SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

In the Matter of the Application of

CAMILLO M. SANTOMERO,

Petitioner,

For a Judgment and Order Pursuant to Article 78 of the Civil Practice Law and Rules,

- 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.

Index No. **25405-2008**

NOTICE OF MOTION FOR RENEWAL AND/OR REARGUMENT

Assigned to the Honorable Barbara Gunther Zambelli, A. J. S. C.

PLEASE TAKE NOTICE that, upon the Affirmation of Robert A. Sternbach, Esq., dated May 7, 2009, and the Exhibits annexed thereto, and upon all the pleadings and proceedings herein, Petitioner will move this Court, at the Courthouse, 111 Dr. Martin Luther King, Jr., Blvd., White Plains, New York, before the Hon. Barbara Gunther Zambelli, A.J.S.C., Courtroom 203, on the 5th day of June, 2009, at 9:30 a.m., or as soon thereafter as counsel may be heard, for an order, pursuant to CPLR § 2221,

A. granting Petitioner leave to reargue the Court's Decision & Order, filed March __, 2009 (the "Decision"), to the extent the Decision (i) disposed of the Petition

herein; (ii) ruled, without conducting an *in camera* inspection, that Respondents properly denied Petitioner access to the alleged "draft disciplinary charges" identified in their Answer; and (ii) denied Petitioner's request for attorney's fees;

B. in the alternative, granting Petitioner leave to renew his request for access to the "draft disciplinary charges" and for attorney's fees, based on Respondents' failure to certify, in their Answer, whether additional documents responsive to Petitioner's FOIL request existed and their belated disclosure, only in response to the Court's directive in the Decision, that hundreds of additional responsive records exist;

and, upon such reargument and/or renewal, (i) vacating that portion of the Decision which disposed of the Petition; (ii) vacating that portion of the Decision that ruled that Respondents properly denied Petitioner access to the "draft disciplinary charges," pending an *in camera* review of the same; and (iii) vacating that portion of the Decision which denied Petitioner's request for attorney's fees, subject to final determination of this matter, together with such other and further relief as the Court deems just and proper.

PLEASE TAKE FURTHER NOTICE that, pursuant to CPLR 2214(b), answering papers, if any, must be served upon the undersigned no later than seven days prior to the return date of this motion.

Dated: New York, New York
May 7, 2009

Law Office of ROBERT A. STERNBACH
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TO: KEANE & BEANE, P.C.
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

In the Matter of the Application of

CAMILLO M. SANTOMERO,

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For a Judgment and Order Pursuant to Article 78 of the Civil Practice Law and Rules,

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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.

Index No. 25405-2008

AFFIRMATION IN SUPPORT OF MOTION FOR REARGUMENT AND/OR RENEWAL

Assigned to the Honorable Barbara Gunther Zambelli, A. J. S. C.

ROBERT A. STERNBACH, an attorney duly admitted to practice in New York State, affirms under the penalties of perjury as follows:

1. I am a principal of the Law Office of Robert A. Sternbach, attorneys for Petitioner Camillo M. Santomero ("Petitioner"). I respectfully submit this Affirmation in support of Petitioner's motion, pursuant to CPLR 2221, for an Order:

A. granting Petitioner leave to reargue the Court's Court's Decision & Order, filed March __, 2009 (the "Decision"), to the extent the Decision (i) disposed of the Petition herein; (ii) ruled, without conducting an *in camera* inspection, that Respondents properly denied Petitioner access to the alleged "draft disciplinary

charges" identified in their Answer; and (ii) denied Petitioner's request for attorney's fees;

B. in the alternative, granting Petitioner leave to renew his request for access to the "draft disciplinary charges" and for attorney's fees, based on Respondents' failure to certify, in their Answer, whether additional documents responsive to Petitioner's FOIL request existed and their belated disclosure, only in response to the Court's directive in the Decision, that hundreds of additional responsive records exist; and

and, upon such reargument and/or renewal, (i) vacating that portion of the Decision which disposed of the Petition; (ii) vacating that portion of the Decision that ruled that Respondents properly denied Petitioner access to the "draft disciplinary charges," pending an *in camera* review of the same; and (iii) vacating that portion of the Decision which denied Petitioner's request for attorney's fees, subject to final determination of this matter, together with such other and further relief as the Court deems just and proper.

2. A copy of the Decision is annexed hereto as Exhibit "A." Copies of the Notice of Petition; Petition; Memorandum of Law in support of the Petition; Answer; Jackson Affidavit, Wollin Affidavit, Memorandum of Law in opposition, Petitioner's Reply Affidavit, and Reply Memorandum of Law are annexed hereto collectively as Exhibit "B."

Grounds For Reargument And/Or Renewal

3. It is respectfully submitted that, by stating in the Decision that the Petition was "disposed of," the Court overlooked or misapprehended Public Officers Law § 89[3] and applicable case law interpreting such provision, such as *Beechwood Restorative Care Center v. Signor*, 5 N.Y.3d 435 (2005), which requires an agency, in response to FOIL request, to either

produce all responsive records in its possession, deny the request, or certify that it does not possess the requested documents. It is respectfully submitted that such certification should have been made, at the latest, in Respondents' Answer and supporting Affidavits and that the Petition could not properly be deemed to have been disposed of without such certification. While Petitioner agrees with and is appreciative of the Court's ruling, in the Decision, that Respondents must provide such a certification, Petitioner respectfully submits that the portion of the Decision which "order[s] and [adjudge[s] that the petition is disposed of as follows" was premature and should be vacated.

4. It is also respectfully submitted that the Court overlooked or misapprehended Public Officers Law § 89[4][c] and relevant case law, such as *Beechwood*, supra, which suggests that the Court should not have exercised its discretion to decline to award Petitioner his attorneys' fees until after the Petition had been finally disposed of, the certification required by statute had been obtained, all responsive documents had either been produced or denied, and the Court had had an opportunity to rule on any disagreements with respect to the same. Indeed, in response to the Court's ruling, Respondents have belatedly disclosed that they possess hundreds of responsive documents which were not identified in the Answer or in their previously submitted Affidavits. Accordingly, it is respectfully submitted that the Court should vacate that part of the Decision which denies Petitioner's request for attorneys' fees, subject to further consideration of this issue at the conclusion of this matter.

5. Finally, it is respectfully submitted that the Court should vacate that part of the Decision which denied Petitioner access to the draft disciplinary charges without conducting an *in camera* review. Respondents' Affidavits are devoid of detail concerning what these charges might contain. Without conducting an in camera review, it is respectfully submitted that the Court

could not ascertain, for example, whether the charges contained factual or other material not subject to a FOIL exemption. This conclusion is bolstered by what can only be described as Respondents' bad faith in failing to include the required certification in their answering papers, when apparently they were aware of the existence of hundreds of other documents responsive to Petitioner's request.

Factual and Procedural Background

6. The factual background is set forth at length in the Decision, which need not be repeated in full. However, certain aspects of the record should be emphasized. First, in their July 10, 2008 letter denying Petitioner's FOIL request (Exhibit "D" to the Petition), Respondents spoke of "records" being denied, without indicating that only one responsive record existed. Second, in light of Respondents' belated revelation that hundreds of additional responsive documents exist, it beggars belief that Respondents, in the Affidavit of Susan Elion Wollin submitted in opposition to the Petition, could have in good faith "interpreted" Petitioner's request for "any and all records relating to the 'certain dispute' between the Bedford Central Board of Education and Superintendent of Schools Dr. Debra Jackson that resulted in her termination agreement (emphasis added)" as referring to only one record — the draft disciplinary charges. Third, Respondents failed to include the required certification in their Answer or any of the papers in opposition to the Petition. Fourth, other than the bare description "draft disciplinary charges," there is absolutely no detail as to what, precisely, is contained in these charges. Fifth, in response to the Court's directive in the Decision that they certify whether additional responsive documents did or did not exist, Respondents for the first time revealed that hundreds of such documents exist. Indeed, at the recent conference which is the subject of the Court's further Order, dated April 30, 2009, a copy of which is annexed hereto as Exhibit "C," counsel for Respondents disclosed that five to six

hundred additional documents exist, which Respondents have not even had the opportunity to review.

Reargument And/Or Renewal Should Be Granted

7. In *Beechwood Restorative Care Center v. Signor*, 5 N.Y.3d 435, 440-1 (2005) the Court of Appeals stated: "When faced with a FOIL request, an agency must either disclose the record sought, deny the request and claim a specific exemption to disclosure, or certify that it does not possess the requested document and that it could not be located after a diligent search [citations omitted]." *Ipso facto*, no determination of a Petition can be made unless and until such certification is made.

8. The Decision states, in its first sentence: "Upon the foregoing papers it is ordered and adjudged that the petition is disposed of as follows." The Decision then goes on to deny Petitioner access to the draft disciplinary charges and, on that basis, deny Petitioner's request for attorneys' fees, while at the same time ordering Respondents to provide the missing certification.

9. It is respectfully submitted that, in the absence of a complete record — which could not have occurred prior to Respondents' providing the statutorily required certification — the Petition should not have been deemed "disposed of." Hence, while Petitioner agrees with and appreciates the Court's directive to Respondents to provide the required certification, it is respectfully submitted that the Court should vacate that part of the Decision which deems the Petition "disposed of."

10. The Decision also ruled that Respondents "properly denied petitioner's FOIL request as to the draft disciplinary charges,"[1] finding that they are exempt from production

[1] Decision, p. 7-8.

because they "...were never formally filed and proven against Jackson."[2] On the basis of this finding, the Court denied Petitioner request for attorney's fees.[3]

11. As the Court of Appeals also stated in *Beechwood, supra*: "Pursuant 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 [emphasis added]." Here, however, while finding that Respondents had properly denied access to the draft disciplinary charges, the Court also found that Respondents had failed to meet the "statutory prerequisite" of a certification as to whether additional responsive documents existed. Moreover, in the aftermath of the Court's decision, Respondents have belatedly admitted that hundreds of additional documents exist.

12. Hence, it is respectfully submitted that the denial of attorneys' fees was premature and that portion of the Decision should be vacated. A decision on the issue of attorney's fees should be made only after Respondents have either produced or denied access to the additional records, and the Court has had the opportunity to rule on whether any denial was reasonable and has had the opportunity to consider the other factors relating to an award of attorney's fees in light of the ultimate outcome.

13. Finally, Petitioner respectfully submits that the Court should not have ruled on whether the draft disciplinary charges were wholly exempt from production without conducting an

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2 *Id.*, p. 7.

3 Decision, p. 8, fn. 2.

in camera review. As stated in *Donovan v. F.B.I.*, 806 F.2d 55, 58 (2nd Cir. 1986), the following factors should be considered in deciding whether to conduct an in camera inspection: "(a) judicial economy, (b) the conclusory nature of the agency affidavits, (c) bad faith on the part of the agency, (d) disputes concerning the contents of the documents, (e) whether the agency requests an in camera inspection, and (f) the strong public interest in disclosure." *See also Gould v. New York City Police Dept.*, 89 N.Y.2d 267, 275 (1996): "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."

14. Here, all of the factors mentioned in *Donovan v. F.B.I.* militated in favor of an in camera inspection of the draft disciplinary charges. First, the Court would not be unduly burdened by the inspection of what apparently is a single document (although we cannot be sure based on the description). Second, Respondents' description of the "draft disciplinary charges" is completely conclusory. Other than stating that the charges were not formally served and no final determination was rendered on them, Respondents fail to provide any description whatsoever of what they contain.[4] Thus, it is impossible to determine whether the charges "fall entirely within the scope of the asserted exemption," as required by *Gould, supra*, for example, by including non-exempt factual material. Third, Respondents' apparently purposeful misinterpretation of Petitioner's FOIL request and their subsequent revelation that hundreds of additional documents exist smacks of bad faith, which warrants a heightened degree of scrutiny by the Court. Fourth, Respondents averred in their Memorandum of Law that they "... stand ready to submit the draft disciplinary charges for in camera review should the Court deem this necessary and issue such a

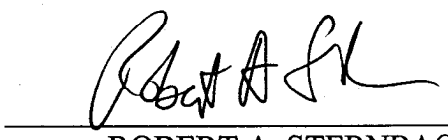
[4] *See* Wolin Affidavit, ¶ 4; Jackson Affidavit, ¶ 4.

directive."[5] Five, there is undeniably a strong public interest in disclosure of an explanation for this settlement with a public officer that will result in the expenditure of $1 million of taxpayer funds.

Conclusion

15. For the foregoing reasons, it is respectfully requested that the Court grant Petitioner's motion for reargument and/or renewal of the Decision and, upon such reargument and/or renewal, that the Court vacate those portions of the Decision which "disposed of" the Petition, denied Petitioner's request for attorneys' fees, and ruled that Respondents had properly withheld disclosure of the draft disciplinary charges, subject to an *in camera* review of the charges and further proceedings herein at the direction of the Court.

Dated: New York, New York
May 7, 2009



ROBERT A. STERNBACH

[5] Respondents' Memorandum of Law, p. 8.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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In the Matter of the Application of
CAMILLO M. SANTOMERO,

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For a Judgment and Order Pursuant to Article 78
of the Civil Practice Law and Rules,

-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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DECISION & ORDER

Index No. 08-25405

ZAMBELLI, J.A.

The following papers numbered 1-9 read on this petition for relief pursuant to CPLR Article 78:

	PAPERS NUMBERED
Notice of Petition, Verified Petition, Exhibits A - F & Memorandum of Law	1-4
Verified Answer, Jackson Affidavit, Wollin Affidavit, Memorandum of Law	5-8
Reply Memorandum of Law & Santomero Affidavit	9

Upon the foregoing papers it is ordered and adjudged that the petition is disposed of as follows:

Petitioner Camillo M. Santomero ("petitioner"), a resident of Bedford, New York, brings this Article 78 proceeding against respondents Board of Education of the Bedford Central School District ("Board"), Susan Elion Wollin, as President of the Board of Education of the Bedford Central School District ("President"), Carole LaColla, as District Clerk of the Board of Education of the Bedford Central School District ("Clerk") and Dr. Debra Jackson ("Jackson"), (collectively, "respondents"), seeking an annulment of respondents' final determination of August 7, 2008 which denied petitioner's request for access to records he requested on June 12, 2008 pursuant to Public Officers Law Article 6 (Freedom of Information Law ("FOIL")) and seeking an order directing respondents to provide petitioner with such records. Petitioner also seeks an order directing respondents to pay his reasonable attorney's fees and costs in this proceeding.

Pursuant to an Employment Agreement dated July 10, 2006, the Board hired Jackson as Superintendent of the Bedford Central School District to serve from July 1, 2006 through June 30, 2011. Less than a year later, in June of 2007, the Board and Jackson entered into a Settlement Agreement and Mutual Release ("Settlement") (Verified Petition, Exhibit B). Pursuant to the Settlement, the parties agreed, inter alia, that Jackson would tender her registration effective June 30, 2008 and until that date the terms of the Employment Agreement would remain in full force and effect (Settlement, ¶¶ 2, 3); that in addition to Jackson's salary and benefits payable through June 30, 2008, the Board agreed

to pay her $650,000 no later than June 30, 2007 and further agreed to provide her and her family with continued health care coverage (medical and dental) for the remainder of her life at no cost to her (Id., ¶ 4(a), (b)), and that the Board would provide Jackson with "good references" and "reasonably assist her in connection with her efforts to find a new position" (Id., ¶10). The Agreement also contained indemnity and confidentiality clauses (Id., ¶14, 15).

As to why the parties were entering into a Settlement culminating in Jackson's resignation, the Settlement itself only states that "Whereas, a certain dispute has arisen between the Superintendent and the Board with regard to the superintendent's performance of her duties, and Whereas, the Board desires to terminate the services of the Superintendent" (Id., p. 2)[1].

Apparently having obtained a copy of the Settlement, petitioner sent an email to the Clerk on June 12, 2008 with the subject "FOIL Request" requesting "any and all records relating to the 'certain dispute' between the Bedford Central Board of Education and Superintendent of Schools, Dr. Debra Jackson that resulted in her termination agreement." (Verified Petition, Exhibit C). By letter dated July 10, 2008, the Clerk denied petitioner's request stating, "the release of these records constitutes an unwarranted invasion of privacy and your request implicates a confidential matter." (Verified Petition, Exhibit D). By email

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[1]Petitioner's papers refer to the September, 2007 arrest of the Principal of Bedford Hills Elementary School on charges accusing the Principal of failing to report allegations of the rape of a nine year-old-girl. The Principal was allegedly made aware of the allegations in December, 2006 or January, 2007 but failed to notify then Superintendent Jackson or state officials (Verified Petition, ¶ 8, Exhibit A). Petitioner does not expressly allege a connection between the Agreement and this incident; however, by the otherwise unexplained inclusion of this incident in his motion papers, he implicitly suggests, without support, that one exists.

dated July 18, 2008, petitioner notified the clerk that he was appealing her decision (Verified Petition, Exhibit E). Thereafter, by letter dated August 7, 2008, the President notified petitioner that his appeal was denied on the grounds that disclosure of the requested documents would constitute an unwarranted invasion of privacy, citing Public Officers Law §§ 87(2)(b); 89(2)(b)(i) (Verified Petition, Exhibit F).

Petitioner argues that he is entitled to the production of the documents because respondents have failed to establish that the documents are exempt from disclosure under FOIL. As to respondents' contention that providing the records would result in an unwarranted invasion of privacy, petitioner submits that this contention is conclusory and insufficient to meet respondents' burden to demonstrate that the requested material qualifies for exemption. Petitioner notes that the Board failed to claim that charges were ever threatened or filed against Jackson and argues that disclosure is justified due to countervailing public policy considerations involving expenditure of substantial taxpayer funds and the conduct of the Board as well as Jackson. Petitioner also disputes respondents' argument that the documents are exempt from disclosure as intra-agency material.

Respondents argue that the documents are exempt from disclosure because they reasonably interpreted petitioner's request as seeking disclosure of the draft disciplinary charges that were the basis of the "certain dispute" between the Board and Jackson. Because those charges were never formally served and no final determination was ever rendered on them, respondents submit that as a matter of law, records relating to non-final or non-substantiated disciplinary charges against a public employee may be withheld from disclosure under FOIL based upon that statute's intra-agency and privacy exemptions.

Respondents offer to submit the draft disciplinary charges to this Court for in camera inspection.

In reply, petitioner argues that while respondents allege that draft disciplinary charges exist, they failed to aver that no other relevant records existed. Petitioner submits that he was a former member of the Board of Education, and in his experience, when disciplinary charges are considered, more documents are created then just the draft charges and the Settlement Agreement. Petitioner also submits that respondents need to make clear what the draft disciplinary charges are and argues that he should be granted leave to conduct discovery to determine whether other materials exist.

FOIL imposes a broad duty of disclosure upon governmental agencies (see Public Officers Law §84; Matter of Mothers on the Move, Inc. v. Messer, 236 A.D.2d 408, 409 (2d Dept. 1997)). All agency records are presumptively available for public inspection and copying unless they fall within one of the enumerated exceptions which permit agencies to withhold certain records (Matter of Mothers on the Move, Inc. v. Messer, supra). The provisions of FOIL are to be liberally construed, and exemptions narrowly interpreted so as to ensure maximum public access to the records of government (Id.). The agency bears the burden of demonstrating that the requested material qualifies for exemption (Id.).

