. 01CA6162828  
Qualified in Putnam County  
Commission Expires March, 19 2011

MARY LOU CAVALIERE  
Notary Public, State of New York  
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**MEMORANDUM OF LAW**  
**IN OPPOSITION TO MOTION**

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**AFFIDAVIT**

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Assigned To:

Hon. Barbara Zambelli, A.J.S.C.

Respondents.  
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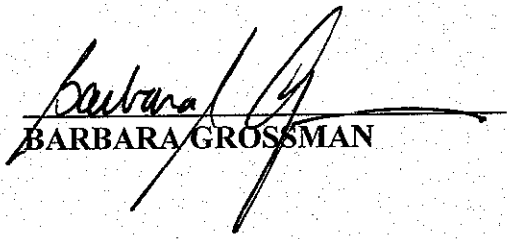
STATE OF NEW YORK                    )  
  ) SS.:  
COUNTY OF WESTCHESTER            )

**BARBARA GROSSMAN**, being duly sworn, deposes and says:

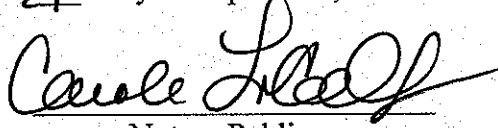
1. I am a former member of the Board of Education of the Bedford Central School District (the "Board of Education"). I submit this Affidavit in connection with Petitioner's motion "pursuant to 4/30/09 Order." Specifically, I am advised that Petitioner has attempted to characterize record \*1-2 as a "factual compilation," and I wish to respond to that claim.

2. I prepared record \*1-2 in or around March 2007, in my capacity as a member of the Board of Education. I did so with the assistance and input of another member of the Board of Education, Donna Marino. The document was intended to summarize the Board of Education's concerns with various aspects of former Superintendent Jackson's job performance. The

document therefore contained, to a large extent, my opinions and thoughts on this subject, as well as those expressed by Ms. Marino. The document was intended solely for the internal use of the Board of Education and its attorneys, and to my knowledge was not disseminated to any third parties.

  
BARBARA GROSSMAN

Sworn to before me this  
29<sup>th</sup> day of September, 2009

  
Notary Public

Carole LaColla  
Notary Public, State of New York  
No. 01LA5082288  
Qualified in Dutchess County  
Commission Expires 7/21/2013

SUPREME COURT OF THE STATE OF NEW YORK  
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-against-

BOARD OF EDUCATION of the BEDFORD  
CENTRAL SCHOOL DISTRICT, SUSAN ELION  
WOLLIN, as President of the Board of Education of the  
Bedford Central School District, CAROLE LACOLLA,  
as District Clerk of the Board of Education of the Bedford  
Central School District and DR. DEBRA JACKSON,

Respondents.  
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**AFFIRMATION  
IN OPPOSITION**

Index No. 2008-25405

Assigned To:

Hon. Barbara Zambelli, A.J.S.C.

**EDWARD J. PHILIPS**, an attorney duly admitted to practice law in the State of New York, affirms the following under the penalties of perjury pursuant to CPLR § 2106:

1. I am a member of Keane & Beane, P.C., counsel for Respondents, the Board of Education of the Bedford Central School District (the "Board of Education"), Susan Elion Wollin, as President of the Board of Education, Carole LaColla, as District Clerk of the Board of Education, and Dr. Debra Jackson (collectively, the "Respondents"), in the above-captioned proceeding. I submit this Affirmation in opposition to Petitioner's motion "pursuant to 4/30/09 Order." Petitioner's motion has essentially three requests for relief. First, Petitioner seeks the disclosure of all redacted information in the additional documents produced by Respondents on June 23, 2009 in connection with his FOIL request (the "Additional Records"). In the alternative, Petitioner challenges the redactions made on certain specific documents that are identified in his motion papers. Finally, Petitioner seeks an award of attorney's fees pursuant to

Public Officers Law § 89(4)(c). For the reasons discussed below, Petitioner is not entitled to any of the foregoing relief.

**RESPONDENTS' REDACTION OF THE ADDITIONAL RECORDS  
COMPLIED WITH FOIL AND THIS COURT'S APRIL 30, 2009 ORDER**

2. The first branch of Petitioner's motion seeking the production of the Additional Records in their entirety, without redaction, has no basis in fact or law. To evaluate this argument in its correct context, it is important to recall the procedural path followed by the parties prior to Petitioner's filing of the current motion.

