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

REPLY AFFIRMATION IN FURTHER 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 Reply Affirmation in further support of Petitioner's motion, pursuant to CPLR 2221, for Reargument and/or Renewal, and in response to Respondents' Memorandum of Law In Opposition To Petitioner's Motion To Reargue.[1]

Preliminary Statement

2. In their Memorandum, Respondents contend that "Petitioner's motion should be

[1] References to Respondents' Memorandum will be in the form "Memo Opp." followed by a page number.

denied because the Court did not misapprehend or overlook any matters of fact or law in rendering the Decision and Order, and no new facts have been presented that would justify changing the rulings therein." Mem. Opp. at p. 5. In raising this argument, Respondents completely ignore the facts of this case, as well as the Court's prior rulings.

3. This is not the usual case where a party has issued a FOIL request to an agency, the agency has considered each document requested, acknowledged its possession of (or failure to possess) such documents, denied the document request, and then the requesting party has brought suit contending that the denial was inappropriate. Instead, Respondents here failed to even acknowledge the existence of hundreds of responsive documents until *after* Petitioner brought suit.

4. The Court has already ruled that Petitioner's FOIL request encompassed much more than a demand for the "draft disciplinary charges" which Respondents initially identified, and, as such, has ruled that Respondents' purported "interpretation" of the request to encompass only one such document was unreasonable, at best. Indeed, no good faith interpretation of Petitioner's request could warrant Respondents' arbitrary and self-serving "interpretation."

5. Respondents have now admitted that they are in possession of hundreds of documents responsive to Petitioner's FOIL request, the existence of which they failed to acknowledge until after Petitioner filed the Petition and after the Court ordered them to turn such documents over. Further, to date, Respondents have not provided any description of the contents of the alleged "draft disciplinary charges" they withheld.

6. Under these circumstances, the proper outcome is plain. This matter is far from concluded. Given Respondents' failure to describe the contents of the "draft disciplinary charges," and especially given Respondents' prior failures in this matter, the Court must examine those charges *in camera* before concluding definitively that no portion of those charges should be

turned over to Petitioner. Likewise, the Petition cannot properly be deemed "disposed of" until after Respondents have turned over the hundreds of responsive documents they have newly identified and all issues regarding those documents have been settled.[2] Only after all outstanding issues have been resolved will the Court be in a position to rule whether or not Petitioner has "substantially prevailed" and is entitled to recover his attorney's fees.

Argument

A. Certification

7. Respondents contend they had no obligation to provide any type of certification, pursuant to POL §89(3)(a) or otherwise, because "the Board of Education interpreted Petitioner's FOIL request as seeking disclosure of a document that it did possess, namely draft disciplinary charges against Dr. Jackson." Mem. Opp. at p.2. However, this Court ruled that Petitioner's FOIL 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." Decision at p. 6. Indeed, no reasonable reading of Petitioner's FOIL request could merit a contrary conclusion.

8. The fast and loose nature of Respondents' conduct is belied by the fact that they have *never* set forth any explanation as to why they allegedly interpreted Petitioner's indisputably broad FOIL request so narrowly. Instead, Respondents' counsel baldly asserts that such alleged interpretation was "reasonable," Mem. Opp. at 5, a conclusion which is plainly contrary to the

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[2] Respondents' counsel's unverified and unverifiable characterization of these as-yet unproduced documents as "... consist[ing] predominantly of intra-agency emails among board members that were not expressly encompassed within Petitioner's initial FOIL demand" (Memo Opp. at p. 4) should be disregarded. Moreover, counsel's statement that these documents "were not expressly encompassed within Petitioner's initial FOIL demand" has been ruled by the Court to be inaccurate.

language of the request, as this Court ruled.[3]

9. Following Respondents' reasoning through to its logical conclusion, any agency is free to arbitrarily "interpret" a FOIL request as only encompassing documents that the agency believes are exempt from disclosure. Patently, that position — the one Respondents seek to adopt here — is preposterous and contrary to law. *See, e.g., M. Farbman & Sons, Inc. v. New York City Health and Hospitals Corp.*, 62 N.Y.2d 75, 476 N.Y.S.2d 69, 464 N.E.2d 437 (1984) ("Where an exemption is claimed, the burden lies with the agency to articulate particularized and specific justification, and to establish that "the material requested falls squarely within the ambit of [the] statutory exemptions") (internal quotation marks omitted) (alteration in original)). Plainly, the only reason Respondents failed to provide a certification pursuant to POL §89(3)(a) in their initial response to the Petition, *as the Court has already held was required*, Decision at p. 6, is clear: Respondents knew they were in possession of hundreds of documents, in addition to the draft disciplinary charges, that are responsive to Petitioner's FOIL request, but hoped Petitioner and the Court would overlook their failure to certify that no such documents existed.[4]