An initial matter is the scope of the documents covered by petitioner's request. Respondents assert that one responsive document - the draft disciplinary charges - exists. Petitioner asserts that based upon his experience as a former Board of Education member that other documents must exist; but while describing general categories of documents, such as "notes, memoranda, etc." on the settlement relating to its cost/benefits, petitioner

does not refer to any specific document by name. However, respondents did not deny the existence of other documents aside from the draft disciplinary charges. Accordingly, this Court interprets the request as broader than just the draft disciplinary charges. The request encompasses all documents, including but not limited to, the draft disciplinary charges, notes, memorandum and/or correspondence (including e-mail) regarding the same as well as any document referring to the incident referred to by the phrase "certain dispute" in the Settlement. Consistent with the spirit of FOIL, the phrase should be broadly construed in considering whether a particular document falls within its ambit, with the presumption being on the side of inclusion. To the extent that the draft disciplinary charges is in fact the only responsive document, respondents should certify that fact in their response (see Public Officers Law §89(3)(a)).

Turning to respondents' arguments regarding applicable exemptions, respondents assert two basis for why the requested documents are exempt from disclosure - as intra-agency materials and as materials if, which disclosed, would constitute an unwarranted invasion of personal privacy. Public Officers Law §87(2)(g) exempts from disclosure 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 or (iv) external audits. The exemption applies only to deliberative materials, ie. communications exchanges for discussion purposes not constituting final policy decisions (Matter of NY 1 News v. Office of the President of Borough of Staten Island, 231 A.D.2d 524, 525 (2d Dept. 1996)). Factual observations are not exempt from disclosure even in documents issued before final decision (Id.). Opinion and recommendations prepared by agency personnel may be

exempt from disclosure as pre-decisional material which was prepared to assist an agency decision maker to arrive at a decision (Matter of Mothers on the Move, Inc. v. Messer, supra). Exempting such material serves the purpose of protecting the deliberative process of government by ensuring that persons in an advisory role can freely express their opinions to agency decision makers (Id.).

Also exempt from disclosure under FOIL are records which if disclosed would constitute an unwarranted invasion of personal privacy (Public Officers Law §87(2)(b)). In determining whether documents can be disclosed while preserving an individual's right to privacy, the Court may consider whether redaction of identifying information would protect that interest (see Matter of Gould v. N.Y.C. Police Dept., 89 N.Y.2d 267, 275 (1996); Matter of N.Y. Civil Liberties Union v. N.Y.Police Dept., 20 Misc.3d 1108 (Sup. Ct. N.Y. Co. 2008)).

As to the draft disciplinary charges, as these charges were never formally filed and proven against Jackson, they are exempt from production pursuant to FOIL as their disclosure would constitute an unwarranted invasion of privacy as defined by Public Officers Law §87(2)(b) (see Matter of LaRocca v. Bd. of Ed. of the Jericho Union Free School District, 220 A.D.2d 424, 427 (2d Dept. 1995); Matter of Western Suffolk Bd. Of Coop. Ed. Svcs. v. Bay Shore Union Free Sch. Dist., 250 A.D.2d 772, 773 (2d Dept. 1998)). Such documents containing unproven disciplinary charges are also exempt as intra-agency memoranda which contain non-final agency determinations (see Sinicropi v. Co. of Nassau, 76 A.D.2d 832, 833 (2d Dept. 1980)). Accordingly, respondents properly denied petitioner's

FOIL request as to the draft disciplinary charges.[2]

However, to the extent that petitioner's request is not limited to the draft disciplinary charges, if such other records do not exist, respondents must provide a certification to that effect pursuant to Public Officers Law §89(3)(a). Otherwise, if other records exist that are responsive to petitioner's request, the records must be produced unless a FOIL exemption applies. In the event respondents' possess other responsive documents for which they claim a FOIL exemption applies, the parties' attorneys are directed to appear for a conference in this matter on Tuesday, April 14, 2009 at 10:00 am at Courtroom 203 of the Westchester County Courthouse, 111 Martin Luther King Jr. Blvd., White Plains, New York 10601.

Lastly, the Court denies petitioner's request for discovery in this matter. The general rule is that discovery is antithetical to the purposes of a special proceeding (see Cox v. J.D. Realty Assocs., 217 A.D.2d 179, 184 (1st Dept. 1995)). In this case, the respondents have been directed to certify whether the draft disciplinary charges are the only documents responsive to the request and to produce any other responsive documents unless they are protected by a FOIL exemption. There is no reason to believe that respondents will not comply with this directive of the Court.

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[2]As the Court has found that respondents had a reasonable basis for denying petitioner access to these records, petitioner's request for attorney's fees in this matter is denied (Public Officers Law §89 (4)(c)(i)).

This decision constitutes the Order and Judgment of the Court.

Dated: White Plains, New York
March , 2009

BARBARA G. ZAMBELLI
A.J.S.C.

Robert A. Sternbach, Esq
Attorney for the Petitioner
274 Madison Avenue - Suite 1303
New York, New York 10016

Keane & Beane, P.C.
Attorneys for the Respondents
445 Hamilton Avenue - Suite 1500
White Plains, New York 10601
Attn: Edward J. Phillips, Esq.

Donna Minort,
Chief Clerk

Elizabeth Pace,
Deputy Chief Clerk

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

In the Matter of an
Article 78 Proceeding

CAMILLO M. SANTOMERO,

Petitioner,

-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.

NOTICE OF PETITION

Index. No. 25405-2008

Date Purchased:
November 17, 2008

PLEASE TAKE NOTICE that, upon the annexed Verified Petition of Camillo M. Santomero, with Exhibits annexed thereto and the accompanying Memorandum of Law, an application will be made to this Court, at the Courthouse, 111 Dr. Martin Luther King Jr. Blvd, White Plains, New York, at an IAS Part to be assigned, Room ___, on the **19th day of December, 2008**, at ___ 9:30 a.m., or as soon thereafter as counsel can be heard, for a judgment pursuant to CPLR Article 78:

(1) annulling the final determination of Respondents, dated August 7, 2008, which denied Petitioner's request for access to documents he requested on June 12, 2008, pursuant to Public Officers Law Article 6;

(2) directing Respondents to provide Petitioner with all such documents pursuant to Public Officers Law Article 6;

(3) ordering Respondents to pay the attorney's fees and other litigation costs reasonably incurred by Petitioner in connection with this proceeding; and

(4) granting Petitioner such other and further relief as the Court deems just and proper.

PLEASE TAKE FURTHER NOTICE, that pursuant to CPLR 7804(c), Petitioner demands that answering papers be served on the undersigned attorneys at least five days before the aforesaid date of hearing.

Petitioner designates Westchester County as the place of venue, the basis being that Westchester County is within the judicial district where Respondents made the determination complained of and in which the material events took place.

Dated: New York, New York
November 12, 2008

Law Office of Robert A. Sternbach

By: _____

Robert A. Sternbach
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274 Madison Avenue, Suite 1303
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(212) 661-4040

Index No. 25404/2008

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

In the Matter of an Article 78 Proceeding

CAMILLO M. SANTOMERO,

Petitioner,

- 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.

NOTICE OF PETITION

Law Office of ROBERT A. STERNBACH
Attorneys for Petitioner
274 Madison Avenue
Suite 1303
New York, New York 10016
(212) 661-4040

CERTIFICATION

I hereby certify pursuant to 22 NYCRR § 130-1.1-a(b) that, to the best of my knowledge, information and belief, formed after an inquiry reasonable under the circumstances, the presentation of the papers contained herein, or the contentions therein, are not frivolous as defined in 22 NYCRR § 130-1.1-(c).

Robert A. Sternbach

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

In the Matter of an Article 78 Proceeding CAMILLO M. SANTOMERO, Petitioner, -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.	**PETITION** Index. No. 25405-2008

Petitioner CAMILLO M. SANTOMERO, by his attorneys, Law Office Of Robert A. Sternbach, as and for his Petition, pursuant to CPLR Article 78, respectfully alleges, upon information and belief, except as to matters concerning himself, which are alleged upon knowledge, as follows:

PRELIMINARY STATEMENT

1. This is a proceeding under CPLR Article 78 and Public Officers Law Article 6 (the New York State Freedom of Information Law). I seek a judgment ordering Respondents to provide copies of "any and all records relating to the 'certain dispute' between the Bedford Central Board of Education and Superintendent of Schools Dr. Debra Jackson that resulted in her termination agreement."

PARTIES

2. I am a resident of the State of New York. I am a former member of the Board of Education of the Bedford Central School District and am active in local administration and politics.

3. Respondent Board of Education of the Bedford Central School District (the "Board") is the administrative body charged with operation of the Bedford Central School District (the "District"), which is located in the town of Bedford, County of Westchester, State of New York.

4. I am informed that the Board is an "agency" performing a governmental function within the meaning of Article 6 of the Public Officers Law, commonly known as the "Freedom of Information Law" ("FOIL") and, as such, is subject to the provisions of that law.

5. Respondent Carole Lacolla ("LaColla") is the District Clerk of the Board and is the person who, on behalf of the Board, denied access to the records I requested.

6. Respondent Susan Elion Wollin ("Wollin") is the President of the Board and the person who affirmed the Board's denial of access to the records I requested.

7. Respondent Dr. Debra Jackson ("Dr. Jackson") is the former Superintendent of the District who, along with the Board, is a party to the Agreement central to this dispute.

FACTUAL BACKGROUND

8. In September 2007, the high-performing and affluent Bedford Central School District was rocked by scandal when the principal of Bedford Hills Elementary School was brought up on criminal charges for failing to report allegations of the rape of a 9-year-old girl to child protection officials. According to the complaint filed against the principal in Court, the principal was informed of the allegations of abuse in December 2006 or January 2007, yet failed

to notify state officials or the school superintendent who, at the time, was Dr. Jackson. (*See* Exhibit A, New York Times article dated 9/11/06).

9. Dr. Jackson had been hired as Superintendent of the District pursuant to a written agreement between herself and the Board dated July 10, 2006 (the "Employment Agreement"). Under the Employment Agreement, Jackson was to serve as the chief administrative officer of the Bedford Central School District for the period July 1, 2006 through June 30, 2011.

10. According to the Board and Dr. Jackson, on or about June 2007, a "dispute" arose between Dr. Jackson and the Board "with regard to the Superintendent's performance of her duties."

11. On or about June 2007, the Board and Dr. Jackson entered into a twenty page Settlement Agreement and Mutual Release" (the "Settlement Agreement"). (*See* Exhibit B).

12. Pursuant to the Settlement Agreement, among other things, (a) Dr. Jackson tendered her resignation effective June 30, 2008 (*Id.* ¶ 2); (b) the parties agreed that, until the effective date of Dr. Jackson's resignation, the terms of the Employment Agreement would remain in full force and effect (*Id.* ¶ 3); (c) the Board agreed to pay Dr. Jackson the sum of $650,000.00 no later than June 30, 2007, and further agreed to provide health care coverage (medical and dental) for her and her family for the remainder of her life at no cost (*Id.* ¶ 4); (d) the Board agreed to give Dr. Jackson "good references" and to indemnify her if the Settlement Agreement was challenged by any party (*Id.* ¶¶ 10, 15); and (e) the parties agreed not to bring suit or retaliate against each other and to keep the terms of, and negotiations concerning, the Settlement Agreement confidential (*Id.* ¶¶ 5-7, 9, 14).

13. The only explanation proffered in the Settlement Agreement for the separation brokered therein was that "a certain dispute has arisen between the Superintendent and the Board

with regard to the Superintendent's performance of her duties." (*Id.* at p. 2). The official Press Release regarding the matter states merely that "terminating the last three years of [Jackson's] five year contract ... was in the mutual interest of both parties." (*See* Press Release attached to Exhibit B, Settlement Agreement).

PROCEDURAL BACKGROUND

14. On June 12, 2008, I submitted a request to LaColla, as representative of the Board, for access to certain records pursuant to Public Officers Law Article 6 (*see* Exhibit C).

15. In my request, I sought the following records:

> any and all records relating to the "certain dispute" between the Bedford Central Board of Education and Superintendent of Schools Dr. Debra Jackson that resulted in her termination agreement.

16. On July 10, 2008, the Board denied my request on the ground that "the release of these records constitutes an unwarranted invasion of privacy and your request implicates a confidential matter" (*see* Exhibit D). The Board proffered no support for this conclusion.

17. On July 18, 2008, pursuant to Public Officers Law § 89, I filed an appeal from the Board's July 10, 2008 denial. (*See* Exhibit E).

18. On August 7, 2008, the Board, in a letter signed by Wollin, denied my appeal, stating:

> Disclosure of the records requested would constitute an unwarranted invasion of privacy. As outlined in the Freedom of Information Law, disclosure of allegations or unsubstantiated charges would result in an unwarranted invasion of privacy [citing, in footnote, POL §§87(2)(b), 89(2)(b)(i)]. Furthermore, the Board of Education is denying access, concluding that such records are intra-agency material involving non-final policy or determinations. (Herald Company. v. School Dist. of City of Syracuse, 104 Misc.2d 1041, 1046).

(*See* Exhibit F).

19. I have exhausted my administrative remedies. I am advised that review by this Court is ripe and otherwise appropriate pursuant to, and in accordance with, CPLR Article 78 and Public Officers Law Article 6.

GROUNDS FOR RELIEF

20. I am advised that I am legally entitled to the records I requested, in that they are agency records.

21. I am further advised that the Freedom of Information Law (Article 6 of the Public Officers Law) makes the records of public agencies presumptively accessible, unless the records fall within one of the specific exemptions set forth in the statute; that the records I seek do not fall within any of these exemptions; and that therefore the records should be given to me in response to my Freedom of Information Law request.

22. I am further advised that the reasons stated by Respondents for denying my request (*see* Exhibit F) are without legal merit and are contrary to the law of this State; and that Respondents' determination to deny the records I requested violates their duty to disclose records under the Freedom of Information Law, is arbitrary and capricious, and constitutes an abuse of discretion.

23. The official records I request are a matter of compelling public interest. They concern the origins of the Board's extraordinary agreement to make an immediate payment to an employee of $650,000.00, plus indeterminate future expenditures for medical and dental care for the employee and her family for the rest of her life --- a total obligation that may well amount to approximately one million dollars of taxpayer money. The sole reason given for the Board's apparently supine concession is that, without it, "protracted and expensive litigation might

result" which, for undisclosed reasons known solely to the parties, "... would not be in the interest of the School District, its students, staff and taxpayers."

24. However, contrary to the summary conclusion reached by the Board in denying my request for records and my appeal, the School District, students, staff and taxpayers are entitled to information from which they might learn the basis for the Settlement Agreement's extraordinary terms and decide for themselves whether they were justified --- or whether other considerations, having nothing to do with an unwarranted invasion of Dr. Jackson's or anyone else's privacy, were the motivating force.

25. Consequently, I am advised that all records I request must be provided. The final determination of Respondents has denied my right of access to agency records, a right that is guaranteed by Public Officers Law Article 6. The Board must not be permitted to avoid disclosure of the basis for the extraordinary settlement it reached with Dr. Jackson.

26. I am advised that, if I prevail in this proceeding, the Court should, pursuant to Public Officers Law § 89(4)(c), award the reasonable attorney's fees and other litigation costs I incurred in connection with this proceeding.

27. The accompanying Memorandum of Law contains legal argument and citations in support of my Petition.

28. No previous request has been made for the relief herein requested.

WHEREFORE, Petitioner respectfully requests that a judgment be entered pursuant to CPLR Article 78:

(a) annulling the final determination of respondents dated August 7, 2008, which denied Petitioner's request for access to records he requested on June 12, 2008, pursuant to Public Officers Law Article 6;

(b) directing Respondents to provide Petitioner with all such records;

(c) ordering Respondents to pay the reasonable attorney's fees and other costs incurred by Petitioner in connection with this proceeding; and

(d) granting Petitioner such other and further relief as the Court deems just and proper.

Dated: November 10, 2008

CAMILLO M. SANTOMERO
Petitioner

VERIFICATION

STATE OF NEW YORK)
) ss:
COUNTY OF WESTCHESTER)

I, Camillo M. Santomero, am the Petitioner in this proceeding. I have read the foregoing Petition and know the contents thereof. The contents are true to my own knowledge except as to matters therein stated to be alleged upon information and belief, and as to those matters I believe them to be true.

Camillo M. Santomero

Subscribed and sworn to before me
this 11th day of November, 2008

Notary Public

SAHID A. LOYOLA
Notary Public - State of New York
No. 01LO6165629
Qualified in Westchester County
My Commission Expires May 14, 2011

The New York Times
nytimes.com

September 11, 2006

Abuse Case Shakes Parents' Trust in a Principal

By WINNIE HU

BEDFORD HILLS, N.Y., Sept. 7 — The students, teachers and parents of Bedford Hills Elementary School in northern Westchester County adopted a student bill of rights and responsibilities last year that, among other thin calls on them to keep everyone safe.

So it was with disbelief and outrage that many families returned to school on Wednesday to learn that the princip Victoria Graboski, 46, is facing a criminal charge of failing to report allegations of the rape of a 9-year-old girl to state child protection officials.

If convicted of the misdemeanor charge, Ms. Graboski, who was arrested on Sept. 1, could face up to a year in jail.

Melanie Danisi, 35, whose daughter is in second grade, said: "For me as a parent, it's one of my worst nightmares, and then when I found out about the school possibly knowing about it, I was even sadder because it might have been prevented. I think it's a black eye on the community. One of my friends said to me, 'You pay all those taxes a look at what's going on.' "

Law enforcement officials have revealed few details about the case, except to say that their investigation showed that Ms. Graboski had been told of the allegations of sexual abuse, which school officials said had not occurred on school grounds.

Parents, neighbors and others in the community said that Ms. Graboski learned about the allegations in Decembe or January after the girl confided in someone at school. According to the complaint the police filed with the court, the principal heard from a parent that one student had told another about having sex with an adult. Law enforcement officials said Ms. Graboski did not notify state officials or even the school superintendent.

About a month ago, local officials said the girl's mother called the police, upset about pictures of her 9-year-old daughter that she had found on the cellphone of her boyfriend, Cesar Joel Sagastume-Morales, 27, a day laborer who lived across the road from the school and has since fled a police search.

Ms. Graboski, who is scheduled to appear in court on Thursday, did not respond to several telephone messages le at her home seeking comment for this article, and efforts to reach her lawyer were unsuccessful. The girl's mother did not answer the door at her home on Thursday, or respond to a request for an interview.

School district officials are also looking into the matter, and placed Ms. Graboski and five teachers on paid leave just a week before classes started. The jarring events have left many parents at a loss as to how to explain the

sudden absences to their children in this rural, affluent hamlet. Many families have lived here for generations, wh others have come because of the stellar schools and comfortable life.

It is a place where teachers are regarded as friends as much as role models, and the biggest school crisis until now was an outbreak of head lice.

"I'm very upset about it, and I'm very disappointed in the school," said Ida Barresi, 36, a speech and language pathologist who moved to Bedford Hills from the Bronx in 1998 so that her son and three daughters could attend the local schools. "A lot of us are full-time workers, and since our children are here most of the time, we depend o the school to identify what we may miss as tired parents."