3. This path begins with the Court's Decision and Order dated March 31, 2009 (the "Decision and Order"). The Decision and Order directed Respondents to expand their search for responsive records using a broader interpretation of Petitioner's FOIL request. The Court tentatively scheduled a conference in the event the Board of Education had additional records that were responsive to this broader search criteria. (Petitioner's Exhibit 4, p. 8).

4. By letter dated April 2, 2009, Respondents advised the Court that it had additional documents (*i.e.*, the "Additional Records," as defined above) that would be responsive to Petitioner's FOIL request, as construed in the Decision and Order. A true copy of this letter is annexed hereto as Exhibit "A."

5. By letter to the Court dated April 7, 2009, Petitioner requested, *inter alia*, that Respondents be directed to "identify" all responsive documents prior to the conference. Petitioner also requested that Respondents be required to "articulate legal grounds" for any claimed FOIL exemptions. A true copy of this letter is annexed hereto as Exhibit "B."

6. In response, by letter to the Court dated April 8, 2009, Respondents pointed out that Petitioner had not conferred in good faith with opposing counsel prior to making the demands set forth in his April 7, 2009 letter. Further, Respondents advised the Court that they were reviewing the Additional Records and anticipated that a significant number of them would be exempt from FOIL disclosure, in whole or in part, because they constituted intra-agency materials. A true copy of this letter is annexed as Exhibit "C."

7. Respondents also indicated in their April 8, 2009 letter that they hoped to confer with opposing counsel and agree upon "a procedure by which Petitioner would be afforded the opportunity to raise any objections to the assertion of the intra-agency exemption or any privilege." (Exhibit C, p. 1).

8. This Court conducted the aforementioned conference on April 28, 2009. At the conference, Respondents made clear that the Additional Records were relatively voluminous, and the process of reviewing and redacting each one would take time. Given the nature of the documents in question — primarily emails among members of the Board of Education — Respondents indicated that there would be extensive redactions of intra-agency material. The parties also addressed a number of procedural issues, including the mechanism by which Respondents would assert any such FOIL exemptions in connection with their production of the Additional Records.

9. Ultimately, it was agreed at the conference that Respondents would produce copies of the Additional Records after redacting any information that was exempt from disclosure under FOIL. Petitioner did not request that each redaction made in the Additional Records be catalogued with respect to the exemption(s) claimed, and the undersigned counsel



indicated that such a itemization would not be forthcoming because of the difficulty of identifying each and every redacted word, phrase and/or paragraph. Indeed, Petitioner chose to forego attempting to prepare his own tabulation of the redactions made in the Additional Records because doing so would be "impractical." (Petitioner's Br., p. 7, n. 12).

10. During the conference, as well as during subsequent telephone conversations with opposing counsel, Respondents strongly suggested that a further Court conference should be conducted in the event that Petitioner contested any of the redactions made by Respondents in the Additional Records. It was Respondents' position that an *in camera* review of all of the Additional Records, which consist of 519 pages of documents, would be unnecessary and needlessly burdensome for the Court. On the other hand, Respondents welcomed the opportunity to respond, in an informal setting, to any specific objections that Petitioner sought to raise as to particular documents. Respondents maintained that this procedure would be efficient and economical for all parties.

11. By Order dated April 30, 2009, this Court established the procedures to be followed by the parties in connection with Respondents' production of the Additional Records. (Petitioner's Exhibit 3). Specifically, the Court directed that Respondents produce copies of the Additional Records "with any necessary redaction(s) for asserted FOIL exemptions." (*Id.*). The April 30, 2009 Order further indicated that copies of the redacted Additional Records need not be submitted to the Court. (*Id.*).

12. As mentioned, Respondents produced copies of the Additional Records, with redactions for exempt material, on June 23, 2009. As required by the April 30, 2009 Order, this production was accompanied by certifications from each member of the Board of Education

attesting to the fact that each of them had conducted a diligent search for records responsive to Petitioner's FOIL request. Respondents also served an Affirmation from the undersigned counsel, dated June 23, 2009, averring in relevant part:

The documents were redacted by the undersigned counsel to remove: (a) information constituting exempt intra-agency material, see Public Officers Law § 87(2)(g); (b) information that, if disclosed, would constitute an unwarranted invasion of personal privacy, see Public Officers Law § 87(2)(b); (c) information that constitutes privileged attorney-client communications, see Public Officers Law § 87(2)(a) and CPLR § 4503; and (d) irrelevant information set forth in documents containing other, responsive information that was subject to FOIL disclosure. I hereby attest that said redactions were made in good faith and based upon prevailing case authorities and advisory opinions issued by the New York State Committee on Open Government.

