

PRELIMINARY STATEMENT

Petitioner Camillo M. Santomero (“Petitioner”) respectfully submits this Memorandum of Law in support of his motion, pursuant to this Court’s Order dated April 30, 2009 (the “April 2009 Order”)¹ and Decision and Order filed March 31, 2009 (the “March 2009 Order”)², for an Order (i) directing Respondents to disclose and produce without any redactions all additional records (the “Additional Records”)³ produced by Respondents in redacted form on or about June 23, 2009⁴; (ii) in the alternative, directing Respondents to deliver the Additional Records to the Court without any redactions for *in camera* inspection to determine to what extent, if at all, the Additional Documents are exempt from disclosure under Public Officers Law § 84, et seq. (“FOIL”); (iii) awarding Petitioner his attorneys’ fees in connection with this proceeding; and (iv) awarding Petitioner such other and further relief as the Court deems just and proper.

As discussed in more detail below, the 519 pages of Additional Records were extremely heavily redacted based solely on Respondents’ counsel’s bald assertion that he did so (apparently without consulting Respondents) to remove information that he considered “exempt intra-agency material,” “information that, if disclosed would constitute an unwarranted invasion of personal privacy,” “privileged attorney-client communications,” and “irrelevant information.” Supplemental Affirmation of Edward J. Philips, dated June 23, 2009 (“Philips Affirmation”), ¶ 3.⁵

These bald assertions do not meet Respondents’ heavy burden to prove that any information is exempt. Moreover, many documents are redacted in their entirety, making the

¹ A copy of the April 2009 Order is annexed to the accompanying Affirmation of Robert A. Sternbach, dated August 19, 2009 (“Sternbach Affirmation”), as Exhibit “C.”

² A copy of the March 2009 Order is annexed to the Sternbach Affirmation as Exhibit “D.”

³ References to the Additional Records in this Memorandum will be by Bates Number preceded by an asterisk, e.g., *1.

⁴ A full set of the Additional Records, as redacted, is annexed to the Sternbach Affirmation as Exhibit “A.”

⁵ A copy of the Philips Affirmation is annexed to the Sternbach Affirmation as Exhibit “B.”

applicability of any exemption impossible to determine; some documents were communicated by or to third-parties, thus destroying any exemption; and other documents contain non-exempt facts, factual observations or final agency decisions, making the intra-agency exemption inapplicable.

Hence, the Additional Records should be produced in their entirety; or, in the alternative, the Court should conduct an *in camera* inspection to determine to what extent, if at all, the claimed exemptions are valid.

Finally, even without further disclosure, the Additional Records shed light on the nature of and reasons for the “dispute” which eventually led to the Board’s controversial and expensive settlement with Dr. Jackson and have thus already resulted in an important public benefit. Respondents have never explained why they failed to produce these records in response to Petitioner’s initial FOIL request, but compelled Petitioner to obtain them through this litigation. The Court should therefore award Petitioner his legal fees in this proceeding.

PROCEDURAL HISTORY

Petitioner commenced this proceeding under FOIL after Respondents denied Petitioner’s request for “any and all records relating to the ‘certain dispute’” between the Board of Education of the Bedford Central School District (“Board”) and Superintendent of Schools Dr. Debra Jackson (“Jackson”) that resulted in Jackson’s resignation and a one-million dollar⁶ payout to her, no strings attached. In their response to the Petition, Respondents claimed — without explanation — that they “interpreted” Petitioner’s FOIL request as referring to only one record — certain self-described “draft disciplinary charges” against Dr. Jackson — but failed to certify that this was the only record responsive to Petitioner’s request.

⁶ \$650,000 in immediate cash and lifetime health insurance benefits for Jackson and her family, which at current rates would be worth considerably in excess of \$350,000.