B. Attorney's Fees

10. According to Respondents, the Court's denial of Petitioner's attorney's fees was appropriate because the Board "clearly had a 'reasonable basis in law' for withholding the draft

[3] Respondents are incorrect that at the time they interposed their Answer to the Petition, "they carefully explained (through the Affidavit of Board President, Susan Elion Wollin) how they interpreted Petitioner's FOIL request." Mem. Opp at p. 7. The Wollin Affidavit states, without explanation, that the Board "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." The facts belie Respondents' contention that they have sought to "preserve[] the accuracy and integrity of the administrative record for judicial review"; *id*; to the contrary, Respondents sought to obfuscate the record to suit their needs.

[4] Respondents unpersuasively aver that "Petitioner's contentions regarding certification and the Procedural disposition of the Petition are actually the same argument." Memo Opp. at p. 2 n.1. Patently, the recent revelation that Respondents are in possession of hundreds of responsive documents displays that the Court's deeming the Petition as "disposed of" by its Decision was premature, regardless of whether any certification was required of Respondents under applicable law.

disciplinary charges" and because "the additional documents that the Board of Education has now identified pursuant to the Decision and Order have not been withheld, but in fact will be produced to Petitioner in redacted form." Mem. Opp. at p. 3. This argument fails on multiple levels.

11. At the outset, Respondents' revelation that they possess and are now going to produce hundreds of additional responsive documents does not aid their cause. This is not the usual case where an agency has denied access to documents in response to a FOIL request and the parties have then become embroiled in a FOIL action regarding whether those documents should have been released. Instead, here, if Petitioner did not bring this action, Respondents not only would not have produced these new documents, they would have never even have acknowledged their existence. Contrary to Respondents' misguided perception, "the volume of responsive documents now identified by the Board" does not "reflect[] the diligent and conscientious nature of its expanded search." *See* Mem. Opp. at p. 4. Instead, it belies Respondents' bad faith in not identifying these documents either in response to Petitioner's FOIL request or in their opposition to the Petition. Respondents' dubious position that their professed intention to comply with the Court's order is laudable and insulates them from an award of counsel fees against them must not be countenanced.

12. Second, as Petitioner has already detailed, Respondents' bare description of the single responsive document they initially identified merely as "draft disciplinary charges" cannot shield that document's disclosure. To the extent that document contains, for example, factual data, it must be provided, albeit possibly in redacted form. *See Gould v. New York City Police Dept.*, 89 N.Y.2d 267, 275-77, 653 N.Y.S.2d 54, 57-59, 675 N.E.2d 808 (1996) (blanket exemptions for particular types of documents are inimical to FOIL's policy of open government; factual data "simply means objective information, in contrast to opinions, ideas, or advice

exchanged as part of the consultative or deliberative process of government decision making" and must be disclosed); *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) (Respondent forced to turn over information requested under FOIL in redacted form); *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) (same); *Obiajulu v. City of Rochester*, 213 A.D.2d 1055, 625 N.Y.S.2d 779 (4th Dept. 1995) (trial court's denial *in toto* of Petitioner's FOIL request for documents held erroneous, since Petitioner was entitled to work performance evaluations and appraisals of law enforcement personnel with identifying details redacted; although work performance evaluations and appraisals constituted "employment histories" within meaning of section of FOIL defining unwarranted invasion of personal privacy, disclosure did not constitute invasion of personal privacy when identifying details were deleted; matter remitted to trial court for *in camera* inspection and redaction of records at issue).

C. ***In Camera* Review**

13. There is no way of knowing what information is encompassed within the "draft disciplinary charges" as Respondents have never disclosed anything about the document, other than the label they have placed upon it. Moreover, because Respondents' admission that they previously withheld hundreds of documents the Court has ruled responsive to Petitioner's FOIL request calls into question Respondents' good faith, *in camera* judicial scrutiny of the "draft disciplinary charges" is warranted even if Respondents' bare label could be said to constitute a "description." Under these circumstances, a ruling that no portion of the document need be disclosed is premature. *In camera* inspection should be ordered.[5] *See, e.g., M. Farbman & Sons,*

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[5] Respondents' suggestion, at page 9 of the Mem. Opp., that *Donovan v. F.B.I.*, 806 F.2d 55 (2d Cir. 1986), cited in Petitioner's moving Affirmation, has no relevance because it is a Federal case is without merit. *See, e.g.,*