(Petitioner's Exhibit 2, ¶ 3).

13. In July 2009, the parties' respective counsel conferred by telephone in a good faith effort to address Petitioner's objections to certain specific redactions on the Additional Records. During this telephone conference, Respondents attempted to answer all of Petitioner's questions regarding the basis for specific redactions on the documents he had singled-out. In some instances, Respondents went so far as to paraphrase or describe, in general terms, the substance of the redacted information so that Petitioner would fully understand the basis for the claimed FOIL exemption.

14. Petitioner nevertheless chose to decline Respondents' suggestion to seek a further Court conference with respect to the redactions at issue, and instead filed the instant motion.<sup>1</sup> All of the redactions discussed by counsel during the aforementioned telephone conference are among those challenged in the instant motion. Indeed, much of the explanatory information set forth below was conveyed to Petitioner by Respondents during the aforementioned telephone conference.

15. Even without the benefit of such informal conferences between counsel, Petitioner cannot reasonably claim to be left in the dark as to the redactions made in the Additional Records. The vast majority of the Additional Records consist of emails among members of the Board of Education. A small number of emails were received from, or sent to, the Board's former legal counsel, John H. Gross, Esq. None of the redactions made in the Additional Records obscured the sender or recipient of an email. Thus, the vast majority of Additional Records consist of emails for which Petitioner was provided at least the following information: (1) the sender; (2) the recipient(s); and (3) the date and time of the email. This permitted Petitioner to readily determine whether particular emails were received from, or sent to, third parties. In addition, except in a handful of instances, the Additional Records also included the subject line of the email. Since only three (3) FOIL exemptions were cited by Respondents in connection with the subject redactions — intra-agency, unwarranted invasion of personal privacy and attorney-client privilege — Petitioner's suggestion that it is "impossible" to

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<sup>1</sup> Petitioner's decision to pursue further motion practice may have been motivated by a desire to generate interest in his website, <http://www.bedfordtownmeeting.com>, where he posted copies of all of the Additional Records in or around August 2009.

determine the nature of the claimed exemptions on particular documents is disingenuous. (Petitioner's Br., p. 2).

16. In sum, it is respectfully submitted that the June 23, 2009 Affirmation of Respondents' counsel, which clearly identified the grounds for the redactions made in the Additional Records, satisfied Respondents' obligation to articulate a "particularized and specific justification" for denying access to the redacted information. See Matter of Capital Newspapers Div. of Hearst Corp., 67 N.Y.2d 562, 566, 505 N.Y.S.2d 576, 665 (1986). This is especially true in light of the procedural path followed by the parties leading up to the instant motion, as set forth above.

**PETITIONER'S OBJECTIONS TO SPECIFIC REDACTIONS  
MADE IN ADDITIONAL RECORDS ARE WITHOUT MERIT**

17. The second branch of Petitioner's motion challenges the redactions made in particular documents among the Additional Records. To facilitate this Court's review of the Additional Records in question, unredacted copies of those documents are collectively annexed hereto as Exhibit "D."

18. These documents are being submitted to the Court for *in camera* review only, and have not been served upon Petitioner.

19. For reference purposes, copies of the redacted Additional Records identified in the motion are collectively annexed hereto as Exhibit "E." As the Court will see, many of the documents in question contain only partial, and sometimes minimal, redactions.

20. As set forth below, all of the redactions in question are consistent with prevailing case law and advisory opinions relating to intra-agency material, personal privacy and the attorney-client privilege.

**Records \*1-2**

21. Contrary to Petitioner's contention, this 2-page document does not constitute a "factual compilation." (Petitioner's Br., p. 7). Rather, the document was prepared by two members of the Board of Education to summarize the Board's discussions concerning various aspects of former Superintendent Jackson's job performance. (See Grossman Affid., ¶ 2).