The upheaval at the school has inevitably spilled into the leafy streets, as mothers pushing strollers pass the "Wanted" poster of Mr. Sagastume-Morales in the window of Briccetti's Bedford Market. A few doors away, the local florist, Ghaias Habal, 46, said he remained shocked by the arrest of Ms. Graboski, one of his regular customers, whom he called a "very nice person with a smile on her face all the time."

Bedford Hills Elementary, with 356 students in prekindergarten through fifth grade, is the smallest of seven scho in the high-performing Bedford Central School District. While the area's gated estates and horse farms have attracted some of Westchester's wealthiest families, the school is racially and economically mixed. Nearly one-fift of the students qualify for free or reduced-price lunches, and more than a quarter of the students are Hispanic, including many from immigrant families that speak little or no English at home.

Ms. Graboski has worked in the Bedford district since 1987, as a special education teacher and a trainer for other teachers, and was appointed the school's principal in 2004. Under her leadership, the school's fourth-grade math and English test scores rose significantly, according to district records.

Dr. Debra Jackson, the Bedford district superintendent, said that Ms. Graboski had also decided to emphasize character-building, working with parents, teachers and students to develop a program that has become a model fc other schools. As part of that effort, the school adopted the bill of rights and responsibilities, which encourages students to learn; to be honest; to treat others politely, kindly and fairly; and to keep everyone safe. Students who violate any of those tenets must fill out a worksheet explaining what happened, and how they would act the next time they are in a similar situation.

"She is a well-regarded principal," Dr. Jackson said of Ms. Graboski. "She has a strong relationship with her students and staff."

Several parents said Ms. Graboski had been a creative and attentive principal who responded promptly to their complaints, but others said they were dissatisfied with the way she had handled school problems.

Curt Fenton, 44, an insurance underwriter whose daughter is in the third grade, said he met with Ms. Graboski la year after hearing from other parents that a student had threatened to take a gun to school. He said he had told h that she should have alerted parents to the threat.

Mr. Fenton said that the administration talked a lot about caring about the children, but that "their actions lead n to believe that they want to protect the reputation of the school and the tenured teachers more than they want to protect our kids."

Ms. Graboski's salary is $133,277; the average salary for teachers in the Bedford district is $84,500, according to district records. School officials have not publicly identified the five teachers placed on leave, and declined to discuss their exact involvement in the case. This has frustrated and upset many parents who have been trying to piece together what happened since receiving an oblique letter dated Aug. 30 that referred to "information of a serious nature" and announced an interim principal.

During a meeting on Thursday night, Bedford district officials and mental health counselors sought to reassure more than 300 parents and students that their school was still a safe haven. But the strained civility turned into sniping at times, and a palpable undercurrent of anger and sadness ran through the crowd. Several mothers brushed away tears.

Afterward, Janet Davis, a fourth-grade teacher at the school, spoke up for Ms. Graboski and the teachers placed o leave, who did not attend the meeting. "The staff involved would never do anything to harm the children," Ms. Davis said. "They love the children here, and they were the most dedicated and ethical staff members."

Exhibit B

UNIVERSITY OF THE STATE OF NEW YORK
BEDFORD CENTRAL SCHOOL DISTRICT

In the Matter of the Dispute between

THE BOARD OF EDUCATION OF THE BEDFORD CENTRAL SCHOOL DISTRICT

-and-

DEBRA JACKSON SUPERINTENDENT OF SCHOOLS.

SETTLEMENT AGREEMENT AND MUTUAL RELEASES

This is an Agreement by and between DEBRA JACKSON (hereinafter referred to as "JACKSON" or the "SUPERINTENDENT"), and the BOARD OF EDUCATION of the BEDFORD CENTRAL SCHOOL DISTRICT and its members, individually and in their official capacity (hereinafter occasionally referred to as "DISTRICT" or "BOARD").

WHEREAS, pursuant to an agreement dated July 10, 2006 between the SUPERINTENDENT and the BOARD (the "Employment Agreement"), the SUPERINTENDENT was employed as chief administrative officer of the DISTRICT for the period July 1, 2006 through June 30, 2011; and,

WHEREAS, a certain dispute has arisen between the SUPERINTENDENT and the BOARD with regard to the SUPERINTENDENT'S performance of her duties; and,

WHEREAS, the BOARD desires to terminate the services of the SUPERINTENDENT; and,

WHEREAS, the SUPERINTENDENT maintains that she is a party to a valid and subsisting contract of employment and that there is no cause which would justify the termination of the SUPERINTENDENT'S services, and that the SUPERINTENDENT would, in the absence of this Settlement Agreement ("Agreement"), pursue claims for direct and consequential damages for breach of contract; and,

WHEREAS, there is a dispute between the parties which, in the absence of this Agreement, would have to be determined in protracted and expensive litigation which would not be in the interest of either party or in the interest of the School District, its students, staff and taxpayers; and,

WHEREAS, the SUPERINTENDENT and the DISTRICT, in order amicably to resolve any and all matters in controversy, disputes, causes of action, claims, contentions and differences between them, have reached a full

and final compromise as set forth herein respecting the continued employment of the SUPERINTENDENT, and respecting any and all matters in controversy, disputes, causes of action, claims, contentions and differences between the SUPERINTENDENT and the BOARD, and/or any of the BOARD'S officers, agents, employees or BOARD members; and,

WHEREAS, the parties have been and are represented by counsel, have had all the terms and conditions of this Agreement and the general releases herein clearly explained to them by their respective counsel, and now freely consent to enter into this Agreement and the general releases, such consent not having been induced by fraud, duress, or any other undue influence; and,

WHEREAS, the SUPERINTENDENT (i) has been represented by and has consulted with legal counsel of her choice; (ii) has been given a reasonable period within which to consider this Agreement and general release; and, (iii) understands that in executing this Agreement she is, inter alia, giving up any and all rights and claims which she has, or may have had in law or in equity under all federal, state, county or local statutes, laws, rules and regulations pertaining to employment, as well as any and all claims under contract or tort law, or which were or could have been alleged by her;

NOW, THEREFORE, in consideration of the said mutual undertakings and promises contained in this Agreement and other good and valuable considerations, the parties agree and covenant as follows:

1. The above recitations of facts and circumstances set forth in all of the preceding "Whereas" clauses are expressly incorporated herein and form a part of the terms of this Agreement.

2. By executing this Agreement, the BOARD shall not seek the termination of the services of the SUPERINTENDENT, and the SUPERINTENDENT for and in consideration of the promises to be rendered by the BOARD as set forth herein, irrevocably resigns her employment effective at the close of business on June 30, 2008. The SUPERINTENDENT shall not seek any payment, remedy, damages or other claim against the BOARD, the BEDFORD CENTRAL SCHOOL DISTRICT, or any of their respective members, officers, employees, servants or agents, other than the performances to be rendered as specifically set forth herein.

3. Through June 30, 2008, the SUPERINTENDENT shall continue to serve as Superintendent of Schools pursuant to the terms and conditions of the Employment Agreement and receive the salary and benefits set forth therein.

Nothing herein contained shall have, nor shall it be deemed to have, modified, changed or otherwise have affected the terms and provisions of the Employment Agreement between the BOARD and the SUPERINTENDENT, which agreement remains in full force and effect without diminution, including all continuing rights to indemnification and legal representation, except as specifically modified by this Agreement. The SUPERINTENDENT shall continue to perform all of the duties and exercise all of the powers of a superintendent of schools through June 30, 2008, as long as she complies with the reasonable instructions and policies of the BOARD and conforms to the normative standards of conduct and performance generally applicable to superintendents of schools in the State of New York. The BOARD shall not seek termination of the services of the SUPERINTENDENT for any act or omission or alleged act or omission prior to the date on which this Agreement has been executed.

4. In addition to the salary and benefits payable to the SUPERINTENDENT between the date of this Agreement and June 30, 2008 pursuant to the preceding paragraph:

(a) the DISTRICT shall pay the SUPERINTENDENT the additional gross sum of $650,000.00 no later than June 30, 2007. This payment represents

compensation for loss of salary, benefits and other losses (including loss of credited service for retirement benefits) incurred by the SUPERINTENDENT as a result of her resignation and relinquishment of her rights under the Employment Agreement to the extent set forth herein. The SUPERINTENDENT shall be solely responsible for the payment of any and all taxes to all taxing authorities attributable to said payment; and

(b) the District shall provide the SUPERINTENDENT with continued health care coverage (medical and dental) for her and/or her family to the same extent provided to active professional employees of the District, for the remainder of her life at no cost to her and/or her family. The health care plan to be provided shall be the health care plan the DISTRICT provides to its active professional employees (or upon taking service retirement pursuant to the applicable rules of the New York State Teachers Retirement System to retirees), as the same be amended, modified or changed from time to time in the future. It is specifically understood that the level of benefits and health care plan granted to the SUPERINTENDENT may change and/or be modified in the future to the extent of changes and/or modification of the health care plan and/or benefit level that is then extended to active professional employees, or retirees, as the case may be. Notwithstanding the

foregoing, the DISTRICT reserves the right to provide the level of health care benefits required by this Agreement to the SUPERINTENDENT through an insured health plan, or a DISTRICT self-funded plan (or combination thereof), and/or in conjunction with benefits provided under Medicare and/or any other available state or federal law or program that may in the future provide a health benefit to the SUPERINTENDENT. The SUPERINTENDENT has no obligation to participate in any health care program that may be offered in connection with any subsequent employment she may obtain and any such participation (or decision not to participate) shall not be deemed to reduce the DISTRICT'S obligations hereunder.

5. (a) The SUPERINTENDENT warrants and represents that she has not filed any action, complaint, proceeding, charge, grievance or arbitration or any other proceeding, administrative or judicial, against the BOARD, its members, officers, employees and agents. The SUPERINTENDENT hereby covenants and agrees not to file any action, complaint, proceeding, charge, grievance or arbitration, nor commence any other proceeding, administrative or judicial, against the BOARD, its members, officers, employees and agents in any court of law, admiralty or equity, or before any administrative agency or arbitrator, seeking damages or other remedies on the SUPERINTENDENT'S own behalf, with respect

to her relationship with the BOARD, her employment with the BOARD, or respecting any matters which were or could have been claimed or otherwise arising on or prior to the date of execution of this Agreement, except to the extent that any such claim concerns an allegation that the BOARD and/or the DISTRICT has failed to comply with any obligations created by this Agreement.

(b) The BOARD warrants and represents that it has not filed any action, complaint, proceeding, charge, grievance or arbitration or any other proceeding, administrative or judicial, against the SUPERINTENDENT. The BOARD, on behalf of itself and its members, officers, employees and agents, and the DISTRICT, hereby covenants and agrees not to file, nor, directly or indirectly, to cause, encourage or instigate anyone else to file, any action, complaint, proceeding, charge, grievance or arbitration, nor commence any other proceeding, administrative or judicial, against the SUPERINTENDENT in any court of law, admiralty or equity or before any administrative agency or arbitrator seeking damages or other remedies with respect to her relationship with the BOARD, her employment with the BOARD, or respecting any matters which were or could have been claimed or otherwise arising on or prior to the date of execution of this Agreement, except to the extent that any such claim concerns an allegation that the

SUPERINTENDENT has failed to comply with any obligations created by this Agreement.

6. (a) (i) The SUPERINTENDENT, for and in consideration of the payments hereunder, hereby releases and forever discharges, and by this instrument does release and forever discharge the BEDFORD CENTRAL SCHOOL DISTRICT, its members, officers, employees, agents, and independent contractors, and the BOARD OF EDUCATION OF THE BEDFORD CENTRAL SCHOOL DISTRICT, its members, individually and in their official capacity, its officers, employees, agents, and independent contractors (collectively referred to in this Paragraph six (6) and in Paragraph seven (7) below as the "DISTRICT ENTITIES AND PERSONS") of and from all actions, causes of action, suits, charges, complaints, proceedings, grievances, obligations, costs, losses, damages, injuries, attorneys' fees, debts, dues, sums of money, accountings, covenants, contracts, controversies, agreements and promises of any form whatsoever (collectively referred to as "claims") including, but not limited to, any claims in law, equity, contract, tort or those claims which were or could have been alleged up until the date of execution of this Agreement, or any claims arising under any and all federal, state, county, or local statutes, laws, rules and regulations pertaining to

employment, as well as any and all claims under state or federal contract or tort law against the DISTRICT ENTITIES AND PERSONS whether known or unknown, unforeseen, unanticipated, unsuspected, or latent which she, her heirs, executors, administrators, successors and assigns ever had, now have or hereafter can, shall or may have for, upon or by reason of any matter, cause or thing whatsoever from the beginning of the world to the date of execution of this Agreement, except a claim that DISTRICT ENTITIES AND PERSONS have failed to comply with any obligations created by this Agreement.

(ii) Without limiting the generality of the foregoing, the SUPERINTENDENT agrees that she knowingly and voluntarily waives all rights she has or may have (or that of anyone on her behalf) to commence or prosecute any lawsuit, charge, claim, complaint, or other legal proceeding or action against the DISTRICT ENTITIES AND PERSONS whether an individual or class action, with any administrative agency, court or other forum, including, but not limited to, any claim arising under a duty to provide the SUPERINTENDENT a "name clearing" arising under the state or federal constitution, claims brought under the Americans with Disabilities Act of 1990, 42 U.S.C. §12101 et. seq., Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et. seq., the Pregnancy Discrimination

Act of 1978, 42 U.S.C. §2000e(k), the Age Discrimination in Employment Act, 29 U.S.C. §621 et. seq., the Older Workers Benefit Protection Act of 1990, Pub. L. No. 101-433, 104 Stat. 978 (1990), the Civil Rights Act of 1991 No. 102-166, 105 Stat. 1071 (1991), 42 U.S.C. §1981, 42 U.S.C. §1983, the Fair Labor Standards Act, 29 U.S.C. §201 et. seq., the National Labor Relations Act, 29 U.S.C. §151 et. seq., the Equal Pay Act of 1963, 29 U.S.C. §206(d), the Employees Retirement Income Security Act of 1974, 29 U.S.C. §1001 et. seq., the Rehabilitation Act of 1973, 29 U.S.C. §791 et. seq., the Family and Medical Leave Act of 1993, 29 U.S.C. §2601 et. seq., the New York State Human Rights Law, N.Y. Executive Law §290 et. seq., Title IX, 20 U.S.C. §1681 et. seq., the New York Civil Rights Law, N.Y. Civil Rights Law §79-e et. seq., the New York Equal Pay Law, N.Y. Labor Law §198, the New York Workers' Compensation Law, N.Y. Workers' Compensation Law §1 et. seq., and the New York Education Law, including, but not limited, to §§3028 and 1711, under any and all other federal, state and local equal employment, fair employment and civil or human rights law (whether statutory, regulatory or decisional), under the statutory, regulatory or common law, including, but not limited, to any and all tort claims (e.g., assault, battery, false imprisonment, defamation, intentional infliction of emotional distress, negligent

infliction of emotional distress, wrongful termination, negligent hiring, supervision and/or retention, conversion, interference with contract, abusive discharge) and under any and all federal, state, and local laws relating to employment and/or gender discrimination, pregnancy discrimination, sexual and/or other harassment, retaliation, benefits, labor or employment standards, or retaliation.

7. The DISTRICT ENTITIES AND PERSONS, for and in consideration of the payments hereunder, hereby releases and forever discharges, and by this instrument do release and forever discharge the SUPERINTENDENT, her heirs, executors, administrators, successors and assigns of and from all actions, causes of action, suits, charges, complaints, proceedings, grievances, obligations, costs, losses, damages, injuries, attorneys' fees, debts, dues, sums of money, accountings, covenants, contracts, controversies, agreements and promises of any form whatsoever (collectively referred to as "claims") including, but not limited, to any claims in law, equity, contract, tort or those claims which were or could have been alleged by or on behalf of any of them, up until the date of execution of this Agreement, or any claims arising under any and all federal, state, county, or local statutes, laws, rules and regulations pertaining to employment, as well as any and all claims under state or federal contract or tort law against the

SUPERINTENDENT whether known or unknown, unforeseen, unanticipated, unsuspected, or latent which they ever had, now have or hereafter can, shall or may have for, upon or by reason of any matter, cause or thing whatsoever from the beginning of the world to the date of execution of this Agreement, except a claim that SUPERINTENDENT has failed to comply with any obligations created by this Agreement.

8. This Agreement shall not be effective or binding upon the SUPERINTENDENT and/or the BOARD unless and until it is approved by a majority of the BOARD by formal resolution.

9. The parties expressly agree that in their joint interest and in the interest of the DISTRICT and its students, they shall commit themselves to working in a harmonious and respectful manner and shall cooperate and communicate with each other freely and candidly so as to allow each to perform their respective duties through June 30, 2008; that neither party shall disparage the other prior to such date or at any time thereafter; and that in dealing with decisions involving the recruitment, retention, promotion, transfer and discipline of staff and administrators of the DISTRICT, neither party shall engage in acts of retaliation or any discriminatory or demeaning treatment. In furtherance of the foregoing, the

SUPERINTENDENT shall refrain from any and all retaliation against any District employees or independent contractors of the District because the employee or independent contractor has made a charge, testified, assisted, or participated in any manner in any investigation, or proceeding respecting the SUPERINTENDENT, or who in any way acted against the interests of the SUPERINTENDENT with respect to such charge, testimony, or assistance. The SUPERINTENDENT shall not malign, discredit or in any way retaliate or act in a derogatory, discriminatory or prejudicial manner against or among such persons including, but not limited, to the grant or denial of tenure, the employee's duties, wages, hours, benefits or working conditions. Similarly, the BOARD and the DISTRICT shall refrain from any and all retaliation against the SUPERINTENDENT and will not act upon any claims, complaints or charges made by any DISTRICT employees or independent contractor which (i) relate to any conduct prior to the date of this Agreement, or (ii) which are made out of ill will or for any retaliatory, malicious or other non-bona fide purpose. In the event that either party has reason to believe that the other party has, may have, or is about to engage in conduct which would violate the terms of this Paragraph, such party shall provide written notice of its concerns to the other party within ten (10) business days after learning of such conduct.

10. The BOARD and the DISTRICT agree that they will cooperate with the SUPERINTENDENT and reasonably assist her in connection with her efforts to find a new position. In this respect, the BOARD and the DISTRICT agree that the SUPERINTENDENT will be given good references, that the BOARD and the DISTRICT will allow appropriate site visits, and that the BOARD and the DISTRICT will direct all inquiries and requests for references solely to a Board Member so designated by the SUPERINTENDENT in writing.

11. The parties represent and acknowledge that no representation, statement, promise, inducement, threat or suggestion has been made by the other party and/or their attorneys, to influence them to sign this Agreement, except such statements as are expressly set forth herein.