Inc. v. New York City Health and Hospitals Corp., 62 N.Y.2d 75, 83, 476 N.Y.S.2d 69, 73, 464 N.E.2d 437 (1984) ("Respondents have not demonstrated as a matter of law that all of the records requested by appellant are in fact inter-agency or intra-agency materials or, even if so, that they are not statistical or factual tabulations, or instructions to staff that affect the public, or final agency policy or determinations. The proper procedure for reaching a determination is the *in camera* inspection ordered by Special Term"); *DJL Restaurant Corp. v. Department of Bldgs. of City of New York*, 273 A.D.2d 167, 168-69, 710 N.Y.S.2d 564, 566 (1st Dept. 2000) (burden rests on agency to demonstrate applicability of exemption which requires a particularized and specific justification for denying access to demanded documents that is more than a "blanket" exemption; affidavits merely repeating statutory phrasing of an exemption are insufficient to establish the requirement of particularity; when agency claims a FOIL exemption that cannot be evaluated on the basis of the documentation submitted on the motion, *in camera* inspection is an appropriate, and likely necessary, method for the court to evaluate whether the exemption is applicable) (citing cases).[6]

Encore College Bookstores, Inc. v. Auxiliary Service Corp. of State University of New York at Farmingdale, 87 N.Y.2d 410, 663 N.E.2d 302, 639 N.Y.S.2d 990 (1995) (looking to federal cases regarding the FOIA, upon which FOIL was patterned, in interpreting provisions of FOIL); *Fink v. Lefkowitz*, 47 N.Y.2d 567, 393 N.E.2d 463, 419 N.Y.S.2d 467 (1979) (same). Additionally, Respondents' citation to *Associated Press v. U.S. Dept. of Justice*, 549 F.3d 62, 67 (2d Cir. 2008) for the proposition that in camera review is (a) "appropriate only where the government seeks to exempt entire documents but provides only vague or sweeping claims as to why those documents should be withheld" and (b) necessary "[o]nly if the government's affidavits make it effectively impossible for the court to conduct de novo review of the applicability of FOIA exemptions," is misguided. *See* Mem. Off. at p. 10. This decision supports *Petitioner's* position. Here, Respondents seek to exempt an entire document without providing the Court with any information about the contents of that document, leaving the Court unable to evaluate for itself whether or not the withholding of that document is appropriate. Under the principles enunciated in the *Associated Press* decision as acknowledged by Respondents themselves, therefore, *in camera* review is warranted here. *See also* Mem. Opp. at p. 10 (citing *Donovan, supra*, for proposition that "in camera review will be unnecessary where an agency adequately describes *the nature and contents* of the requested documents) (emphasis added).

[6] Moreover, as discussed below, because renewal, not only reargument, is warranted here, Respondents' citation *to Simpson v. Loehmann*, 21 N.Y.2d 990 (1968) is inapt, even if reargument were inappropriate.

D. Renewal

14. Here, even if Petitioner's motion were not warranted on the ground of reargument, it is warranted on a second ground — renewal — which Respondents entirely ignore.[7]

15. Renewal is warranted in light of Respondents' admission, after submission of their Answer and Affidavits in opposition to the Petition, that hundreds of documents responsive to Petitioner's FOIL request exist, in addition to the "draft disciplinary charges." Here, it is self-evident that the "new facts" Petitioner offers in support of the Renewal branch of his motion — namely, the existence of these documents — could not have been offered by Petitioner in connection with the original Petition, because their existence had never been acknowledged by Respondents and Respondents were exclusively in possession of the knowledge that they existed.

16. The existence of these documents, which clearly were not known to, and could not have been known to, Petitioner when the Petition was initially argued underscores Petitioner's contention that all matters pertinent to the Petition were not "disposed of" by the Court's Decision.[8] Additionally, Respondents' initial failure to identify hundreds of responsive documents and lackluster excuse for doing so, raises an issue of bad faith shown by Respondents in relation to this matter and entitles Petitioner to raise additional questions even if those questions were not raised in the Petition.

Conclusion

17. In sum, this matter is far from concluded. The Court should wait until all issues regarding the documents here at issue have been finally resolved before a decision on the

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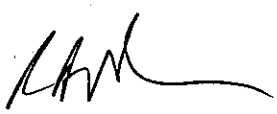
[7] CPLR 221 provides, in relevant part, as follows: " ... (e) A motion for leave to renew: ... 2. shall be based upon new facts not offered on the prior motion that would change the prior determination ...; and 3. shall contain reasonable justification for the failure to present such facts on the prior motion."

[8] Respondents' contention that "no new facts" have been presented" in the current motion is simply, and obviously, untrue. Mem. Opp. at p. 5.

disposition of the Petition as well as on Petitioner's entitlement to his attorney's fees is handed down.

18. For the foregoing reasons, as well as for the reasons stated in Petitioner's moving Affirmation, 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
June 11, 2009



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