In its March 2009 Order, this Court ruled that Respondents “properly denied petitioner’s FOIL request as to the draft disciplinary charges”⁷ and denied Petitioner request for attorney’s fees,⁸ but ordered Respondents to certify that the “draft disciplinary charges” were the only records responsive to Petitioner’s request that were being withheld.⁹

In response to this latter directive, Respondents belatedly revealed that additional responsive documents did indeed exist. Consequently, the Court issued the April 2009 Order, which directed Respondents to produce the additional documents “with any necessary redaction(s) for asserted FOIL exemptions,” together with certifications from individual Board members that, other than the draft disciplinary charges and the additional documents to be produced, no other documents responsive to Petitioner’s FOIL request exist. Finally, the Court ordered the parties to submit a joint briefing schedule to address any issues remaining after Respondents’ additional production.¹⁰

In response to the Court’s April 2009 Order, Respondents produced 519 pages of Additional Records, to be discussed in more detail below, accompanied by the Philips Affirmation described above.

⁷ Decision, p. 7-8.

⁸ Decision, p. 8, fn. 2.

⁹ Decision, p. 6. Petitioner has submitted a motion for reargument which, inter alia, seeks reargument of those portions of the March 2009 Order which ruled that the draft disciplinary charges were exempt without subjecting them to in camera inspection and denied Petitioner’s request for attorney’s fees.

¹⁰ The parties submitted a joint briefing schedule on July 24, 2009. The instant motion is timely made in accordance with that schedule.

POINT I

ALL ADDITIONAL RECORDS SHOULD BE PRODUCED IN UNREDACTED FORM; IN THE ALTERNATIVE, THE COURT SHOULD DIRECT THAT THEY BE DELIVERED FOR IN CAMERA INSPECTION

A. All Additional Records Should Be Produced To Petitioner Unredacted

As the Court recognized in the March 2009 Order, “FOIL is to be liberally construed and its exemptions narrowly interpreted so that the public is granted maximum access to the records of government.” *Mothers on the Move, Inc.* v. Messer, 236 A.D.2d 408, 409-10 (2nd Dep’t 1997) (internal citations omitted). “The burden rests on the agency to demonstrate the applicability of an exemption, which requires a particularized and specific justification for denying access to demanded documents that is more than a ‘blanket’ exemption.” *DJL Restaurant Corp.* v. *Department of Bldgs. of City of New York*, 273 A.D.2d 167, 168 (1st Dept. 2000). *See also Polansky v. Regan*, 81 A.D.2d 102, 104 (3d Dept 1981) (“Mere conclusory allegations, without factual support, that the requested materials fall within an exemption are insufficient to sustain an agency’s burden of proof”).

Here, 519 pages of Additional Records have been subjected to extraordinarily heavy redaction,¹¹ based solely on a one-sentence averment by Respondents’ attorney that he considered the excised portions exempt. This conclusory statement cannot possibly suffice to meet the Board’s burden of proof as to even a single document. Moreover, Respondents do not even state which exemption among the three they claim applies to each of the Additional Records. Hence, the Court should direct Respondents to produce to Petitioner all Additional Records in their entirety, unredacted.

¹¹ Numerous records, of which the following list represents only a small sample, are redacted in their entirety. *See, e.g.*, *16, 18, 19, 65, 70, 83, 90, 161, 163, 164-5, 166, 170, 173, 184-5, 198, 205-9, 211-13, 224, 238-9, 267, 293, 297, 370, 415-17, 420, 432-7, 447, 449-50, 465, 501, 505, 519.

B. Records Containing Third-Party Communications Must Be Produced Unredacted

In addition, the unredacted portions of certain records, including *63, *79, *156, *302, *334, *444-5, *467, indicate that they were sent to non-agency third parties, or contain or are based on communications with non-agency third-parties. Therefore, they should be produced in their entirety.

“[D]ocumentary communications are not confidential if copies thereof are sent to third parties.” *Morgan v. New York State Dept. of Environmental Conservation*, 9 A.D.3d 586, 587-8 (3 Dept. 2004). *See also Judicial Watch, Inc. v. Department of Army*, 435 F.Supp.2d 81 (D.D.C. 2006) (documents made available to individuals not associated with agency cannot be inter-agency or intra-agency communication). Furthermore, records are not exempt to the extent they contain “information obtained from or communicated to third parties.” *Morgan v. New York State Dept. of Environmental Conservation, supra*, 9 A.D.3d at 588.

Records *156 and *467 were sent from the email address “Temujin @aol.com,” which, upon information and belief, belongs to Mark Slivka, who was not on the Board at the time these emails were sent. Therefore, they must be produced.