12. The SUPERINTENDENT acknowledges and agrees that she has been given a sufficient time period, at least twenty-one (21) days in accordance with the Age Discrimination in Employment Act, 29 U.S.C. §621 et. seq., and the Older Workers Benefit Protection Act of 1990, Pub. L. No. 101-433, 104 Stat. 978 (1990), within which to consider this Agreement, that she has read this Agreement, that she has fully discussed the terms of this Agreement with legal counsel of her own choosing and that she has fully reviewed with legal counsel the claims and

rights which are being released and her obligations under this Agreement. The SUPERINTENDENT further acknowledges that, pursuant to the Age Discrimination in Employment Act, 29 U.S.C. §621 et. seq., and the Older Workers Benefit Protection Act of 1990, Pub. L. No. 101-433, 104 Stat. 978 (1990), for a period of seven (7) days following execution of this Agreement, the SUPERINTENDENT may revoke this Agreement and the Agreement shall not become effective or enforceable until the revocation period has expired. The SUPERINTENDENT further acknowledges and agrees that, in deciding to execute this Agreement, she has had the opportunity to ask any questions that she may have of anyone, including legal counsel and other personal advisors of her own choosing, that she has consulted with legal counsel and personal advisors of her own choosing, and that she has executed this Agreement freely, voluntarily, and of her own will, and with full and complete understanding of its terms and effects.

13. The parties acknowledge that this Agreement represents the full, final, and complete resolution of this matter so that this Agreement supersedes all prior agreements, written or oral, between the parties, except to the extent otherwise provided herein. This Agreement may not be changed except by an instrument in writing signed by the parties.

14. Except as required by law and specifically by the Freedom of Information Law of the State of New York, or except pursuant to the direction of the Commissioner of Education or pursuant to an order of a court of competent jurisdiction, the terms of this Agreement, the consideration given hereunder, the identity of the parties released under this Agreement and the documents and correspondence between the parties and the discussions and negotiations concerning this Agreement are deemed confidential, and shall not be disclosed by any party to any individual or entity not a party to this Agreement. Without limiting the generality of the foregoing, with the exception of furnishing a copy of the annexed "Press Release" together with a statement of "no further comments," each party to this Agreement shall not initiate, nor respond to, nor in any way participate in, nor contribute to any discussion, public, private or otherwise, nor take part in any other form of publicity concerning, nor in any way relating to, the terms of this document and the disputes between the parties that led to any of the differences and/or disputes between them. During the course of interviews for subsequent employment, the Superintendent can respond to inquiries regarding reasons for the leaving the District in a manner consistent with the content of the Press Release.

15. It is the mutual intention of the parties that this Agreement be valid and fully enforceable. Neither party will take, procure or encourage any effort to contest the validity of this Agreement, whether in its entirety or with respect to any provision hereof. In the event that the validity of this Agreement, or any provision hereof, is challenged by any third party in any court or before any administrative body or tribunal, the BOARD will promptly and effectively oppose such challenge, and will defend and indemnify the SUPERINTENDENT against and with respect to such challenge, including, but not limited, to the SUPERINTENDENT's reasonable costs and attorneys' fees, and any judgment which may be rendered as a result thereof to the extent permitted by law and in accordance with the provisions of the Education Law and Public Officers Law of the State of New York.

16. If any provision of this Agreement is determined to be invalid or unenforceable by a court of competent jurisdiction, it is understood and agreed that such provision shall be deemed deleted and the balance of this Agreement without such deleted provision, if otherwise lawful, shall remain in full force and effect, unless the effect of such invalidity or unenforceability would be such as to deprive either party of the material benefits of its bargain as set forth herein. It is expressly acknowledged by both parties that any determination that Paragraphs three (3)

and/or four (4) are invalid or unenforceable in whole or in part shall constitute a deprivation to the SUPERINTENDENT of the material benefits of her bargain. In the event that either party is deprived of the material benefits of its bargain as defined in this Paragraph, this Agreement and the resignation provided pursuant thereto shall become null and void and the Employment Agreement will continue in full force and effect as if it had never been modified. This Agreement shall be governed by and construed and interpreted in accordance with the laws of the State of New York.

17. The parties agree to cooperate fully and execute this Agreement and all supplementary documents and to take any and all additional action which may be necessary or appropriate to give full force and effect to the basic terms and intent of this Agreement.

THE BOARD OF EDUCATION
OF THE BEDFORD CENTRAL SCHOOL DISTRICT

BY: _____
BRAD SACKS, PRESIDENT

BY: _____
DEBRA JACKSON,
SUPERINTENDENT OF SCHOOLS

State of New York)
) s.s.:
County of Westchester)

On June 12, 2007, before me personally came BRAD SACKS, PRESIDENT OF THE BOARD OF EDUCATION OF THE BEDFORD CENTRAL SCHOOL DISTRICT, to me known, and known to me to be the individual described herein, and who executed the foregoing Agreement, and duly acknowledged to me that he executed the same.

Notary Public

EMILY J. LUCAS
Notary Public, State of New York
No. 02LU6126601
Qualified in Orange County
Commission Expires May 9, 20 09

State of New York)
) s.s.:
County of Westchester)

On 8th day of June 2007, before me personally came DEBRA JACKSON, to me known, and known to me to be he individual described herein, and who executed the foregoing Agreement, and duly acknowledged to me that she executed the same.

Notary Public

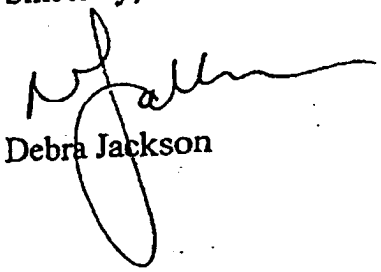
MICHELLE J. CUNNAN
Notary Public, State of New York
No. 01CU4622881
Qualified in Westchester County
Commission Expires March 14, 2010

Debra Jackson

To the Board of Education:

I, Debra Jackson, hereby tender my resignation, effective June 30, 2008. This resignation is being made pursuant to an Agreement between me and the Board of Education of the Bedford Central School District dated June 8, 2007, and is expressly conditioned upon the enforceability, validity and performance of said Agreement.

Sincerely,



Debra Jackson

PRESS RELEASE

For Immediate Release

The Superintendent of the Bedford Central School District will resign effective June 30, 2008, thus terminating the last three years of a five year contract. She began her tenure as Bedford's Superintendent of Schools on July 1, 2004.

While Dr. Jackson was fully-prepared to serve out her entire contract, she and the Board of Education have agreed that the separation is in the mutual interest of both parties.

The Superintendent of Schools and Board of Education shared that they will work together to ensure a smooth transition during the upcoming school year. The Superintendent stated, "The district's long range goals will continue to be addressed during the transition year. I look forward to continuing to work with the schools and the community."

6/8/07

From: Camillo M. Santomero
Sent: Thursday, June 12, 2008 8:07 AM
To: 'LaColla, Carole'
Subject: FOIL Request

Contacts: Carole LaColla
Under the NYS Freedom of Information Law, I am requesting any and all records relating to the "certain dispute" between the Bedford Central Board of Education and Superintendent of Schools Dr. Debra Jackson that resulted in her termination agreement.

After consulting with a FOIL expert, based upon previous court rulings, BOE and district records relating to the "dispute" cited in the agreement are covered under FOIL, regardless of any confidentiality clause between the board and the superintendent.

Please let me know your response to this request as soon as possible, and if you need any further from me.

Camillo M. Santomero

(914) 242-9118
393 Guard Hill Road
Bedford, NY 10506

BEDFORD CENTRAL SCHOOL DISTRICT
THE FOX LANE CAMPUS, P.O. BOX 180
MOUNT KISCO, NEW YORK 10549

Carole LaColla, District Clerk
Board of Education

914-241-6011 (phone)
914-241-6004 (fax)

July 10, 2008

Mr. Camillo M. Santomero
393 Guard Hill Road
Bedford NY 10506

Dear Mr. Santomero:

I write in response to your FOIL request for "all records relating to the certain dispute between the Bedford Board of Education and Superintendent of Schools Dr. Debra Jackson that resulted in her termination agreement". I regret to inform you that your request is denied. The release of these records constitutes an unwarranted invasion of privacy and your request implicates a confidential matter.

Please be aware that an applicant denied access to a public record may file an appeal by delivering a copy of the request and a copy of the denial to the District Clerk within 30 days after the denial from which such appeal is taken.. The appeal will be submitted to the Board for decision. The applicant and the New York State Committee on Open Government will be informed of the Board's determination in writing within ten business days of receipt of an appeal. The District Clerk shall transmit to the Committee on Open Government photocopies of all appeals and determinations.

Sincerely,

Carole LaColla
District Clerk

Camillo M. Santomero

From: Camillo M. Santomero
Sent: Friday, July 18, 2008 7:49 AM
To: 'LaColla, Carole'
Subject: Foil Appeal
Attachments: Jackson Foil Denied 7 10 08.tif

I herby appeal the districts decision to deny my FOIL request concerning the Debra Jackson information. Your denial dated July 10, 2008 is attached.

Camillo M. Santomero

(914) 242-9118
Rabbit Hill
Sarles Street
Mount Kisco, NY 10549

BEDFORD CENTRAL SCHOOL DISTRICT
THE FOX LANE CAMPUS, P.O. BOX 180
MOUNT KISCO, NEW YORK 10549

Carole LaColla, District Clerk
Board of Education

914-241-6011 (phone)
914-241-6004 (fax)

July 10, 2008

Mr. Camillo M. Santomero
393 Guard Hill Road
Bedford NY 10506

Dear Mr. Santomero:

I write in response to your FOIL request for "all records relating to the certain dispute between the Bedford Board of Education and Superintendent of Schools Dr. Debra Jackson that resulted in her termination agreement". I regret to inform you that your request is denied. The release of these records constitutes an unwarranted invasion of privacy and your request implicates a confidential matter.

Please be aware that an applicant denied access to a public record may file an appeal by delivering a copy of the request and a copy of the denial to the District Clerk within 30 days after the denial from which such appeal is taken.. The appeal will be submitted to the Board for decision. The applicant and the New York State Committee on Open Government will be informed of the Board's determination in writing within ten business days of receipt of an appeal. The District Clerk shall transmit to the Committee on Open Government photocopies of all appeals and determinations.

Sincerely,

Carole LaColla
District Clerk

BEDFORD CENTRAL SCHOOL DISTRICT
BOARD OF EDUCATION
P.O. BOX 180, MOUNT KISCO, NEW YORK 10549
914-241-6010 914-241-6004 (fax)
boe@bcsdny.org

August 7, 2008

Camillo Santomero
Rabbit Hill
Sarles Street
Mount Kisco, NY 10549

Re: FOIL APPEAL

Dear Mr. Santomero

The Board of Education is in receipt of your Freedom of Information Law (FOIL) appeal, dated July 18, 2008. In your appeal you request, "...any and all documents pertaining to a certain dispute that occurred between the Bedford Central Board of Education and Superintendent of Schools Dr. Debra Jackson..." The Board of Education reviewed your appeal in executive session on August 6, 2008.

The Board of Education hereby denies your appeal. Disclosure of the documents requested would constitute an unwarranted invasion of privacy. As outlined in the Freedom of Information Law, disclosure of allegations or unsubstantiated charges would result in an unwarranted invasion of personal privacy[1].

Furthermore, the Board of Education is denying access, concluding that such records are intra-agency material involving non-final policy or determinations. (Herald Company v. School District of the City of Syracuse, 104 Misc.2d 1041, 1046).

Thank you for your attention to this matter.

Sincerely,

Susan Wollin (CL)

Susan Elion Wollin, President
Board of Education

c: Robert Freeman, Committee on Open Government

[1] See Public Officers Law §§ 87(2)(b); 89(2)(b)(i)

Index No. 25404/2008

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

In the Matter of an Article 78 Proceeding

CAMILLO M. SANTOMERO,

Petitioner,

- 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.

PETITION

Law Office of ROBERT A. STERNBACH
Attorneys for Petitioner
274 Madison Avenue
Suite 1303
New York, New York 10016
(212) 661-4040

CERTIFICATION

I hereby certify pursuant to 22 NYCRR § 130-1.1-a(b) that, to the best of my knowledge, information and belief, formed after an inquiry reasonable under the circumstances, the presentation of the papers contained herein, or the contentions therein, are not frivolous as defined in 22 NYCRR § 130-1.1-(c).

Robert A. Sternbach

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

In the Matter of an
Article 78 Proceeding

CAMILLO M. SANTOMERO,

Petitioner,

- 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.

Index No. 25405/2008

PETITIONER'S MEMORANDUM OF LAW

Law Office of ROBERT A. STERNBACH
Attorneys for Petitioner
274 Madison Avenue, Suite 1303
New York, New York 10016
(212) 661-4040

PRELIMINARY STATEMENT

This proceeding under CPLR Article 78 and Public Officers Law Article 6 (the New York State Freedom of Information Law) seeks a judgment ordering Respondents to provide copies of "any and all records relating to the 'certain dispute' between the Bedford Central Board of Education and Superintendent of Schools Dr. Debra Jackson that resulted in her termination agreement."

PARTIES

Petitioner Camillo M. Santomero ("Petitioner") is a resident of the State of New York. He is a former member of the Board of Education of the Bedford Central School District and is active in local administration and politics (Petition ¶ 2).

Respondent Board of Education of the Bedford Central School District, (the "Board") is the administrative body charged with operation of the Bedford Central School District (the "District"), which is located in the town of Bedford, County of Westchester, State of New York. The Board is an "agency" performing a governmental function within the meaning of Article 6 of the Public Officers Law, commonly known as the "Freedom of Information Law" ("FOIL") and, as such, is subject to the provisions of that law (Petition ¶ 3).

Respondent Carole Lacolla ("LaColla") is the District Clerk of the Board and the person who, on behalf of the Board, denied Petitioner access to the information he requested (Petition ¶ 4). Respondent Susan Elion Wollin ("Wollin") is the President of the Board and the person who affirmed the Board's denial of access to the information requested by the Petitioner (Petition ¶ 5). Respondent Dr. Debra Jackson ("Dr. Jackson") is the former Superintendent of the District who, along with the Board, is a party to the Agreement central to this dispute (Petition ¶ 6).

FACTUAL BACKGROUND

In September 2007, the high-performing and affluent Bedford Central School District was rocked by scandal when the principal of Bedford Hills Elementary School was brought up on criminal charges for failing to report allegations of the rape of a 9-year-old girl to child protection officials. According to the complaint filed against the principal in Court, the principal was informed of the allegations of abuse in December 2006 or January 2007, yet failed to notify state officials or the school superintendent who, at the time, was Dr. Jackson. (*See* Exhibit A to Petition, New York Times article dated 9/11/06).

Dr. Jackson had been hired as Superintendent of the District pursuant to a written agreement between herself and the Board dated July 10, 2006 (the "Employment Agreement"). Under the Employment Agreement, Dr. Jackson was to serve as the chief administrative officer of the Bedford Central School District for the period July 1, 2006 through June 30, 2011 (Petition ¶ 8).

According to the Board and Dr. Jackson, on or about June 2007, a "dispute" arose between Dr. Jackson and the Board "with regard to the Superintendent's performance of her duties" (Petition ¶ 9). On or about June 2007, the Board and Dr. Jackson entered into a twenty page Settlement Agreement and Mutual Release" (the "Settlement Agreement"). (*See* Exhibit B to Petition).

Pursuant to the Settlement Agreement, among other things, (a) Dr. Jackson tendered her resignation effective June 30, 2008 (*Id.* ¶ 2); (b) the parties agreed that, until the effective date of Dr. Jackson's resignation, the terms of the Employment Agreement would remain in full force and effect (*Id.* ¶ 3); (c) the Board agreed to pay Dr. Jackson the sum of $650,000.00 no later than June 30, 2007, and further agreed to provide health care coverage (medical and dental) for her

and her family for the remainder of her life at no cost (*Id.* ¶ 4); (d) the Board agreed to give Dr. Jackson "good references" and to indemnify her if the Settlement Agreement was challenged by any party (*Id.* ¶¶ 10, 15); and (e) the parties agreed not to bring suit or retaliate against each other and to keep the terms of, and negotiations concerning, the Settlement Agreement confidential (*Id.* ¶¶ 5-7, 9, 14).

The only explanation proffered in the Settlement Agreement for the separation brokered therein was that "a certain dispute has arisen between the Superintendent and the Board with regard to the Superintendent's performance of her duties." (*Id.* at p. 2). In the official Press Release regarding the matter, the parties stated merely that "terminating the last three years of [Jackson's] five year contract ... was in the mutual interest of both parties." (*See* Press Release attached to Petition Exhibit B, Settlement Agreement).

PROCEDURAL BACKGROUND

On August 12, 2008, Petitioner submitted a request to LaColla, as representative of the Board, for access to certain records pursuant to Public Officers Law Article 6 (*see* Exhibit C to Petition). In his request, Petitioner sought the following records:

> any and all records relating to the "certain dispute" between the Bedford Central Board of Education and Superintendent of Schools Dr. Debra Jackson that resulted in her termination agreement.

Id.

On July 10, 2008, the Board denied Petitioner's request on the ground that "the release of these records constitutes an unwarranted invasion of privacy and your request implicates a confidential matter" (*see* Exhibit D to Petition). The Board proferred no support for this conclusion. On July 18, 2008, pursuant to Public Officers Law § 89, Petitioner filed an appeal

from the Board's July 10, 2008 denial. (*See* Exhibit E to Petition).

On August 7, 2008, the Board, in a letter signed by Wollin, denied Petitioner's appeal, stating:

> Disclosure of the records requested would constitute an unwarranted invasion of privacy. As outlined in the Freedom of Information Law, disclosure of allegations or unsubstantiated charges would result in an unwarranted invasion of privacy [citing, in footnote, POL §§87(2)(b), 89(2)(b)(i)]. Furthermore, the Board of Education is denying access, concluding that such records are intra-agency material involving non-final policy or determinations. (Herald Company. v. School Dist. of City of Syracuse, 104 Misc.2d 1041, 1046).

(*See* Exhibit F to Petition).

Petitioner has exhausted his administrative remedies, and review by this Court is ripe and otherwise appropriate pursuant to, and in accordance with, CPLR Article 78 and Public Officers Law Article 6.

GROUNDS FOR RELIEF

Respondents' determination to deny the requested records is arbitrary and capricious and constitutes an abuse of discretion. Petitioner is legally entitled to the records he requested, in that they are agency records.

The Board's denials of Petitioner's request and appeal were purportedly based (a) on privacy issues, as referenced in POL §§ 87(2)(b), 89(2)(b)(i); and (b) the conclusion that the records Petitioner requested purportedly constitute intra-agency materials, referencing *Herald Co. v. School Dist. of City of Syracuse*, 104 Misc.2d 1041, 430 N.Y.S.2d 460 (Sup. Ct. Onondaga Co. 1980). Both justifications are specious at best.

The Board Has Failed To Demonstrate
That The Records Petitioner Seeks Are Exempt From Disclosure.

Unless they fall within one of the enumerated exemptions in Public Officers Law § 87(2), all government records are presumptively open for public inspection and copying. *Gould v. New York City Police Dept.*, 89 N.Y.2d 267, 274-75, 653 N.Y.S.2d 54, 57 (1996). It is well-settled that "the 'exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption.'" *Id.* at 275, 653 N.Y.S.2d at 57 (quoting *Matter of Hanig v. State of New York Dept. of Motor Vehicles,* 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715 (1992) and citing Public Officers Law § 89[4][b]).

As the Court of Appeals has readily acknowledged, "to invoke one of the exemptions of section 87(2), the agency must articulate 'particularized and specific justification' for not disclosing requested documents." *Id.*, 653 N.Y.S.2d at 57 (citation omitted). 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 and order disclosure of all nonexempt material. *Id.*, 653 N.Y.S.2d at 57 (citations omitted).