22. To the extent that record \*1-2 contained factual information, such information was not redacted. In contrast, material that reflected or revealed the opinions, impressions or thoughts of the document's author was redacted because such information is exempt from disclosure as intra-agency material. See Public Officers Law § 87(2)(g).<sup>2</sup>

**Records \*63, \*78-81**

23. These records consist of emails that circulated among the then-current members of the Board of Education, former Superintendent Jackson, and certain teachers within the Bedford Central School District. To the extent that the documents contained factual information, such information was not redacted. In contrast, material that reflected or revealed the opinions,

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<sup>2</sup> A banner across the top of Petitioner's website recites John Adams' famous quotation, "facts are stubborn things," ostensibly for some thematic purpose. A more apt Adams' quotation would have been, "a government of laws and not of men." Massachusetts Constitution, pt. 1, art. 30. When it comes to distinguishing between fact and opinion, FOIL strives to balance the need for open government with the countervailing need to protect the deliberative processes of government officials, who must be able to express their opinions freely to one another. See Matter of Xerox Corp. v. Town of Webster, 65 N.Y.2d 131, 132, 490 N.Y.S.2d 488, 490 (1985). This balancing is achieved through a conscientious application of law, and not by the promotion of an individual cause or agenda.

impressions or thoughts of the emails' authors was redacted because such information is exempt from disclosure as intra-agency material. See Public Officers Law § 87(2)(g).

24. Petitioner argues that records \*63 and \*79 do not qualify as intra-agency materials because they were sent to teachers within the Bedford Central School District. In making this argument, Petitioner asserts, without any citation to case authority or relevant advisory opinions, that "not every teacher within the Bedford school system should be considered a member of the agency so as to be afforded the intra-agency exemption." (Petitioner's Br., p. 6).

25. Petitioner cites no authority for this argument because there is none. As set forth in the accompanying Memorandum of Law, FOIL defines the term "agency" as "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature." Public Officers Law § 86(3). Under this definition, Petitioner cannot reasonably argue that teachers fall outside the "agency" that constitutes the Bedford Central School District. Nor can Petitioner plausibly argue, as he appears to suggest, that some teachers fall within the agency, while others do not. The statutory definition of the term "agency," and the relevant case authorities and advisory opinions, demonstrate that Petitioner's argument is untenable.

**Records \*156 and \*463<sup>3</sup>**

26. Records \*156 and \*463 are the same document: an email from Mark Slivka to the then-current members of the Board of Education on April 26, 2007. This document was

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<sup>3</sup> Petitioner's brief incorrectly identifies record \*463 as "467." (Pet. Br., p. 5).

produced with only two lines of redaction for intra-agency material. Although Mr. Slivka was not a member of the Board of Education at the time he wrote the subject email, the redacted material summarizes the impressions and opinions related to him by Mark Betz (identified in the email as "Mark B."), who is the Assistant Superintendent for Business and Administrative Services for the Bedford Central School District. Moreover, the redacted impressions and opinions that Assistant Superintendent Betz imparted to Mr. Slivka were conveyed at a time when Mr. Slivka was a member of the Board of Education. Accordingly, the intra-agency exemption is applicable.

Records \*271 and \*275<sup>4</sup>

27. Records \*271 and \*275 are the same document: an email from Barbara Grossman, who until recently was a member of the Board of Education, to the other members of the Board of Education. The email, dated February 10, 2007, poses a number of questions to the other members of the Board of Education concerning the impending resignation of a teacher, Alice Bailey.

28. Contrary to Petitioner's assertion, the email does not "describe items on an agenda." (Petitioner's Br., p. 7). All of the questions and statements made in this email concerning Alice Bailey constitute intra-agency material because they reflect the opinions and thoughts of Ms. Grossman. Accordingly, they were properly redacted. The last line of redaction on this email (and continuing onto record \*276) does not relate to the dispute with former Superintendent Jackson and likewise constitutes intra-agency material.

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<sup>4</sup> The duplicative enumeration of these and other documents in Petitioner's brief does not appear to be inadvertent. Rather, the duplication appears intended to create the false appearance that more documents are at issue than is really the case.

**Record \*302**

29. Record \*302 is an email from Brad Sacks, the then-President of the Board of Education, to the other members of the Board of Education. The email, dated January 10, 2007, relates the substance of a telephone call between Mr. Sacks and Brian Davidson, who is the Assistant Principal of the Fox Lane High School in the Bedford Central School District.

30. To the extent that Mr. Sacks' email contained factual information, such information was not redacted. In contrast, material that reflected or revealed the opinions, impressions or thoughts of Messrs. Sacks or Davidson was redacted because such information is exempt from disclosure as intra-agency material. See Public Officers Law § 87(2)(g).

**Records \*312-320**

31. Records \*312-320 comprise a single document, namely, an 8-page "Annual Evaluation of the Superintendent" dated May 21, 2007. The document, prepared by a member of the Board of Education, evaluates the job performance of former Superintendent Jackson.