Record *302 describes a telephone conversation with Brian Davidson, who, upon information and belief, is a third party non-agency member. Since this is “information obtained from or communicated to third parties,” it is not exempt and should be produced unredacted.

Similarly, Record *334 are emails to/from Paul Alcorn, a third party non-agency member, and should be produced unredacted.

Records *444-5 indicated they were sent to Janice Goldklang, who, upon information and belief, is a third party non-agency member. These records should therefore be produced unredacted.

Records *63 and *79 indicate that they were sent to teachers within the Bedford school system who are not members of the Board or executives of the district. It is Petitioner's position that not every teacher within the Bedford school system should be considered a member of the agency so as to be afforded the intra-agency exemption. Hence, these records should be produced unredacted.

C. In The Alternative, The Additional Records Should Be Delivered To The Court For In Camera Inspection

If the Court declines to order that all Additional Records be produced to Petitioner, based on Respondents' failure to demonstrate that any exemption applies to any of the records, the Court should nevertheless direct Respondents to deliver the Additional Records to the Court, without any redactions, for *in camera* inspection to determine to what extent, if at all, the claimed exemptions apply.

As the Court stated in *Zuckerman v. New York State Bd. of Parole*, 53 A.D.2d 405, 408 (3rd Dep't 1976), "[w]hile an agency should be accorded an opportunity to prove by means other than an In camera inspection that they are entitled to an exemption, if they fail to provide such detailed information an In camera inspection of the documents sought should be performed."

See also Polansky v. Regan, 81 A.D.2d 102, 104 (3d Dept 1981) (where agency failed to show that all portions of withheld materials were exempt, even if some might be, in camera inspection required); *see also M. Farbman & Sons, Inc. v. New York City Health and Hospitals Corp.*, 62 N.Y.2d 75, 83 (1984) (where agency fails to "demonstrate[] as a matter of law that all of the records requested ... are in fact inter-agency or intra-agency materials, ... The proper procedure for reaching a determination is the in camera inspection...").

Moreover, the exemption for intra-agency materials "... does not apply to final agency policy or decisions." *New York 1 News v. Office of President of Borough of Staten Island*, 231

A.D.2d 524, 525 (2nd Dep’t 1996). As stated *New York I News*, documents become final agency policy or decision when they are relied on as a basis for decision. In addition, “Factual observations are not exempt from disclosure, even in documents issued before final decision.” See *New York I News* (“report of an investigation of facts surrounding certain events” was factual observation not exempt from disclosure”).

Here as stated above, numerous records are redacted in their entirety, making it impossible to determine to what extent they contain factual observations, or facts, or to what extent any exemption is applicable at all.

Other Records, including, for example, *1-2, *78, *80-1, *271, *275, *312-20, *387-8, *405-6, *413-14, and *460-1 and *517,¹² strongly suggest that they contain either final agency policies or decisions, factual observations, or factual tabulations:

- *405-6 is a heavily redacted letter to Jackson that appears to refer to facts surrounding Jackson’s job performance and the basis for the Board’s dissatisfaction with her.
- *1-2 appears to be a list of Jackson’s “Recent Activities,” which, as a factual compilation, is not subject to any exemption.
- *78, which is redacted in its entirety and is titled “Incident at FLMS,” appears to describe facts related to that incident, which are not exempt.
- *80-1, also titled “Incident at FLMS,” and also very heavily redacted, again appears to describe facts related to a meeting with parents.
- *271 appears to describe items on an agenda. The agenda adopted by the Board at a meeting is a fact which should be disclosed.

¹² This list and the other references to specific records in this Memorandum does not purport to be a complete list of all Additional Records which Petitioner believes contain factual and/or other non-exempt material and/or are otherwise improperly redacted. It would be impractical to attempt to produce such a list in part because the redactions are so extensive that, as stated above, it is difficult or impossible to know to what extent the claimed exemptions are improper. Petitioner reserves all his rights in this regard.