In both its denial of Petitioner's initial request and his appeal, the Board tacitly acknowledges that records concerning the "dispute" between Dr. Jackson and the Board exist, as the Settlement Agreement confirms. However, the Board utterly fails to provide the required "particularized and specific justification" for its refusal to provide the records sought.

The Board Fails To Demonstrate That The Records Petitioner Seeks
Would Result In An Unwarranted Invasion Of Privacy.

The Board's first purported reason for seeking to avoid production is its summary conclusion that "[d]isclosure of the records requested would constitute an unwarranted invasion of privacy."

Patently, this conclusory justification is insufficient. *See, e.g., Clinch v. Town of Hyde Park*, 173 Misc.2d 497, 661 N.Y.S.2d 786 (Sup. Ct. Duchess Co. 1997) (where FOIL exemption claimed, "mere conclusory allegations, without factual support, are insufficient to sustain an agency's burden of proof"); *Belth v. New York State Dept. of Ins.*, 189 Misc.2d 508, 733 N.Y.S.2d 833 (Sup. Ct. N.Y. Co. 2001) (same); *New York Civil Liberties Union v. New York City Police Dept.*, 20 Misc.3d 1108(A), 2008 WL 2522233, (Sup. Ct. N.Y. Co., May 7, 2008) (agency's denial of administrative appeal by letter which merely set forth list of allegedly applicable statutory exemptions and briefly explained same, insufficient under FOIL).

Further, notwithstanding the Board's averment that "... disclosure of allegations or unsubstantiated charges would result in an unwarranted invasion of privacy," the Board fails even to claim that any allegations were made or that any charges were ever threatened or filed against Dr. Jackson or anyone else. To the contrary, the Settlement Agreement refers merely to a "dispute" between the parties, and the official position, stated in the accompanying press release, is simply that a parting was in the parties' "mutual interest."

Indeed, the acknowledged "dispute" on its face encompasses facts and circumstances that go well beyond the mere personal privacy interests of Dr. Jackson. Indeed, the "dispute" on its face appears to involve the conduct of parties other than Dr. Jackson, such as the Board itself, and implicates public policy considerations involving the expenditure of substantial taxpayer funds.

Under these circumstances, the requested records must be released to Petitioner, or, at the very least, provided to the Court for *in camera* inspection.

The Board Fails To Demonstrate That The Records Petitioner Seeks Are Intra-Agency Material Exempt From Disclosure.

The Board's additional vacant assertion --- articulated for the first time in its denial of Petitioner's appeal --- that the records requested are exempt from disclosure because they constitute "intra agency material involving non-final or policy determinations" is equally without merit.

Herald Co. v. School Dist. of City of Syracuse, supra, the sole case cited by the Board in support of its position, is distinguishable on its face and has no application here. *Herald Co.* involved an attempt by a newspaper publisher to compel a school district to produce the name of, and charges against, a teacher charged with misconduct in a pending private disciplinary proceeding. The court found, *inter alia,* that the requested information was inter-agency or intra-agency material exempt from disclosure under POL § 87(2)(g), since the name of and charges against the teacher were merely part of unproved allegations and were thus predetermination materials exempt from disclosure.

However, the records sought by Petitioner have no relation to the information sought in *Herald Co.* and the Board has made no attempt to show otherwise. In this matter, the identity of the parties and the terms of the settlement they reached are already known. These terms cannot possibly constitute "non-final policy or determinations" --- to the contrary, they are unquestionably final. Nor has the Board alleged that any charges were filed against Dr. Jackson. Moreover, as stated above, the acknowledged "dispute" on its face encompasses facts and circumstances that go well beyond mere unproved allegations against Dr. Jackson; may involve the conduct of parties other than Dr. Jackson, such as the Board itself; and, since they resulted in final settlement terms that required and will require the expenditure of substantial taxpayer

funds, clearly affect the public interest in ways that mere unsubstantiated allegations do not.

Thus, none of the considerations discussed in *Herald Co.* are applicable here. *See also The New York Times Co. v. City of New York Fire Dept.*, 4 N.Y.3d 477, 487, 796 N.Y.S.2d 302, 307 (2005) (affirming lower court ruling that intra-agency materials "be disclosed to the extent they consist of factual statements or instructions affecting the public..."); *New York 1 News v. Office of President of Borough of Staten Island*, 231 A.D.2d 524, 647 N.Y.S.2d 270 (2nd Dept. 1996) (investigator's report on charges of racial insensitivity against public employee not exempt from disclosure under FOIL once borough president relied on and incorporated investigator's findings in final decision; exemption for intra-agency materials could not apply to final agency policy or decisions, and investigator's findings were expressly adopted by borough president in explaining his decision); *In re Jasmine G.*, 35 A.D.3d 604, 828 N.Y.S.2d 107 (2nd Dept. 2006) (agency precluded from claiming that agency materials were exempt from disclosure under POL 87(2)(g) where agency witness testified that agency employees relied upon materials in reaching conclusions as to the dispositional recommendation); *Mothers on the Move, Inc. v. Messer*, 236 A.D.2d 408, 652 N.Y.S.2d 773 (2nd Dept. 1997) (finding, inter alia, factual observations not exempt from disclosure, even in documents issued before final decision); *Miracle Mile Associates v. Yudelson*, 68 A.D.2d 176, 417 N.Y.S.2d 142 (4th Dept. 1979) (POL 87(2)(b) does not authorize agency to throw protective blanket over all information by casting it in the form of internal memo; question in each case is whether possession of contested document would be injurious to consultative functions of government that the privilege of nondisclosure protects), *appeal denied*, 48 N.Y.2d 606, 421 N.Y.S.2d 1031, *appeal denied*, 48 N.Y.2d 706, 422 N.Y.S.2d 68 (1979).

ATTORNEY'S FEES AND COSTS

Respondents have withheld the records requested by Petitioner, although they lack a reasonable basis to do so. If Petitioner prevails in this proceeding, the Court should, pursuant to Public Officers Law § 89(4)(c), award Petitioner his reasonable attorney's fees and other litigation costs incurred in connection with this proceeding.

CONCLUSION

The official records requested by Petitioner are clearly of significant interest to the general public. They concern the origins of the Board's extraordinary agreement to make an immediate payment to an employee of $650,000.00, plus indeterminate future expenditures for medical and dental care for the employee and her family for the rest of her life --- a total obligation that may well amount to approximately one million dollars of taxpayer money. The sole reason given for the Board's apparently supine concession is that, without it, "protracted and expensive litigation might result" which, for undisclosed reasons known solely to the parties, "... would not be in the interest of the School District, its students, staff and taxpayers."

However, contrary to the summary conclusion reached by the Board in denying Petitioner's request for records and his appeal, the School District, students, staff and taxpayers are entitled to information from which they might learn the basis for the Settlement Agreement's extraordinary terms and decide themselves whether they were justified --- or whether other considerations, having nothing to do with an unwarranted invasion of Dr. Jackson's privacy, were the motivation.

Consequently, all records Petitioner requests must be provided. The final determination of Respondents has denied Petitioner his right of access to agency records, a right that is guaranteed by Public Officers Law Article 6. The Board must not be permitted to avoid disclosure of the

basis for the extraordinary settlement it reached with Dr. Jackson, a matter of compelling public interest.

Dated: New York, New York
November 12, 2008

Law Office of Robert A. Sternbach

By: _____

Robert A. Sternbach
Attorneys for Petitioner
274 Madison Avenue, Suite 1303
New York, New York 10016
(212) 661-4040

Anthony J. Rella, Esq.
Robert A. Sternbach, Esq.
Of Counsel

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

In the Matter of an Article 78 Proceeding CAMILLO M. SANTOMERO, Petitioner, -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.	**REPLY AFFIDAVIT OF CAMILLO M. SANTOMERO IN FURTHER SUPPORT OF PETITION** Index No. 2008-25405 Justice Barbara Gunther Zambelli

STATE OF NEW YORK)
) ss:
COUNTY OF WESTCHESTER)

CAMILLO M. SANTOMERO, being duly sworn deposes and says:

1. I respectfully submit this Reply Affidavit in response to the opposing affidavits and memorandum of law submitted by Respondents in this matter and in further support of my Petition.

2. In their papers submitted in opposition to my Petition, Respondents acknowledge the existence of only one document (other than the Settlement Agreement) related to the "dispute" between the Board and Dr. Jackson that is the subject of my FOIL request: to wit, alleged "draft disciplinary charges" prepared by the Board against Dr. Jackson.

3. However, it must be emphasized that nowhere do Respondents specifically deny that other documents relevant to my FOIL request exist.

4. As stated in the Petition, I am a former member of the Board of Education of the Bedford Central School District, having served from Spring 1995 through Spring 1998.

5. In my experience as, *inter alia*, a member of the Board, there was never any circumstance where disciplinary charges were contemplated, issued, and/or settled by the Board where only two documents were prepared. Based upon my experience with similar prior matters, here there should exist, at a minimum, additional information (notes, memoranda, etc.) on the settlement reached with Dr. Jackson, relating to its costs/benefits, the life-time medical coverage afforded Dr. Jackson and her family, deliberations of the Board, and similar issues.

6. As noted in the Petition, the settlement the Board reached with Dr. Jackson is truly extraordinary. It is beyond credulity to believe that only two documents were ever prepared related to the parties' alleged "dispute." Upon information and belief additional documents exist, but have not been disclosed and are not subject to any FOIL exemptions.

7. Moreover, Respondents' reference to "draft disciplinary charges" is inexplicable in and of itself. How did these chargers come into being? How many "drafts" of the "draft charges" were prepared? Who drafted them? How were they prepared?

8. Accordingly, Respondents should be directed to produce and disclose any and all documentation relating to the dispute between the Board and Dr. Jackson.

9. Moreover, the existence of additional relevant documentation is solely within the knowledge and control of Respondents. Hence, I am advised that the Court should grant me leave to conduct discovery in this matter.

10. The accompanying Reply Memorandum of Law contains legal argument and

citations in further support of my Petition.

WHEREFORE, Petitioner respectfully requests that a judgment be entered pursuant to CPLR Article 78:

(a) annulling the final determination of respondents dated August 7, 2008, which denied Petitioner's request for access to records he requested on June 12, 2008, pursuant to Public Officers Law Article 6;

(b) directing Respondents to provide Petitioner with all such records;

(c) ordering Respondents to pay the reasonable attorney's fees and other costs incurred by Petitioner in connection with this proceeding; and

(d) granting Petitioner such other and further relief as the Court deems just and proper.

CAMILLO M. SANTOMERO
Petitioner

Sworn to before me this 27th day of January, 2009

Notary Public

SAHID A. LOYOLA
Notary Public - State of New York
No. 01LO6165629
Qualified in Westchester County
My Commission Expires May 14, 2011

AFFIRMATION OF SERVICE

ROBERT A. STERNBACH, an attorney duly admitted to practice in the courts of New York, affirms under the penalties of perjury as follows:

That deponent is a principal of the Law Office of Robert A. Sternbach, is over 18 years of age, is not a party to the within action, and resides in the State of New York. And that, on January 28, 2009, he served the within

PETITIONER'S REPLY AFFIDAVIT; REPLY MEMORANDUM OF LAW

KEANE & BEANE, P.C.
Attorneys for Respondents
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, and CAROLE LACOLLA, as District Clerk of the BOARD OF EDUCATION OF THE BEDFORD CENTRAL SCHOOL DISTRICT
445 Hamilton Avenue
White Plains, New York 10601
(914) 946-4777

KRAUSS PLLC
Attorneys for Respondent DR. DEBRA JACKSON
81 Main Street
White Plains, New York 10601
(914) 949-9100

the foregoing addresses having been designated for such purpose by the preceding papers in this action, by depositing true and correct copies of the same, enclosed in properly addressed post-paid wrappers to each such address, in an official depository maintained and exclusively controlled by the United States Post Office in New York City.

Dated: New York, New York
January 28, 2009

ROBERT A. STERNBACH

Index No. 2008-25405

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

In the Matter of an Article 78 Proceeding

CAMILLO M. SANTOMERO,

Petitioner,

- 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.

PETITIONER'S REPLY AFFIDAVIT

Law Office of ROBERT A. STERNBACH
Attorneys for Petitioner
274 Madison Avenue
Suite 1303
New York, New York 10016
(212) 661-4040

CERTIFICATION

I hereby certify pursuant to 22 NYCRR § 130-1.1-a(b) that, to the best of my knowledge, information and belief, formed after an inquiry reasonable under the circumstances, the presentation of the papers contained herein, or the contentions therein, are not frivolous as defined in 22 NYCRR § 130-1.1-(c).

Robert A. Sternbach

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

In the Matter of an
Article 78 Proceeding

CAMILLO M. SANTOMERO,

Petitioner,

- 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.

Index No. 2008 – 25405

PETITIONER'S REPLY MEMORANDUM OF LAW

Law Office of ROBERT A. STERNBACH
Attorneys for Petitioner
274 Madison Avenue, Suite 1303
New York, New York 10016
(212) 661-4040

PRELIMINARY STATEMENT

In framing their opposition to the Petition, Respondents begin with the fallacious premise that Petitioner's request for information is limited to vaguely defined "draft disciplinary charges" that the Board now admits exist but were never proffered against Dr. Jackson. *Without* any Affidavits affirmatively swearing that no other relevant records relating to the "dispute" exist, the Board spends its entire opposition arguing that these "draft disciplinary charges" should be exempt from disclosure.

First, the Board needs to make clear exactly what these "draft disciplinary charges" are and give some rational explanation for why these materials should be withheld in the context of the extraordinary seven-figure settlement agreement the Board reached with Dr. Jackson, in keeping with Respondents' burden to prove these materials fit within the "narrowly construed" FOIL exemptions. *See Hanig v. State Dept. of Motor Vehicles*, 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 717 (1992). Respondents have not done so.

Second, Respondents cannot hide behind their failure to affirmatively identify the other relevant materials that, Petitioner has good reason to believe, must exist. Consequently, the Court should order Respondents to identify and disclose all materials relating to the dispute. Further, because the existence of such information is solely within the knowledge and control of Respondents, the Court should grant Petitioner leave to conduct discovery, pursuant to CPLR 408.

ARGUMENT

At the outset, Respondents contend that the Petition should be denied because disclosure of the "draft disciplinary charges" would constitute an unwarranted invasion of privacy. *See* Memorandum of Law in Opposition to Petition ("Opp. Mem.") at pp. 4-6. Respondents' reliance

on the Second Department's decisions in *LaRocca v. Board of Educ. of Jericho Union Free School Dist.*, 220 A.D.2d 424, 632 N.Y.S.2d 576 (2d Dept. 1995) and *Western Suffolk Bd. of Co-op. Educational Services v. Bay Shore Union Free School Dist.*, 250 A.D.2d 772, 672 N.Y.S.2d 776 (2d Dept. 1998) to support their position is misplaced.

First, in both of those cases, Respondents were forced to turn over the requested materials, albeit in redacted form.[1] Second, unlike in *LaRocca* and *Western Suffolk*, this case does not involve disciplinary charges that were denied, not admitted and/or unproven. To the contrary, Respondents point to vaguely defined "draft" charges that were never even proffered against Dr. Jackson. Moreover, the information sought here is much broader than that at issue in the *LaRocca* and *Western Suffolk* cases. The present case is not principally about determining what the alleged "draft disciplinary charges" against Dr. Jackson were. Petitioner seeks all records relating to the dispute, so that the rationale for the extraordinary expenditure of public funds at issue here may be revealed to the public.

The other decisions referenced by Respondents are equally inapposite. *Sinicropi v. Nassau County*, 76 A.D.2d 832, 428 N.Y.S.2d 312 (2d Dept.), *lv. to appeal denied*, 51 N.Y.2d 704, 432 N.Y.S.2d 1028 (1980), is diametrically opposite to Respondents' position: in *Sinicropi*, Petitioner "was given access to the charges preferred against [a probation officer], her answer, the demand and bill of particulars and the stipulation of settlement." 76 A.D.2d at 833, 428 N.Y.S.2d at 313 (emphasis added). Only after the charges had been supplied to Petitioner did the Court hold that disclosure of other materials would be "unnecessary and ... improper." Here, unlike in *Sinicropi*, Petitioner has been given nothing other than the settlement agreement. Additionally, in *Sinicropi*, there was no issue regarding the extraordinary nature of the settlement

[1] Also note, *LaRocca* contained a lengthy opinion by Judge O'Brien, concurring in part and dissenting in part from the majority's opinion, setting forth a persuasive argument that the respondent agency should have been ordered to disclose the settlement agreement there at issue in its entirety.

agreement, as is the case here. *Johnson Newspaper Corp. v. Melino*, 77 N.Y.2d 1, 564 N.E.2d 1046, 563 N.Y.S.2d 380 (1990) was not even a FOIL case, but instead involved the issue of public access to a professional disciplinary hearing.[2]

Also unpersuasive is Respondents' continued assertion that Petitioner should be denied access to documents concerning the dispute because the alleged "draft disciplinary charges" constitute intra-agency material immune from disclosure. Here, the materials Petitioner seeks were clearly were not merely "preliminary and non-final in nature," as Respondents argue, but antecedent to and conclusive of a final Settlement Agreement. *See* Petitioner's Memorandum Of Law at pp. 7-8.

Moreover, as Petitioner detailed in his opening memorandum, here the acknowledged "dispute" on its face encompasses facts and circumstances that go well beyond mere unproved allegations against Dr. Jackson, and may involve the conduct of parties other than Dr. Jackson, such as the Board itself.

Consequently, none of the decisions or advisory opinions referenced by Respondents meet their burden of proving that any of the materials relevant to this dispute, including the "draft" disciplinary charges, warrant application of an exemption to FOIL disclosure.

---

[2] Respondents' citation to provisions of the Education Law and to Committee on Open Government advisory opinions are equally deficient in that they simply relate to Respondents' contention that "unproven disciplinary charges may be withheld from FOIL disclosure," which as detailed above, is not dispositive here.

Moreover, as discussed below, it appears that documents in addition to the "draft disciplinary charges" exist that are relevant to Petitioner's FOIL request, but which Respondents fail to identify.

THE COURT SHOULD ORDER RESPONDENTS TO IDENTIFY AND DISCLOSE ALL MATERIALS RELATING TO THE DISPUTE AND GRANT PETITIONER LEAVE TO CONDUCT DISCOVERY

Here, the Petitioner, Camillo M. Santomero, was in the past himself a member of the Respondent Board. In Petitioner's experience as, *inter alia*, a member of the Board, there was never any circumstance where disciplinary charges were contemplated, issued, and/or settled by the Board where only two documents were prepared — in this case, the only two documents mentioned by the Board being "draft" disciplinary charges and the Settlement Agreement.

Based upon Petitioner's experience with similar prior matters, here there should exist, at a minimum, additional information (notes, memoranda, etc.) on the settlement reached with Dr. Jackson, relating to its costs/benefits, the life-time medical coverage afforded Dr. Jackson and her family, deliberations of the Board, and similar issues.

As noted in the Petition, the settlement the Board reached with Dr. Jackson is truly extraordinary. It is beyond credulity to believe that only two documents were ever prepared related to the parties' alleged "dispute." Upon information and belief, additional documents exist, but have not been disclosed and are not subject to any FOIL exemptions.