32. Consistent with prevailing case law and advisory opinions issued by the New York Committee on Open Government, those portions of the evaluation that describe former Superintendent Jackson's duties, and the standards and goals relating to those duties, were produced to Petitioner without redaction. Those portions of the evaluation containing the reviewer's subjective analysis of former Superintendent Jackson's job performance was redacted on the grounds that disclosure would constitute an unwarranted invasion of personal privacy, and on the ground that such analysis constitutes intra-agency material. As set forth in the accompanying Memorandum of Law, Petitioner's reliance upon New York 1 News v. Office of



President of Borough of Staten Island, 231 A.D.2d 524, 647 N.Y.S.2d 270 (2d Dep't 1996), is erroneous.

**Record \*334**

33. Record \*334 includes several short emails sent by a member of the Board of Education to a non-agency third party, Paul Alcorn. The slight redactions made on those emails eliminated material that was purely personal in nature and clearly had no bearing upon the "certain dispute" between the Board of Education and former Superintendent Jackson. Accordingly, the material was redacted because it was not responsive to Petitioner's FOIL request.

**Records \*387-388**

34. Records \*387-388 comprise a single document written by Brad Sacks, the then-President of the Bedford Board of Education. The document summarizes the Board of Education's discussions concerning aspects of former Superintendent Jackson's job performance. The information redacted on the document constitutes subjective analysis and opinion and therefore was redacted on the grounds that disclosure would constitute an unwarranted invasion of personal privacy, and on the ground that such analysis constitutes intra-agency material.

35. In addition, record \*387-388 was provided via email to John H. Gross, Esq., and therefore the information it contains also falls within the attorney-client privilege. Attorney Gross formerly served as the Board of Education's general counsel. (Wollin Affid., ¶ 5). As evidenced by other documents among the Additional Records produced to Petitioner, Attorney Gross was personally involved in counseling the Board of Education in connection with former Superintendent Jackson's separation from employment. Record \*385 (also produced herewith

*in camera*) confirms that the document was sent to Attorney Gross for the purpose of obtaining legal advice.

**Records \*405-406**

36. Records \*405-406 comprise a single letter addressed to former Superintendent Jackson from then-President of the Bedford Board of Education, Brad Sacks. The letter is incorporated the substance of record \*377-388 which, as mentioned above, summarizes the Board of Education's concerns with aspects of former Superintendent Jackson's job performance. The redactions made upon record \*405-406 are based upon the same FOIL exemptions specified above in connection with record \*377-388. The factual information set forth in record \*405 (the first page of the subject letter) was not redacted.

**Records \*413-414**

37. Records \*413-414 consist of a single email from former Superintendent Jackson to the members of the Board of Education, dated February 6, 2007. In her email, Superintendent Jackson provides the Board of Education with her opinions and recommendations concerning teacher certification requirements under New York State law and the federal No Child Left Behind Act of 2001 ("NCLB"), 115 Stat. 1702, as added, 20 U.S.C. § 6842 *et seq.* The email also opines as to the individual teachers in the Bedford Central School District whom she believes do not meet applicable certification requirements. In addition, the last paragraph of Superintendent Jackson's email (record \*414) relates the substance of a discussion between herself and the Board of Education's former counsel, John H. Gross, Esq., concerning the applicable certification laws.

38. To the extent that Superintendent Jackson's email contained factual information, such information was not redacted. However, Superintendent Jackson's assessment of the applicable teacher certification requirements, and the identity of teachers in the Bedford Central School District who purportedly did not meet these requirements at the time of her email in February 2007, were redacted for two reasons.

39. First, Superintendent Jackson's interpretation of applicable teacher certification requirements under federal and state law necessarily constituted her opinion, rather than factual information. The same is true with respect to her opinion that certain teachers did not meet these requirements.

40. Second, this information was properly redacted because it is not within the scope of Petitioner's FOIL request. As construed by the Court, Petitioner's FOIL request encompasses "all documents . . . regarding the [draft disciplinary charges] as well as any document referring to the incident referred to by the phrase 'certain dispute' in the [Jackson] Settlement." (Petitioner's Exhibit 4, p. 6). As indicated elsewhere in the unredacted Additional Records produced to Petitioner, the "certain dispute" between the Board of Education and former Superintendent Jackson did not involve her interpretation of the applicable legal requirements for teacher certification, nor did it concern Superintendent Jackson's opinion as to which teachers did or did not meet these requirements. It was the implementation of these requirements, particularly in the case of former Bedford school teacher Alice Bailey, that became problematic. (See Records \*400, 402-403, 408-412).