- *275 similarly describes an agenda.
- *312-20 is titled “Annual Evaluation of the Superintendent” but is heavily redacted. To the extent this evaluation was relied upon as a basis for the Board’s decision in regard to Jackson’s continued employment, it is non-exempt, *New York 1 News v. Office of President of Borough of Staten Island*, *supra*. This document also appears to contain factual observations and other facts.
- *387-8, which is redacted almost in its entirety, appears to be a recitation of events concerning the extension of Jackson’s contract and subsequent events, and is therefore a factual description or observation that is not exempt.
- *405-6, a heavily redacted communication to Jackson, also appears to be a factual recitation of the events surrounding the dispute with Jackson and as such is not exempt.
- *413, titled “certification overview,” begins “this is a summary” and appears to summarize events related to non-certified teachers in the Bedford school system, an issue that contributed to friction between the Board and Jackson, as well as a list of non-certified teachers. The list of teachers is clearly a non-exempt factual compilation and the summary of events is likewise non-exempt factual material and observations.
- *460-1 appears to summarize a Board meeting. The meeting agenda and other events that took place at the meeting are non-exempt facts that should be disclosed.
- *517 attaches a document titled “Resignation Agreement” that should at least be examined for factual material contained therein.

All of these documents apparently contain non-exempt factual observations, decisions and/or facts and should be produced in unredacted form.

POINT II

PETITIONER IS ENTITLED TO ATTORNEYS' FEES

In this case, Respondents have never offered any explanation for their patently unreasonable “interpretation” of Petitioner’s FOIL request as relating to only one document. Only after Petitioner commenced this proceeding and the Court ordered Respondents to disclose all responsive documents did Respondents reveal the existence of, and produce, the Additional Records.

Even in their heavily redacted state, the Additional Records shed significant light on the nature of and reasons for the “dispute” between the Board and Jackson. For example, Record *12 appears to be a memo from a District employee which refers to a “No Confidence Vote” relating to employees’ “personal convictions that someone should have notified CPS ‘early on’”; Record *380-1, which appears to be from a faculty member, states “Your faculty no longer supports this Superintendent” and discusses the writer’s perception of inadequate abuse reporting procedures in place during Jackson’s tenure. None of these documents or information would have come to light if Petitioner had not forced their disclosure through this litigation.

Under these circumstances, Petitioner is entitled to an award of attorneys’ fees, even in the absence of any further disclosures. A petitioner is regarded as having “substantially prevailed” in the proceeding where the agency discloses documents after the proceeding is commenced. *See Cross-Sound Ferry Services Inc. v. Department of Transp.*, 219 A.D.2d 346, 351 (3rd Dept. 1995) (awarding fees) (“It was only after petitioner commenced this proceeding that DOT released the requested information”); *Powhida v. City of Albany*, 147 A.D.2d 236, 239 (3 Dept. 1989) (awarding fees) (“Supreme Court was correct in determining that it was the initiation of this proceeding which brought about the release of the documents”); *Ajluni v. F.B.I.*,

947 F.Supp. 599, 609 (N.D.N.Y. 1996) (the phrase “substantially prevailed” “has been construed to encompass situations in which the government discloses documents after the litigation has commenced”).

Another factor militating in favor of an award of fees is the agency’s failure to proffer a reasonable explanation for withholding the documents ultimately produced. In this case, as stated above, Respondents have never proffered a reasonable explanation for failing to produce the Additional Records, even if only with the redactions to which Petitioner now objects, before Petitioner was compelled to commence this proceeding. *See Cross-Sound Ferry Services Inc. v. Department of Transp.*, *supra* (“No explanation was ever proffered by respondents as to why this information was withheld”).

Finally, an award of attorneys’ fees is appropriate where the records requested, and obtained, are of significant public interest, as are the Additional Records here. *See Powhida v. City of Albany*, *supra*; *Katz v. Department of Justice*, 498 F.Supp. 177, 186 (S.D.N.Y. 1979) (awarding fees where “the information which the Government has been directed to disclose ... adds important knowledge to the public domain”).

Thus, in accordance with the factors recognized by law, Petitioner is entitled to an award of attorneys’ fees.

CONCLUSION

All of the Additional Records should be produced in their entirety. In the alternative, the Court should order the production in their entirety of the specific documents referred to above and should direct Respondents to deliver the Additional Records to the Court for *in camera* examination. In any event, the Court should award Petitioner his reasonable attorneys' fees which were necessary to obtain these documents.

Dated: New York, New York
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