Accordingly, the Court should order Respondents to identify and disclose all materials that relate to the "dispute" which is the subject of Petitioner's FOIL request.

Further, because the existence of such records is entirely within the knowledge of Respondents, the Court should grant Petitioner leave to conduct discovery in this proceeding, including, but not limited to, leave to depose Respondents, pursuant to CPLR § 408.

CONCLUSION

As the Court of Appeals acknowledged in *Capital Newspapers Div. of Hearst Corp. v. Burns*, 67 N.Y.2d 562, 565-66, 505 N.Y.S.2d 576, 578, 496 N.E.2d 665 (1986):

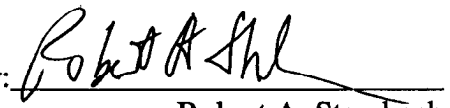
> The Freedom of Information Law expresses this State's strong commitment to open government and public accountability and imposes a broad standard of disclosure upon the State and its agencies. The statute [is intended as] *an effective tool for exposing waste, negligence and abuse on the part of government officers* [internal citations omitted].

Here, Respondents seek to hide behind an undefined and unintelligible identification of "draft disciplinary charges" and have apparently failed to identify all documents relevant to the dispute, thus preventing any rational investigation into whether or not exemptions are warranted. The public is entitled to an explanation for this settlement with a public officer that will result in the expenditure of $1 million of taxpayer funds.

For the reasons stated herein, as well as those stated in Petitioner's opening memorandum of law, the Petition should be granted in its entirety.

Dated: New York, New York
January 28, 2009

Law Office of Robert A. Sternbach

By: 

Robert A. Sternbach
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274 Madison Avenue, Suite 1303
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(212) 661-4040

Anthony J. Rella, Esq.
Robert A. Sternbach, Esq.
Of Counsel

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

In the Matter of an Article 78 Proceeding

CAMILLO M. SANTOMERO,

Petitioner,

-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.

VERIFIED ANSWER

Index No. 2008-25405

Assigned To:
Hon. Barbara Zambelli, A.J.S.C.

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 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 (collectively, the "Respondents"), by their attorneys, Keane & Beane, P.C., as and for their Answer to the Verified Petition in the above-captioned proceeding, respectfully allege as follows:

1. The allegations contained in the Petition's "Preliminary Statement" are conclusions of law and Petitioner's description of the case, and therefore they require no response. To the extent a response is deemed necessary, Respondents deny said allegations.

2. Deny having knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph "2" of the Verified Petition, except admit that Petitioner is a former member of the Board of Education.

3. Admit the allegations set forth in paragraph "3" of the Verified Petition.

4. The allegations contained in paragraph "4" of the Verified Petition are conclusions of law and therefore require no response. To the extent a response is deemed necessary, Respondents deny said allegations.

5. Deny the allegations set forth in paragraph "5" of the Verified Petition, except admit that Respondent Carole Lacolla is the District Clerk of the Board of Education ("the District Clerk").

6. Deny the allegations set forth in paragraph "6" of the Verified Petition, except admit that Respondent Susan Elion Wollin is the President of the Board of Education.

7. Deny the allegations set forth in paragraph "7" of the Verified Petition, except admit that Respondent Dr. Debra Jackson ("Dr. Jackson") is a former Superintendent of the Bedford Central School District and that Dr. Jackson and the Board of Education are parties to a certain agreement, denominated "Settlement Agreement and Mutual Releases," that was executed on or about June 12, 2007 (the "Settlement Agreement").

8. Deny having knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph "8" of the Verified Petition, except admit upon information and belief that Victoria Graboski, a former principal at the Bedford Hills Elementary

School, was arrested in connection with her alleged failure to report allegations of child abuse as required by law.

9. Admit the allegations set forth in paragraph "9" of the Verified Petition.

10. Admit the allegations set forth in paragraph "10" of the Verified Petition.

11. Admit the allegations set forth in paragraph "11" of the Verified Petition.

12. Deny the allegations contained in paragraph "12" of the Verified Petition, and refer the Court to the Settlement Agreement for a full recitation of its contents and a determination as to its legal effect.

13. Deny the allegations contained in paragraph "13" of the Verified Petition, and refer the Court to the Settlement Agreement (including the press release annexed thereto) for a full recitation of its contents and a determination as to its legal effect.

14. Deny having knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph "14" of the Verified Petition, and refer the Court to the email annexed to the Verified Petition as "Exhibit C" for a full recitation of its contents and a determination as to its legal effect.

15. Deny having knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph "15" of the Verified Petition, and refer the Court to the email annexed to the Verified Petition as "Exhibit C" for a full recitation of its contents and a determination as to its legal effect.

16. Deny the allegations contained in paragraph "16" of the Verified Petition, except admit that the Board of Education denied Petitioner's FOIL request and refer the Court to the denial letter from the District Clerk to Petitioner, dated July 10, 2008, for a full recitation of its contents and a determination as to its legal effect.

17. Deny the allegations set forth in paragraph "17" of the Verified Petition, and refer the Court to the email from Petitioner to the District Clerk, dated July 18, 2008, for a full recitation of its contents and a determination as to its legal effect.

18. Deny the allegations set forth in paragraph "18" of the Verified Petition, except admit that the Board of Education denied Petitioner's FOIL appeal and refer the Court to the letter from Susan Elion Wollin, President of the Board of Education, to Petitioner, dated August 7, 2008, for a full recitation of its contents and a determination as to its legal effect.

19. The allegations contained in paragraph "19" of the Verified Petition are conclusions of law and therefore require no response. To the extent a response is deemed necessary, Respondents deny said allegations.

20. Deny having knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph "20" of the Verified Petition.

21. Deny having knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph "21" of the Verified Petition.

22. Deny having knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph "22" of the Verified Petition.

23. Deny the allegations contained in paragraph "23" of the Verified Petition, and refer the Court to the Settlement Agreement for a full recitation of its contents and a determination as to its legal effect.

24. Deny the allegations contained in paragraph "24" of the Verified Petition.

25. Deny the allegations contained in paragraph "25" of the Verified Petition.

26. Deny the allegations contained in paragraph "26" of the Verified Petition.

27. Deny the allegations contained in paragraph "27" of the Verified Petition.

28. Deny having knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph "28" of the Verified Petition.

AS AND FOR A FIRST
AFFIRMATIVE DEFENSE

29. The Verified Petition fails to state a cause of action for which relief can be granted.

AS AND FOR A SECOND
AFFIRMATIVE DEFENSE

30. The claim raised in the Verified Petition is barred, in whole or in part, by the statute of limitations.

WHEREFORE, Respondents respectfully request that a judgment be entered denying the Verified Petition in its entirety, and granting Respondents such other and further relief as the Court deems just and proper.

Dated: White Plains, New York
January 16, 2008

KEANE & BEANE, P.C.

By: 

Edward J. Phillips
Attorneys for Respondents
445 Hamilton Avenue, Suite 1500
White Plains, New York 10601
(914) 946-4777

TO: LAW OFFICE OF ROBERT A. STERNBACH
Attn: Robert A. Sternbach, Esq.
Attorneys for Petitioner
274 Madison Avenue, Suite 1303
New York, NY 10016
(212) 661-4040

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

In the Matter of an Article 78 Proceeding

CAMILLO M. SANTOMERO,

Petitioner,

-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.

VERIFICATION

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:

I am the President of the Board of Education of the Bedford Central School District; I have read the foregoing Verified Answer and know the contents thereof; that the same is true to the best of my knowledge, except as to matters stated therein on information and belief and, as to those matters, I believe them to be true.

SUSAN ELION WOLLIN

Sworn to before me this
13th day of January, 2009

Notary Public

E. WEDGES
November, 30 2010
Notary
Public
WE6016837
County, New York

Hon. Barbara Zambelli, A.J.S.C.
Index No. 2008-25405

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

In the Matter of an Article 78 Proceeding

CAMILLO M. SANTOMERO,

Petitioner,

-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

VERIFIED ANSWER

Law Offices of
KEANE & BEANE, P.C.
445 Hamilton Avenue, Suite 1500
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

CAMILLO M. SANTOMERO,

Petitioner,

-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.

AFFIDAVIT

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"), which is named as a Respondent in the above-captioned proceeding. I submit this Affidavit in opposition to the Verified Petition, which challenges the Board of Education's denial of Petitioner's request under the N.Y. Freedom of Information Law ("FOIL") for all records "relating to the 'certain dispute' between the Bedford Central Board of Education and Superintendent of Schools Dr. Debra Jackson that resulted in her termination agreement." (Petition, Exhibit C). I am personally familiar with the facts set forth in this Affidavit.

2. In August 2008, Petitioner appealed the denial of the aforementioned FOIL request to the Board of Education. (Petition, Exhibit E). By letter dated August 7, 2008, the Board of Education denied Petitioner's appeal on two grounds: (i) that the records in question constituted intra-agency material, and (ii) that disclosure would constitute an unwarranted invasion of privacy. (Petition, Exhibit F).

3. I respectfully submit that the Board of Education's denial of Petitioner's FOIL appeal was entirely proper and consistent with applicable law. As Petitioner's FOIL request states, a dispute arose in 2007 between the Board of Education and the former Superintendent of the Bedford Central School District, Respondent Debra Jackson ("Dr. Jackson"), involving the performance of her job duties. This dispute resulted in the Board of Education preparing draft disciplinary charges against Dr. Jackson. However, before the Board of Education served Dr. Jackson with the charges and commenced the disciplinary procedures prescribed under N.Y. Education Law § 3020-a, the parties were able to voluntarily settle the dispute. The terms and conditions of the settlement are set forth in the "Settlement Agreement and Mutual Releases" that was executed on or about June 12, 2007 (the "Settlement Agreement"). The Settlement Agreement has always been available to the public, and indeed a copy is annexed to the Verified Petition. (Petition, Exhibit B).

4. The Board of Education interpreted Petitioner's FOIL request as seeking disclosure of the draft disciplinary charges that were the basis of the "certain dispute" between the Board and Dr. Jackson. Because the disciplinary charges were never formally served upon Dr. Jackson and no final determination was ever rendered upon them, the Board of Education concluded that it was not required to disclose the charges under FOIL for the above-mentioned reasons. I submit that the Board of Education's decision was proper and should not be disturbed.

WHEREFORE, I respectfully request that the Verified Petition be denied, and that Respondents be awarded such other and further relief as may be just and proper.

SUSAN ELION WOLLIN

Sworn to before me this
13th day of January, 2009

Notary Public

LYNN E. WEDGES
Notary Public
Westchester County, New York
No. 01WE6016837
Exp. November, 30 2010

Hon. Barbara Zambelli, A.J.S.C.
Index No. 2008-25405

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

In the Matter of an Article 78 Proceeding

CAMILLO M. SANTOMERO,

Petitioner,

-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

AFFIDAVIT IN OPPOSITION TO PETITION

Law Offices of
KEANE & BEANE, P.C.
445 Hamilton Avenue, Suite 1500
White Plains, New York 10601
914-946-4777

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
----------x

In the Matter of an Article 78 Proceeding

CAMILLO M. SANTOMERO,

Petitioner,

-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.

----------x

AFFIDAVIT

Index No. 2008-25405

Assigned To:

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

STATE OF NEW YORK)
) ss.:
COUNTY OF WESTCHESTER)

DEBRA JACKSON, being duly sworn, deposes and says:

1. I am a former Superintendent of the Bedford Central School District and a Respondent in the above-captioned proceeding. I submit this Affidavit in opposition to the Verified Petition, which challenges the denial of Petitioner's request under the N.Y. Freedom of Information Law ("FOIL") for all records "relating to the 'certain dispute' between the Bedford Central Board of Education and Superintendent of Schools Dr. Debra Jackson that resulted in her termination agreement." (Petition, Exhibit C). Except where otherwise stated, I am personally familiar with the facts set forth in this Affidavit.

2. I am advised that in August 2008, Petitioner appealed the denial of the aforementioned FOIL request to the Board of Education. (Petition, Exhibit E). I am further

advised that by letter dated August 7, 2008, the Board of Education denied Petitioner's appeal on two grounds: (i) that the records in question constituted intra-agency material, and (ii) that disclosure would constitute an unwarranted invasion of privacy. (Petition, Exhibit F).

3. I respectfully submit that the Board of Education's denial of Petitioner's FOIL appeal was entirely proper and, to my knowledge, consistent with applicable law.

4. As Petitioner's FOIL request states, a dispute arose in 2007 between myself and the Board of Education. The dispute related to my job performance as Superintendent of the Bedford Central School District and resulted in the Board of Education preparing disciplinary charges against me. Although I was never formally served with disciplinary charges, I was advised at that time that a set of draft charges had been prepared by the Board of Education.

5. Thereafter, the Board of Education and I agreed to voluntarily settle our differences. The terms and conditions of the settlement are set forth in the "Settlement Agreement and Mutual Releases" (the "Settlement Agreement"), a copy of which is annexed to the Petition as Exhibit B.

6. Following execution of the Settlement Agreement, no further action was taken by the Board of Education with respect to the draft disciplinary charges. The Board of Education never commenced any disciplinary proceeding against me pursuant to N.Y. Education Law § 3020-a.

7. As set forth in the Settlement Agreement, it was (and remains) my position that the Board of Education had no grounds to pursue disciplinary charges against me and seek the termination of my services as Superintendent. At that time, I made it clear to the Board of

Education that I would respond to such action by asserting all of my legal rights, including the commencement of litigation against the School District.

8. For the reasons set forth in the accompanying Memorandum of Law, I submit that the Board of Education's denial of Petitioner's FOIL request was proper and should not be disturbed. The public disclosure and dissemination of the draft disciplinary charges prepared by the Board of Education in 2007 would be particularly unfair and inappropriate because I would have no means of effectively responding to them.

WHEREFORE, I respectfully request that the Verified Petition be denied, and that Respondents be awarded such other and further relief as may be just and proper.

DEBRA JACKSON

Sworn to before me this
14th day of January, 2009

Moira Liardi
Notary Public

MOIRA LIARDI
Notary Public - State of New York
No. 01LI6073453
Qualified in Orange County
My Commission Expires Apr. 22, 2010

Hon. Barbara Zambelli, A.J.S.C.
Index No. 2008-25405

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

In the Matter of an Article 78 Proceeding

CAMILLO M. SANTOMERO,

Petitioner,

-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

AFFIDAVIT IN OPPOSITION TO PETITION

Law Offices of
KEANE & BEANE, P.C.
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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Respondents.

Index No. 2008-25405

Assigned To:
Hon. Barbara Zambelli, A.J.S.C.

MEMORANDUM OF LAW
IN OPPOSITION TO PETITION

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SUPREME COURT OF THE STATE OF NEW YORK
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Assigned To:
Hon. Barbara Zambelli, A.J.S.C.

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MEMORANDUM OF LAW
IN OPPOSITION TO PETITION

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 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 (collectively, the "Respondents"), submit this Memorandum of Law in opposition to the Petition in the above-captioned proceeding.

The Petition challenges the Board of Education's denial of Petitioner's appeal under the N.Y. Freedom of Information Law ("FOIL"), N.Y. Public Officer's Law § 84, *et seq.* Petitioner's underlying FOIL request sought the disclosure of all records "relating to the 'certain dispute' between the Bedford Central Board of Education *(sic)* and Superintendent of Schools Dr. Debra Jackson that resulted in her termination agreement." (Petition, Exhibit C).

In August 2008, Petitioner appealed the denial of the aforementioned FOIL request to the Board of Education. (Petition, Exhibit E). By letter dated August 7, 2008, the Board of Education denied Petitioner's appeal on two grounds: (i) that the records in question constituted intra-agency material, and (ii) that disclosure would constitute an unwarranted invasion of privacy. (Petition, Exhibit F). This proceeding followed.

As set forth below, the Board of Education's denial of Petitioner's FOIL request was entirely proper and should be upheld. The "dispute" referenced in Petitioner's FOIL request relates to disciplinary action that the Board of Education contemplated taking against the former superintendent of the Bedford Central School District, Respondent Dr. Debra Jackson ("Dr. Jackson"). To that end, the Board of Education prepared a set of draft disciplinary charges for the purpose of commencing a disciplinary proceeding against Dr. Jackson pursuant to N.Y. Education Law § 3020-a. (Wollin Affid., ¶ 3). However, before those disciplinary charges were finalized and served upon Dr. Jackson, the parties agreed to voluntarily settle their dispute. (Id.). The terms and conditions of the settlement are set forth in the "Settlement Agreement and Mutual Releases" that was executed on or about June 12, 2007 (the "Settlement Agreement"). A copy of the Settlement Agreement was previously made available to Petitioner and is annexed to his Petition as Exhibit B.

Case law and advisory opinions issued by the New York State Committee on Open Government uniformly hold that records relating to non-final and/or unsubstantiated disciplinary charges against a public employee may be withheld from disclosure under FOIL based upon the statute's intra-agency and privacy exemptions. See Public Officer's Law §§ 87(2)(g), 87(2)(b) and 89(2)(b). Accordingly, the Board of Education's denial of Petitioner's FOIL appeal on these grounds was entirely appropriate and should not be disturbed.

II. Argument

POINT I

DRAFT DISCIPLINARY CHARGES ARE EXEMPT FROM FOIL DISCLOSURE

A. Standard of Review

Because FOIL is based on a presumption of access to the records, an agency denying access carries the burden of demonstrating that an exemption applies to the FOIL request in question. See Public Officers Law § 89[4][b]; Matter of Hanig v. State of New York Department of Motor Vehicles, 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 717 (1992). To meet this burden, the agency must show that the requested information "falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access." Matter of Capital Newspapers Division of Hearst Corp. v. Burns, 67 N.Y.2d 562, 566, 505 N.Y.S.2d 576, 578 (1986); see also Bahnken v. New York City Fire Department, 17 A.D.3d 228, 229, 794 N.Y.S.2d 312, 313 (1st Dep't), leave to appeal denied, 6 N.Y.3d 701, 810 N.Y.S.2d 415 (2005) (stating that the "normal article 78 'arbitrary and capricious' standard of review" is inapplicable in proceedings challenging the denial of a FOIL request).

Applying this standard here, the Board of Education's denial of Petitioner's FOIL appeal must be upheld. All pertinent case authorities and advisory opinions[1] squarely hold that records relating to unproven disciplinary charges may be withheld by an agency under FOIL's privacy

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[1] Courts generally defer to advisory opinions issued by the Committee on Open Government regarding the interpretation of FOIL, provided that the opinion is not irrational or arbitrary. See Matter of Miracle Mile Associates v. Yudelson, 68 A.D.2d 176, 181, 417 N.Y.S.2d 142, 146 (4th Dep't 1979); Gannett Co., Inc. v. Rochester City School District, 179 Misc.2d 502, 684 N.Y.S.2d 757 (Sup. Ct. Monroe Cty. 1998), aff'd, 267 A.D.2d 964, 701 N.Y.S.2d 679 (4th Dep't 1999).

and intra-agency exemptions. None of the cases cited in Petitioner's moving papers hold to the contrary.