41. The information in Superintendent Jackson's email concerning the substance of a discussion between herself and John H. Gross, Esq. was redacted because it constitutes privileged attorney-client communications.

**Records \*444-445**

42. Records \*444-445 consist of a single email sent by Susan Elion Wollin, who at the time was a member of the Board of Education, to the other members of the Board of Education. Her email contained her opinions, impressions and recommendations, and therefore was redacted because such information is exempt from disclosure as intra-agency material. See Public Officers Law § 87(2)(g). The email also related the substance of Ms. Wollin's communications with Attorney Gross, and therefore is also exempt by reason of the attorney-client privilege.

43. Petitioner argues that record \*444-445 is subject to disclosure because it was sent to a non-agency third party with an email address of JGoldklang@randomhouse.com. As explained in the accompanying Affidavit of Susan Elion Wollin, this third party received her email in error. (Wollin Affid., ¶ 2). Almost immediately after sending the email, Mr. Wollin realized her mistake and promptly advised Ms. Goldklang to disregard the email. As set forth in Respondents' Memorandum of Law, such inadvertent disclosure does not result in a waiver of the intra-agency exemption or attorney-client privilege.

**Records \*460-461**

44. Records \*460-461 consists of notes prepared by then-member of the Board of Education, Susan Elion Wollin, in connection with a meeting she planned to attend with an attorney for the Board of Education. (Wollin Affid., ¶ 3). Accordingly, the document was

appropriately redacted as intra-agency material because it contains her opinions, impressions and recommendations.

**Record \*517**

45. Record \*517 is an email from the Board of Education's former counsel, John H. Gross, Esq., to the then-President of the Board of Education, Brad Sacks. The email attaches a document identified as "Resignation Agreement – April 2007 JHG.doc." Both the substance of the communication set forth in this email, and the document attached to it by Attorney Gross, constitute attorney-client communications.

46. It should be noted that the document attached to Attorney Gross' email has not been produced *in camera* because it has not been located in either electronic or hard copy form. (Wollin Affid., ¶ 5).

**PETITIONER IS NOT ENTITLED TO  
AN AWARD OF ATTORNEY'S FEES**

47. In the closing pages of his brief, Petitioner argues that he should be awarded attorney's fees as a prevailing party. Petitioner, however, has not satisfied any of the statutory criteria for such an award.

48. As a threshold matter, Petitioner attempts to argue that he has "substantially prevailed" in this proceeding because the production of the Additional Documents "shed significant light on the nature of and reasons for the 'dispute' between the Board and Jackson." (Petitioner's Br., p. 9). However, a review of the two (2) particular documents Petitioner highlights in support of this argument only helps show that his argument is meritless.

49. The two documents in question, records \*12 and \*380-381, relate to the 2006 arrest of a former Bedford Hills Elementary School principal for failing to report allegations that a 9-year old girl had been raped. Although all criminal charges against the principal were eventually dropped, the matter caused significant controversy in the Bedford Central School District. Copies of several newspaper articles concerning the matter are collectively annexed hereto as Exhibit "F."

50. Contrary to Petitioner's assertion, the content of records \*12 and \*380-381 cannot be reasonably characterized as new and significant. Record \*12 is an anonymous note, dated-stamped November 16, 2006, that expresses the author's support for the actions taken by the Board of Education. Although Petitioner apparently finds the document's reference to a "no confidence vote" to be noteworthy, the results of this "vote" were announced by representatives of the Bedford teachers' union at a public, televised meeting at the Board of Education. (Wollin Affid., ¶ 4). The document does not add anything of substance to the public's knowledge (or memory) of the events in question.

51. Record \*380-381 is an anonymous email to the Board of Education, dated September 2, 2006. The email expresses another viewpoint from an unknown person on the controversy that led to the no confidence vote. (Wollin Affid., ¶ 2). Again, the document no new or significant information to the public domain, as Petitioner suggests. (Petitioner's Br., p. 10).

52. Petitioner's other arguments and case citations regarding his claim for attorney's fees are addressed in the accompanying Memorandum of Law. Respondents submit that those arguments are equally unavailing.

**WHEREFORE**, I respectfully submit that Petitioner's motion should be denied, and Respondents should be awarded such other and further relief as the Court deems just and proper.

Dated: White Plains, New York  
October 1, 2009

  
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**EDWARD J. PHILLIPS**