B. The Draft Disciplinary Charges Constitute Intra-Agency Material And Their Disclosure Would Compromise Protected Privacy Interests

FOIL expressly authorizes an agency to deny access to records that, if disclosed, would constitute an "unwarranted invasion of personal privacy." Public Officers Law § 87(2)(b). FOIL defines an "unwarranted invasion of personal privacy" by providing a non-exclusive list of examples. See Public Officers Law § 89(2)(b)(i)-(vi). Case law and advisory opinions rendered by the Committee on Open Government make it clear that disciplinary charges that were never adjudicated, and never resulted in the imposition of any penalty upon the employee in question, may be withheld under FOIL pursuant to this statutory exemption.

At least two decisions of the Appellate Division, Second Department, are directly on point and controlling authority here. In 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), written disciplinary charges were filed against a school principal pursuant to Education Law § 3020-a. Thereafter, the Board of Education of the Jericho Union Free School District and the school principal entered into a written settlement agreement stipulating that the charges were withdrawn. The Second Department ruled in LaRocca that portions of this settlement agreement were subject to FOIL disclosure, but that "the release of that portion of the agreement which contains references to charges which were denied and/or not admitted by [the employee] or which contain the names of any teachers, would constitute an unwarranted invasion of privacy as defined by Public Officers Law § 87(2)." LaRocca, 220 A.D.2d at 427, 632 N.Y.S.2d 579. In a similar case involving a school district superintendent, the Second Department cited LaRocca and held that

the lower court had "erred in authorizing . . . release of certain pages of the sealed record on appeal filed herein which recite unproven disciplinary charges." Western Suffolk Board of Cooperative Educational Services v. Bay Shore Union, 250 A.D.2d 772, 672 N.Y.S.2d 776, 776 (2d Dep't 1998). In sum, LaRocca and Western Suffolk leave no doubt that unproven disciplinary charges may be withheld from FOIL disclosure.

These decisions are consistent with New York's strong public policy of preserving the right to confidentiality with respect to unproven allegations of professional misconduct. In Johnson Newspaper Corp. v. Melino, 77 N.Y.2d 1, 563 N.Y.S.2d 380 (1990), the Court of Appeals explained that "our statutes and case law reflect a policy of keeping disciplinary proceedings involving licensed professionals confidential until they are finally determined. The policy serves the purpose of safeguarding information that a potential complainant may regard as private or confidential and thereby removes a possible disincentive to the filing of complaints of professional misconduct." Id. at 10, 563 N.Y.S.2d at 385. See also Sinicropi v. County of Nassau, 76 A.D.2d 832, 428 N.Y.S.2d 312 (2d Dep't 1980), lv. to appeal denied, 51 N.Y.2d 704, 432 N.Y.S.2d 1028 (1980) (materials pertaining to disciplinary proceedings against probation officer were exempt from disclosure under FOIL as intra-agency material). Section 3020-a of the Education Law itself evinces a legislative intent to preserve confidentiality of non-final or unproven disciplinary charges. See Education Law § 3020-a(2)(a) [disciplinary charges are voted on in executive session]; § 3020-a(3)(c)(i) [educator has right to a private hearing]; and § 3020-a(4)(b) [charges resulting in acquittal must be expunged from employment record].

The Committee on Open Government has rendered numerous advisory opinions likewise recognizing that "[w]hen allegations or charges of misconduct have not yet been determined or did not result in disciplinary action or a finding of misconduct, the records relating to such

allegations may, according to judicial pronouncement, be withheld, for disclosure would result in an unwarranted invasion of personnel privacy." Advisory Opinion 3978-03, at *2-3. See also Advisory Opinion AO-16764 (August 29, 2007) (making the same observation as to the prevailing law); Advisory Opinion AO-12802, at *2 (July 13, 2001) (same observation); Advisory Opinion AO-10192, at *7 (July 11, 1997) (same observation); Advisory Opinion AO-7826, at *3 (July 27, 1993) (same observation). Copies of these Advisory Opinions are attached to this Memorandum of Law for ease of reference.

Applying this body of authorities here, the Board of Education's denial of Petitioner's FOIL request must be sustained. The draft disciplinary charges withheld by the Board of Education were never formally served upon Dr. Jackson, and no final determination was ever rendered upon them. (Wollin Affid., ¶ 4; Jackson Affid., ¶¶ 4-6). The release of the draft disciplinary charges would therefore "constitute an unwarranted invasion of privacy as defined by Public Officers Law § 87(2)." LaRocca, 220 A.D.2d at 427, 632 N.Y.S.2d 579.

FOIL also allows an agency to withhold records that constitute intra-agency materials. See Public Officers Law § 87(2)(g). The statute 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 purpose of FOIL's intra-agency exemption 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 Herald Company v.

School District of City of Syracuse, 104 Misc.2d 1041, 430 N.Y.S.2d 460 (Sup. Ct. Onondaga Cty. 1980).

This statutory exemption for intra-agency materials likewise authorized the Board of Education to withhold disclosure of the draft disciplinary charges against Dr. Jackson. Because the draft disciplinary charges remained preliminary and non-final in nature, they cannot be regarded as "factual data" or a "final determination." As the Committee on Open Government observed in an analogous situation involving records prepared in connection with a disciplinary investigation, such materials reflect "opinions, advice, conjecture, recommendations and the like," and therefore may be withheld as intra-agency records. Advisory Opinion AO-13978, at *3 (March 31, 2003) (copy attached); see also Advisory Opinion AO-9383, at *4 (March 26, 1996) (copy attached).

The cases cited by Petitioner on pages 7-8 of his Memorandum of Law are not to the contrary. For instance, Petitioner attempts to distinguish Herald Company, supra, based upon his apparent misapprehension that the dispute involving Dr. Jackson did not involve disciplinary charges (notwithstanding that page 1 of the Settlement Agreement bears the caption of an administrative proceeding). That is not the case -- whether Dr. Jackson's draft disciplinary charges must be disclosed under FOIL is, in fact, the issue at bar. Herald Company actually supports the Board of Education's denial of Petitioner's FOIL appeal because the court's decision was premised upon the non-final nature of the disciplinary proceeding in question (the proceeding remained pending and incomplete). See Herald Company, 104 Misc.2d at 1043, 430 N.Y.S.2d 462. Thus, the court held that "at this stage, the name and charges constitute a material part of the unproved allegation before the hearing panel and are pre-determination materials exempt from disclosure under subparagraph (2)(g) of Section 87 of the Public Officers Law." Id.

at 1046, 430 N.Y.S.2d at 464 (emphasis added). The same principle supports the Board of Education's decision to withhold the draft disciplinary charges in the instant matter.

None of the other cases cited by Petitioner on page 8 of his Memorandum of Law involved the accessibility of non-final disciplinary charges. To summarize, New York Times Company, supra, involved materials related to the September 11, 2001 attacks on the World Trade Center. The records in 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), related to a disciplinary matter in which the employee had been found guilty. In Matter of Jasmine G., 35 A.D.3d 604, 828 N.Y.S.2d 107 (2d Dep't 2006), the court ruled that materials relating to a "Probation Assessment Tool" used by the New York City Department of Probation was subject to disclosure because, among other reasons, a testifying witness in a related juvenile delinquency proceeding had relied upon them. Mothers on the Move, Inc. v. Messer, 236 A.D.2d 408, 652 N.Y.S.2d 773 (2d Dep't 1997), involved a form used by a school district interview committee, and Miracle Mile Associates v. Yudelson, 68 A.D.2d 176, 417 N.Y.S.2d 142 (4th Dep't 1979), involved documents generated in connection with the construction of a proposed shopping mall. None of these cases have any applicability to the instant matter.

Respondents stand ready to submit the draft disciplinary charges for *in camera* review should the Court deem this necessary and issue such a directive.

III. Conclusion

For these reasons, the Petition should be denied in its entirety, and Respondents should be awarded such other and further relief as the Court deems just and proper.

Dated: White Plains, New York
January 16, 2009

KEANE & BEANE, P.C.

By: 

Edward J. Phillips
Attorneys for Respondents
445 Hamilton Avenue, Suite 1500
White Plains, New York 10601
(914) 946-4777

EXHIBIT A

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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FOIL-AO-16764

August 29, 2007

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear

I have received a variety of correspondence from you relating to your request to the New Castle Fire District, which you serve as a member of the Board of Commissioners, involving the "conduct and actions of the Fire Chief." Based on a review the materials, I offer the following general remarks.

First, you cited the Personal Privacy Protection Law in your request. That statute pertains only to state agencies and specifically excludes local government from its coverage [see definition of "agency" for purposes of the Personal Privacy Protection Law, §92(1)]. The Freedom of Information Law, however, includes entities of state and local government within its coverage [see definition of "agency", §86 (3)].

Second, the responses to your request indicate that the item of interest may be withheld because it an "intradepartmental communication." In my view, the characterization of a document as "intradepartmental" does not necessarily mean that it may be withheld under the Freedom of Information Law. That statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (j) of the Law.

Although one of the exceptions to rights of access deals with communications between or among government officers or employees, the extent to which those communications may be withheld or,

conversely, must be disclosed, is dependent on their content. Specifically, §87(2)(g) authorizes an agency, such as a fire department, to withhold records that:

> "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; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

The record at issue appears to be a final determination relating to the conduct of the Chief. If that is so, it must be disclosed, except to the extent that a different exception might apply. Pertinent is §87(2)(b), which permits an agency to withhold records or portions of records when disclosure would result in "an unwarranted invasion of personal privacy." Although the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public officers and employees. It is clear that those persons enjoy a lesser degree of privacy than others, for it has been found in various contexts that they are required to be more accountable than others. Further, the courts have found that, as a general rule, records that are relevant to the performance of a such person's official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD d 309 (1977), aff'd 45 NY2d 954 (1978); Sinicropi v. County of Nassau, 76 AD2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS2d 309, 138 AD2d 50 (1988); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk

Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, 67 NY2d 562 (1986)]. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

Several of the decisions cited above, for example, Farrell, Sinicropi, Geneva Printing, Scaccia and Powhida, dealt with situations in which determinations indicating the imposition of some sort of disciplinary action pertaining to particular public employees were found to be available. However, when allegations or charges of misconduct have not yet been determined or did not result in disciplinary action, the records relating to such allegations may, according to case law, be withheld, for disclosure would result in an unwarranted invasion of personal privacy [see e.g., Herald Company v. School District of City of Syracuse, 430 NYS2d 460 (1980)].

In sum, if indeed there is a written determination indicating misconduct or a penalty imposed in the context of the situation to which you referred, I believe that the determination would be accessible to the public under the Freedom of Information Law, with the possibility of the deletion of certain portions. While there is no judicial decision of which I am aware dealing with such a situation, it has been advised that portions of determination indicating misconduct or discipline may be withheld that refer to a medical or mental health condition. For instance, if part of a determination requires that an individual enter a program or seek treatment involving drug or alcohol abuse, I believe that portion of the record may be withheld on the ground that disclosure of so intimate a personal detail would constitute an unwarranted invasion of privacy.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Daniel A. Doran

EXHIBIT B

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

41 State Street, Albany, New York 12231
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July 13, 2001

FOIL-AO-12802

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear

I have received your letter in which you questioned the propriety of a denial of access to records by Delaware County. The request involved "records pertaining to an investigation performed by John Trela with regard to sexual harassment by William R. Moon of female employees." The request was denied in its entirety under §87(2)(g) of the Freedom of Information Law.

From my perspective, rights of access would be dependent on the outcome of the investigation. In this regard, I offer the following comments.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. In my view, two of the grounds for denial would be pertinent to an analysis of rights of access.

Section 87(2)(b) states that an agency may withhold records insofar as disclosure would result in "an unwarranted invasion of personal privacy. Although the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts

have provided substantial direction regarding the privacy of public employees. It is clear that public employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public employees are required to be more accountable than others. Further, the courts have found that, as a general rule, records that are relevant to the performance of a public employee's official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, 67 NY 2d 562 (1986)].

Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

Several of the decisions cited above, for example, Farrell, Sinicropi, Geneva Printing, Scaccia and Powhida, dealt with situations in which determinations indicating the imposition of some sort of disciplinary action pertaining to particular public employees were found to be available.

However, when allegations or charges of misconduct have not yet been determined or did not result in disciplinary action, the records relating to such allegations may, according to case law, be withheld, for disclosure would result in an unwarranted invasion of personal privacy [see e.g., Herald Company v. School District of City of Syracuse, 430 NYS 2d 460 (1980)].

In short, if there was no determination to the effect that an employee engaged in misconduct, I believe that a denial of access to the records based upon considerations of privacy would be

consistent with law. I note, however, that there are several decisions indicating that the terms of settlement agreements reached in lieu of disciplinary proceedings must generally be disclosed [see Geneva Printing, supra; Western Suffolk BOCES v. Bay Shore Union Free School District, Appellate Division, Second Department, NYLJ, May 22, 1998, ___ AD2d ___; Anonymous v. Board of Education for Mexico Central School District, 616 NYS2d 867 (1994); and Paul Smith's College of Arts and Science v. Cuomo, 589 NYS2d 106, 186 AD2d 888 (1992)].

The exception pertaining to the protection of personal privacy could also be invoked in my opinion to shield the identities of alleged victims and perhaps others, such as witnesses.

The other provision of significance is that cited by the County, §87(2)(g), which permits an agency to withhold records that:

"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; or

iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

In sum, if there was a final determination indicating misconduct on the part of a public employee, based on judicial determinations, such a determination

would be accessible. In that event, other aspects of the records consisting of factual information would be available, except to the extent that disclosure would constitute an unwarranted invasion of personal privacy. Again, however, if there was no finding of misconduct, it appears that the request could have been denied to protect personal privacy.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. James E. Eisel, Sr.
Christa Schafer

EXHIBIT C

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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July 11, 1997

Mr. Mark Streb
Assistant to Mayor
City of Troy
Office of the Mayor
City Hall
Monument Square
Troy, NY 12180

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Streb:

As you are aware, I have received your letter of June 10. Please accept my apologies for the delay in response. You have sought an advisory opinion concerning a request made under the Freedom of Information Law for "disciplinary records" involving employees of the City of Troy Department of Public Works "pertaining to trash pick up and removal during the year of 1997." In response to the request, you disclosed the records without the names of those who were disciplined. The materials attached to your letter indicate that three employees of the Department of Public Works "were suspended without pay" for one day "for failure to follow departmental rules concerning trash removal", that the suspensions "were the result of a negotiated settlement between the workers, their union (CSEA) and the city", and that as part of the settlement, "the city agreed not to release the names of the individuals to the public."

You added that you informed the applicant that you requested

an opinion from the Committee, and that upon its receipt, you "will comply."

From my perspective, the identities of the employees who were disciplined must be disclosed. However, I note that while your reliance on the Committee on Open Government is gratifying, opinions rendered by this office are not binding. With regard to the substance of the matter, I offer the following comments.

It is emphasized at the outset that the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. In my view, two of the grounds for denial are relevant in consideration of rights of access to the records in question.

Perhaps most significant to an analysis of the ability to withhold the information sought is §87(2)(b), which permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy".

While the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public officers employees. It is clear that public officers and employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public officers and employees are required to be more accountable than others. With regard to records pertaining to public officers and employees, the courts have found that, as a general rule, records that are relevant to the performance of a their official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, supra; Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

The other ground for denial of relevance, §87(2)(g), states

that an agency may withhold records that:

"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; or

iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld. Insofar as a request involves final agency determinations, I believe that those determinations must be disclosed, again, unless a different ground for denial could be asserted.

In terms of the judicial interpretation of the Freedom of Information Law, in situations in which allegations or charges have resulted in the issuance of a written reprimand, disciplinary action, or findings that public employees have engaged in misconduct, records reflective of those kinds of determinations have been found to be available, including the names of those who are the subjects of disciplinary action [see Powhida v. City of Albany, 147 AD 2d 236 (1989); also Farrell, Geneva Printing, Scaccia and Sinicropi, supra].

With respect to the agreement to withhold the names of the employees, in Geneva Printing, supra, a public employee charged with misconduct and in the process of an arbitration hearing engaged in a settlement agreement with a municipality. One aspect of the settlement was an agreement to the effect that its terms would remain confidential. Notwithstanding the agreement of confidentiality, which apparently was based on an assertion that

"the public interest is benefited by maintaining harmonious relationships between government and its employees", the court found that no ground for denial could justifiably be cited to withhold the agreement. On the contrary, it was determined that:

"the citizen's right to know that public servants are held accountable when they abuse the public trust outweighs any advantage that would accrue to municipalities were they able to negotiate disciplinary matters with its employee with the power to suppress the terms of any settlement".

It was also found that the record indicating the terms of the settlement constituted a final agency determination available under the Law. The decision states that:

"It is the terms of the settlement, not just a notation that a settlement resulted, which comprise the final determination of the matter. The public is entitled to know what penalty, if any, the employee suffered...The instant records are the decision or final determination of the village, albeit arrived at by settlement..."

In another more recent decision involving a settlement agreement between a school district and a teacher, it was held in Anonymous v. Board of Education [616 NYS 2d 867 (1994)] that:

"...it is disingenuous for petitioner to argue that public disclosure is permissible...only where an employee is found guilty of a specific charge. The settlement agreement at issue in the instant case contains the petitioner's express admission of guilt to a number of charges and specifications. This court does not perceive the distinction between a finding of guilt after a hearing and an admission of guilt insofar as protection from disclosure is concerned" (id., 870).

In the context of the situation at issue, I believe that the outcome, the settlement, represents an acceptance of discipline on the part of the employees in question. It is my understanding that disciplinary action can be imposed only after charges have been made, a hearing held and a determination indicating a finding of misconduct has been rendered, i.e., as in a proceeding conducted pursuant to §75 of the Civil Service Law, or, as in this case, when

in lieu of the initiation of charges and a formal disciplinary proceeding, a public employee agrees to some sort of sanction, penalty or punishment. As suggested by the Court in Anonymous, there is no distinction in substance between a finding of guilt after a hearing and an admission of guilt as a means of avoiding such a proceeding.

The same decision also referred to contentions involving privacy as follows:

"Petitioner contends that disclosure of the terms of the settlement at issue in this case would constitute an unwarranted invasion of his privacy prohibited by Public Officers Law § 87(2)(b). Public Officers Law § 89(2)(b) defines an unwarranted invasion of personal privacy as, in pertinent part, '(i) disclosure of employment, medical or credit histories or personal references of applicants for employment.' Petitioner argues that the agreement itself provides that it shall become part of his personnel file and that material in his personnel file is exempt from disclosure..." (id.).

In response to those contentions, the decision stated that:

"This court rejects that conclusion as establishing an exemption from disclosure not created by statute (Public Officers Law § 87[2][a]), and not within the contemplation of the 'employment, medical or credit history' language found under the definition of 'unwarranted invasion of personal privacy' at Public Officers Law § 89(2)(b)(i). In fact, the information sought in the instant case, i.e., the terms of settlement of charges of misconduct lodged against a teacher by the Board of Education, is not information in which petitioner has any reasonable expectation of privacy where the agreement contains the teacher's admission to much of the misconduct charged. The agreement does not contain details of the petitioner's personal history-but it does contain the details of admitted misconduct toward students, as well as the agreed penalty. The information is clearly of significant interest to the public, insofar as it is a final determination and disposition of matters

within the work of the Board of Education and reveals the process of and basis for government decision-making. This is not a case where petitioner is to be protected from possible harm to his professional reputation from unfounded accusations (Johnson Newspaper Corp. v. Melino, 77 N.Y.2d 1, 563 N.Y.S.2d 380, 564 N.E.ed 1046), for this court regards the petitioner's admission to the conduct described in the agreement as the equivalent of founded accusations. As such, the agreement is tantamount to a final agency determination not falling within the privacy exemption of FOIL 'since it was not a disclosure of employment history.'" (id., 871).

Most recently, in LaRocca v. Board of Education of Jericho Union Free School District [632 NYS 2d 576 (1995)], the Appellate Division held that a settlement agreement was available insofar as it included admissions of misconduct. In that case, charges were initiated under §3020-a of the Education Law, but were later "disposed of by negotiation and settled by an Agreement" (id., 577) and withdrawn. The court rejected claims that the record could be characterized as an employment history that could be withheld as an unwarranted invasion of privacy, and found that a confidentiality agreement was invalid. Specifically, it was stated that:

"Having examined the settlement agreement, we find that the entire document does not constitute an 'employment history' as defined by FOIL (see, Matter of Hanig v. State of New York Dept. of Motor Vehicles, supra) and it is therefore presumptively available for public inspection (see, Public Officers Law § 87[2]; Matter of Farbman & Sons v. New York City Health and Hosps. Corp., supra, 62 N.Y.2d 75, 476 N.Y.S.2d 69, 464 N.E.2d 437). Moreover, as a matter of public policy, the Board of Education cannot bargain away the public's right of access to public records (see, Board of Educ., Great Neck Union Free School Dist. v. Areman, 41 N.Y.2d 527, 394 N.Y.S.2d 143, 362 N.E.2d 943)" (id., 578, 579).

In contrast, when allegations or charges of misconduct have not yet been determined or did not result in disciplinary action or a finding of misconduct, the records relating to such allegations may, in my view, be withheld, for disclosure would result in an unwarranted invasion of personal privacy [see e.g., Herald Company

v. School District of City of Syracuse, 430 NYS 2d 460 (1980)]. Similarly, to the extent that charges are dismissed or allegations are found to be without merit, I believe that they may be withheld. As stated earlier, the records in this instance do not involve mere allegations; admissions have been made, and disciplinary action has been or will be taken.

Pertinent is one of the first decisions rendered under the Freedom of Information Law, a case cited earlier, which dealt specifically with reprimands of three police officers. In that holding, the Court concluded that:

"To disclose these will not result in an unwarranted invasion of personal privacy; they are 'relevant to the ordinary work of the municipality'. In effect, they are 'final opinions' and 'final determinations' which the Legislature directed be made available for public inspection. Disclosure, of course, will reveal the names of the police officers who were reprimanded but also let it be known, by implication, which others were not censured" (Farrell, supra, 908-909).

Lastly, the courts have consistently interpreted the Freedom of Information Law in a manner that fosters maximum access. As stated by the Court of Appeals more than a decade ago:

"To be sure, the balance is presumptively struck in favor of disclosure, but in eight specific, narrowly constructed instances where the governmental agency convincingly demonstrates its need, disclosure will not be ordered (Public Officers Law, section 87, subd 2). Thus, the agency does not have carte blanche to withhold any information it pleases. Rather, it is required to articulate particularized and specific justification and, if necessary, submit the requested materials to the court for in camera inspection, to exempt its records from disclosure (see Church of Scientology of N.Y. v. State of New York, 46 NY 2d 906, 908). Only where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld" [Fink v. Lefkowitz, 47 NY 2d 567, 571 (1979)].

In a decision that was cited earlier, the Court of Appeals found

that:

"The Freedom of Information Law expresses this State's strong commitment to open government and public accountability and imposes a broad standard of disclosure upon the State and its agencies (see, Matter of Farbman & Sons v New York City Health and Hosps. Corp., 62 NY 2d 75, 79). The statute, enacted in furtherance of the public's vested and inherent 'right to know', affords all citizens the means to obtain information concerning the day-to-day functioning of State and local government thus providing the electorate with sufficient information 'to make intelligent, informed choices with respect to both the direction and scope of governmental activities' and with an effective tool for exposing waste, negligence and abuse on the part of government officers" (Capital Newspapers v. Burns, supra, 565-566).

For the reasons described above, it is my opinion that the names of the employees must be disclosed.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

EXHIBIT D

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

41 State Street, Albany, New York 12231
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http://www.dos.state.ny.us/coog/coogwww.html

July 27, 1993

Mr. Daniel Petigrow
Anderson, Banks, Curran & Donoghue
Attorneys & Counsellors at Law
61 Smith Avenue - P.O. Box 240
Mount Kisco, N.Y. 10549-0240

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Petigrow:

I have received your letter of July 21 and the materials attached to it.

You have requested an advisory opinion:

"on whether a school district is obligated under the Freedom of Information Law, and to what extent, to release the transcript and complete record, including exhibits, from a proceeding held pursuant to §3020-a of the Education Law wherein: (i) students testified at the hearing and exhibits that were introduced contain numerous references to students' names; and (ii) the determination that was made sustained some, but not all of, the charges preferred against the teacher."

In this regard, I offer the following comments.

First, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all

records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. It is emphasized that the introductory language of §87(2) refers to the authority to withhold "records or portions of thereof" that fall within the scope of the grounds for denial that follow. The phrase quoted in the preceding sentence indicates that a single record or report, for example, might include both accessible and deniable information. In addition, that phrase in my opinion imposes an obligation upon an agency to review requested records in their entirety to determine which portions, if any, may justifiably be withheld and to disclose the remainder.

Second, from my perspective, three of the grounds for denial may be relevant to an analysis of rights of access to records in question.

Section 87(2)(a) pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute, the federal Family Educational Rights and Privacy Act ("FERPA"; 20 U.S.C. §1232g), generally requires that "education records" identifiable to students be kept confidential with respect to the public. The regulations promulgated by the U.S. Department of Education define the phrase "education records" (34 CFR 99.3) to mean:

"those records that are -
(1) Directly related to a student; and
(2) Maintained by an educational agency or institution or by a party acting for the agency or institution."

The regulations exclude from the scope of education records:

"Records relating to an individual who is employed by an educational agency or institution, that -
(A) Are made and maintained in the normal course of business..."

In my opinion, records prepared in conjunction with a proceeding conducted pursuant to §3020-a of the Education Law would not have been made and maintained in the ordinary course of business. If that is so, insofar as the records in question are identifiable to particular students, I believe that they would constitute education records that are specifically exempted from disclosure by means of a federal statute, the FERPA.

Also relevant is §87(2)(b) of the Freedom of Information Law,

which authorizes an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy." Even if the FERPA is inapplicable, I believe that disclosure of portions of the records identifiable to students could be withheld on the basis of §87(2)(b).

Further, although the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public employees. It is clear that public employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public employees are required to be more accountable than others, and the courts have found that, as a general rule, records that are relevant to the performance of a public employee's official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

Several of the decisions cited above, for example, Farrell, Sinicropi, Geneva Printing, Scaccia and Powhida, dealt with situations in which determinations indicating the imposition of some sort of disciplinary action pertaining to particular public employees were found to be available. However, when allegations or charges of misconduct have not yet been determined or did not result in disciplinary action, the records relating to such allegations or unsubstantiated charges may, in my view, be withheld, for disclosure would result in an unwarranted invasion of personal privacy [see e.g., Herald Company v. School District of City of Syracuse, 430 NYS 2d 460 (1980)]. Therefore, to the extent that charges were dismissed or were found to be without merit, I believe that those charges and records relating to them may be withheld.

Lastly, §87(2)(g) states that an agency may withhold records that:

"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; or

iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

Records prepared in conjunction with the proceeding would in my view constitute intra-agency materials. Insofar as they consist of opinions, advice, conjecture, recommendations and the like offered by public officers or employees, I believe that they could be withheld. For instance, opinions offered by public employees who testified could in my view be withheld. However, I believe that factual information would be available, except to the extent, under the circumstances, that disclosure would result in an unwarranted invasion of personal privacy or would otherwise be exempted from disclosure by statute. A final agency determination, insofar as it includes findings of misconduct, would in my opinion be accessible.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

EXHIBIT E

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

41 State Street, Albany, New York 12231
(518) 474-2518
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http://www.dos.state.ny.us/coog/coogwww.html

March 31, 2003

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear

I have received your letter in which you questioned whether certain records must be disclosed pursuant to the Freedom of Information Law.

In your capacity as attorney for the Enlarged City School District of Middletown, you wrote that the request involves "counseling memos" pertaining to the District's Superintendent, Robert Sigler. You added that the President of the Board of Education informed the public that two counseling memos had been prepared last year, but that Mr. Sigler has not been reprimanded, nor is he the subject of any final determination indicating misconduct. Mr. Sigler was arrested in January of this year and charged with sexual abuse of a student, and you expressed the belief that the request involves an effort to ascertain the extent to which information may have been in the Board's possession prior to the arrest. Since the matter is under investigation by the Police Department and the District Attorney, you wrote that District officials are concerned with respect to the effect of release of the memos on their investigation.

In this regard, as I understand the general sense of the phrase, a "counseling memo" does not represent or serve as a determination to the effect that an employee has been found to have engaged in misconduct; rather, a counseling memo is essentially a warning, an admonition, or advice offered to an employee. If my interpretation of the nature of the records at issue is accurate, based on the ensuing analysis, the counseling memos may be withheld.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through

(i) of the Law.

I note that there is nothing in the Freedom of Information Law that deals specifically with personnel records or personnel files. Further, the nature and content of so-called personnel files may differ from one agency to another, and from one employee to another. In any case, neither the characterization of documents as "personnel records" nor their placement in personnel files would necessarily render those documents "confidential" or deniable under the Freedom of Information Law (see Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980). On the contrary, the contents of those documents serve as the relevant factors in determining the extent to which they are available or deniable under the Freedom of Information Law.

Perhaps of greatest significance is §87(2)(b), which permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy". In addition, §89(2)(b) provides a series of examples of unwarranted invasions of personal privacy.

While the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public officers employees. It is clear that public officers and employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that they are required to be more accountable than others. With regard to records pertaining to public officers and employees, the courts have found that, in general, records that are relevant to the performance of a their official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, supra; Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

Several of the decisions cited above, for example, Farrell, Sinicropi, Geneva Printing, Scaccia and Powhida, dealt with situations in which determinations indicating the imposition of some sort of disciplinary action pertaining to particular public employees were found to be available. When allegations or charges of misconduct have not yet

been determined or did not result in disciplinary action or a finding of misconduct, the records relating to such allegations may, according to judicial pronouncement, be withheld, for disclosure would result in an unwarranted invasion of personal privacy [see e.g., Herald Company v. School District of City of Syracuse, 430 NYS 2d 460 (1980)]. Similarly, to the extent that charges are dismissed or allegations are found to be without merit, I believe that they may be withheld.

The other ground for denial of significance, §87(2)(g), states that an agency may withhold records that:

"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; or

iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter- agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

Counseling memos in my view constitute intra-agency materials. Insofar as they consist of opinions, advice, conjecture, recommendations and the like, I believe that they may be withheld. However, factual information would be available, except to the extent, under the circumstances, that disclosure would result in an unwarranted invasion of personal privacy.

In sum, if indeed a counseling memo is essentially a warning rather than a conclusion reflective of a finding of misconduct, it would not constitute a final agency determination, and I believe that it could be withheld under §87(2)(g).

With respect to the impact on the investigation by law enforcement authorities, I do not believe that the exception typically relevant in that context would be applicable. Section 87(2)(e) permits an agency to withhold records "compiled for law enforcement purposes" when, for example, disclosure would interfere with an investigation. From my

perspective, the records in question, although perhaps pertinent to an investigation, would not have been "compiled for law enforcement purposes."

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

EXHIBIT F

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

41 State Street, Albany, New York 12231
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March 26, 1996

Ms. Betsy Sullivan
29 Route 416
Montgomery, NY 12549

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence, unless otherwise indicated.

Dear Ms. Sullivan:

I have received your letter of March 7, as well as a variety of related correspondence.

In brief, you and others have alleged that an employee of the New York State Department of Transportation has engaged in misconduct, and you wrote that Department officials provided "assurances...that appropriate action would be taken." Although you were apparently informed that the subject of your allegations was issued a "counseling memo", you indicated that you have attempted since January, without success, to obtain the results of the Department's investigation and answers to your inquiries. You have asked for assistance in obtaining the information sought.

In this regard, I offer the following comments.

First, it is noted at the outset that the title of the Freedom of Information Law may be somewhat misleading, for it is not a vehicle that requires agencies to provide information per se; rather, it requires agencies to disclose records to the extent provided by law. As such, while agency officials may in many circumstances choose to answer questions or to provide information by responding to questions, those steps would represent actions beyond the scope of the requirements of

the Freedom of Information Law. Moreover, the Freedom of Information pertains to existing records. Section 89(3) of that statute states in part that an agency need not create a record in response to a request. In short, Department officials in my view would not be obliged to provide the information sought by answering questions or preparing new records in an effort to be responsive.

Second, as I understand the matter, the "result" of the Department's investigation was the issuance of a counseling memo. As that phrase is commonly used, a counseling memo does not represent a determination to the effect that an employee has been found to have engaged in misconduct; rather, a counseling memo is essentially a warning, an admonition, or advice offered to an employee. If my interpretation of the matter is accurate, based on the ensuing analysis, the counseling memo and much of the documentation leading to its preparation could justifiably be withheld.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

There is nothing in the Freedom of Information Law that deals specifically with personnel records or personnel files. Further, the nature and content of so-called personnel files may differ from one agency to another, and from one employee to another. In any case, neither the characterization of documents as "personnel records" nor their placement in personnel files would necessarily render those documents "confidential" or deniable under the Freedom of Information Law (see Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980). On the contrary, the contents of those documents serve as the relevant factors in determining the extent to which they are available or deniable under the Freedom of Information Law.

Perhaps of greatest significance is §87(2)(b), which permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy". In addition, §89(2)(b) provides a series of examples of unwarranted invasions of personal privacy.

While the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public officers employees. It is clear that public officers and employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that they are required to be more accountable than others. With regard to records pertaining to public officers and employees, the courts have found that,

in general, records that are relevant to the performance of a their official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, supra; Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977]. One of the decisions cited above, Capital Newspapers, involved an element of your request that was granted. That case dealt with a request for records indicating the days and dates of sick leave claimed by a particular employee, and it was held that those records were relevant to the performance of the employee's duties and, therefore, were accessible. On the basis of that decision, it is clear that time and attendance records must be disclosed.

The other ground for denial of significance, §87(2)(g), states that an agency may withhold records that:

"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; or

iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

Records prepared in conjunction with an investigation would in my

view constitute intra-agency materials. Insofar as they consist of opinions, advice, conjecture, recommendations and the like, I believe that they could be withheld. For instance, recommendations concerning the course of an investigation or opinions offered by witnesses or employees interviewed could be in my opinion withheld. However, factual information would in my view be available, except to the extent, under the circumstances, that disclosure would result in an unwarranted invasion of personal privacy.

Several of the decisions cited above, for example, Farrell, Sinicropi, Geneva Printing, Scaccia and Powhida, dealt with situations in which determinations indicating the imposition of some sort of disciplinary action pertaining to particular public employees were found to be available. However, when allegations or charges of misconduct have not yet been determined or did not result in disciplinary action or a finding of misconduct, the records relating to such allegations may, in my view, be withheld, for disclosure would result in an unwarranted invasion of personal privacy [see e.g., Herald Company v. School District of City of Syracuse, 430 NYS 2d 460 (1980)]. Similarly, to the extent that charges are dismissed or allegations are found to be without merit, I believe that they may be withheld.

Further, if indeed a counseling memo is essentially a warning rather than a conclusion reflective of a finding of misconduct, it would not constitute a final agency determination, and I believe that it could be withheld under §87(2)(g).

I hope that the foregoing serves to enhance your understanding of the Freedom of Information Law and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: William T. Bonacum
John B. Dearstyne
Peter Shawhan

COUNTY COURT OF THE COUNTY OF WESTCHESTER
RICHARD J. DARONCO
WESTCHESTER COUNTY COURTHOUSE
111 DR. MARTIN LUTHER KING, JR. BOULEVARD
WHITE PLAINS, NEW YORK 10601

FAX. (914) 995-8653

Chambers of
Barbara G. Zambelli
Judge

April 30, 2009

Via Fax & US Mail

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Re: Matter of Santomero v. Bd. Of Ed. Of Bedford Cent. Sch. Dist.
Index No.: 08 / 25405

Dear Counselors:

As per the conference in this matter held on April 28, 2009, this letter confirms that, in light of the Court's prior decision in this matter, counsel for respondents is to produce additional documents identified as responsive to the petitioner's FOIL request by June 16, 2009 with any necessary redaction(s) for asserted FOIL exemptions. Respondents' counsel is further directed to provide certification from the individual Board of Education members that, other than the draft disciplinary charges which were the subject of this Court's prior ruling and the documents to be disclosed by June 16, 2009, no other documents responsive to the petitioner's request exist. While the Court requests a courtesy copy of the cover letter that will accompany the documents, it does not require its own set of the redacted documents. If there any remaining outstanding issues after this production, the parties are directed to jointly submit a briefing schedule to the Court to address the remaining issues no later than July 16, 2009.

As to petitioner's concern about the procedural posture of the case as a result of the language used in the Court's prior decision, the Court does not deem it necessary to amend the petition or its prior decision. To the extent that any party disagrees with the decision, appropriate procedural vehicles exist in the form of an appeal or a motion pursuant to CPLR §2221.

So Ordered:

HON. BARBARA G. ZAMBELLI
Acting Supreme Court Justice

AFFIRMATION OF SERVICE

ROBERT A. STERNBACH, an attorney duly admitted to practice in the courts of New York, affirms under the penalties of perjury as follows:

That deponent is a principal of the Law Office of Robert A. Sternbach, is over 18 years of age, is not a party to the within action, and resides in the State of New York. And that, on May 7, 2009, he served the within

NOTICE OF MOTION FOR RENEWAL AND/OR REARGUMENT with supporting Affirmation and Exhibits on

KEANE & BEANE, P.C.
Attorneys for Respondents
445 Hamilton Avenue
White Plains, New York 10601
(914) 946-4777

the foregoing address having been designated for such purpose by the preceding papers in this action, by depositing a true and correct copy of the same, enclosed in properly addressed post-paid wrapper, in an official depository maintained and exclusively controlled by the United States Post Office in New York City.

Dated: New York, New York
May 7, 2009

ROBERT A. STERNBACH

Index No. 2008-25405

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

In the Matter of an Article 78 Proceeding

CAMILLO M. SANTOMERO,

Petitioner,

- 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.

NOTICE OF MOTION FOR RENEWAL AND/OR REARGUMENT

Law Office of ROBERT A. STERNBACH
Attorneys for Petitioner
274 Madison Avenue
Suite 1303
New York, New York 10016
(212) 661-4040

CERTIFICATION

I hereby certify pursuant to 22 NYCRR § 130-1.1-a(b) that, to the best of my knowledge, information and belief, formed after an inquiry reasonable under the circumstances, the presentation of the papers contained herein, or the contentions therein, are not frivolous as defined in 22 NYCRR § 130-1.1-(c).

Robert A. Sternbach