

Matter of Thomas v Condon

2013 NY Slip Op 33463(U)

November 26, 2013

Supreme Court, New York County

Docket Number: 103434/12

Judge: Alice Schlesinger

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

IA PART 16

PRESENT: ALICE SCHLESINGER
Justice

Index Number : 103434/2012
THOMAS, MICHAEL P.
vs.
CONDON, RICHARD J.
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

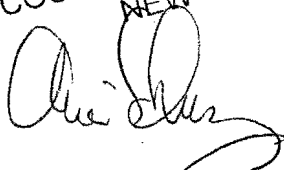
Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	No(s). _____
Answering Affidavits — Exhibits _____	No(s). _____
Replying Affidavits _____	No(s). _____

Upon the foregoing papers, it is ordered that this ~~motion is~~ Article 78 proceeding is granted to the extent provided in this Court's April 8, 2013 Interim Decision, as supplemented by the accompanying memorandum decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: NOV 26 2013

FILED
NOV 29 2013
COUNTY CLERK'S OFFICE
NEW YORK


_____, J.S.C.
ALICE SCHLESINGER

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X
In the Matter of

MICHAEL P. THOMAS,

Petitioner,

-against-

Index No. 103434/12
Motion Seq. No. 001

RICHARD J. CONDON, Special Commissioner of
Investigation for the New York City School District
and REGINA A. LOUGHRAN, FOIL Appeals Officer
for the Special Commissioner of Investigation for the
New York City School District,

FILED

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Respondents.

COUNTY CLERK'S OFFICE
NEW YORK

-----X
SCHLESINGER, J.:

On April 8, 2013, in an interim order, I directed that the voluminous records produced in three investigations conducted by the Special Commissioner of Investigation ("SCI") should be turned over to the Court for an *in camera* inspection. This order was the by-product of an Article 78 proceeding brought by Michael Thomas wherein he requested, pursuant to the Freedom of Information Law ("FOIL"), documents from the two investigations initiated by him into whether he was entitled to whistleblower designation, as well as a third investigation by SCI. as to charges allegedly brought by the principal of the school where he taught, David Jimenez.

The investigation initiated by Jimenez seems to have been the first of these proceedings. When Thomas learned about this investigation and that he was the focus of it, as opposed to one which he believed he initiated where Jimenez was its focus, Thomas then made his first request for whistleblower designation. That status was denied in a letter dated July 6, 2009. Following that denial, Thomas brought an Article 78

proceeding challenging the determination. That proceeding, which came before this Court, was settled in a stipulation of July 3, 2010, wherein SCI agreed to vacate all the findings in its prior investigation and conduct a new investigation as to Mr. Thomas' request for whistleblower status. This new investigation, requested by Thomas in August 2010, was completed in late November 2011, and in a letter dated November 29, 2011, Thomas was again denied whistleblower designation.

Thomas then turned to the Freedom of Information Law, and in February 2012 asked for records associated with the original SCI investigation and his two whistleblower applications made in November 2008 and August 2010. In a letter dated March 5, 2012, Mr. Thomas' requests were for the most part denied. He appealed the denial and in April 2012, this denial was for the most part upheld and disclosure was denied. The grounds relied on for the denial were that the records were exempt from disclosure as either "an unwarranted invasion of privacy" or as "inter-agency or intra-agency material" pursuant to Public Officers Law §87, subd.2(b),(e), and (g). Thomas challenged the denial in an Article 78 proceeding, and respondents filed an answer. We then had oral argument

That was the posture of the case when I issued my interim order directing an *in camera* inspection. In that order, I gave both sides an opportunity to make specific objections or comments by letter as to the materials being turned over to the Court. Counsel for respondents was to go first, followed by Michael Thomas who was representing himself.¹

¹As expressed earlier by this Court in decisions and in arguments in court, Mr. Thomas, who appears to have been an excellent teacher of mathematics, also has developed fine lawyering and litigation skills. So even though Mr. Thomas might seem to be at a disadvantage, in fact he continually impressed the Court with his knowledge of the applicable cases in this area of the law. In other words, he more than held his own.

On November 18, 2013, I wrote a letter to David Allen Rosinus, Assistant Corporation Counsel for respondents, and Michael Thomas directing that they come to court for final argument on the submitted material on November 25, 2013 at 10:00 a.m. Since FOIL is all about transparency and the presumption that public transactions should be that, I believed that the *in camera* inspection by the Court should be conducted with both gentlemen present, giving each an opportunity to be heard as we dealt with the various categories of records. The approximately two hours spent in this fashion were, I believe, productive, in that after lively argument I communicated how I was going to treat each category of documents. I told them that these decisions would be perpetuated in a written decision soon thereafter. This is that written decision.

At the onset of our discussion on November 25, I made it clear that certain principles would be guiding my decisions. First, I stated my belief that government investigations which concerned a tenured high school teacher and his relationship to his colleagues, to the administration, to his students and to his school was a matter of public interest and importance. Therefore, I told them that the presumption of openness of public documents and/or investigations would be broadly construed and, conversely, the available exemptions narrowly interpreted. I also said that it was the agency's burden to demonstrate that the material qualified for exemption. *Matter of Hanig v State of New York Dept. of Motor Vehicles*, 79 NY2d 106 (1992).

Secondly, I informed Messrs. Rosinus and Thomas that I was not going to be considering privileges which, for the first time, counsel for the respondents raised in the letter he submitted to the Court along with the records. In that May 29, 2013 letter, on pages 4-5, Mr. Rosinus specifically argued that certain communications which are part of

the records are entitled to be exempt pursuant to attorney-client privilege and that other documents prepared by attorneys who worked for SCI were entitled to attorney work product exemptions. I made it clear that since these privileges had not been raised earlier before the agency pursuant to FOIL, they were unpreserved for review. *Matter of Eisland v. NYC Campaign Finance Board*, 31 AD3d 259 (1st Dep't 2006). Therefore, in this regard I made it clear that I would only be considering the two reasons for non-disclosure proffered by respondents. Those were, as stated earlier, "unwarranted invasion of privacy" and "inter-agency or intra-agency material".

Counsel for respondents first acknowledged that the privacy rights they were relying on did not fall into the six specific designated subcategories of unwarranted invasion of privacy further defined in §89(2)(b), although the concerns expressed in that subsection involving information of a personal nature were certainly going to be considered by this Court. Counsel's paramount argument was that the kinds of investigation which were the subject of these proceedings were the kind that deserved confidentiality so as to not discourage people from coming forward to give information on matters of public concern. He argued that even though there was neither an implicit nor explicit assurance of confidentiality given to the individuals providing information, nevertheless the exposure of their identities and the content of their information that Mr. Thomas was requesting would provide a disincentive for people in the future to come forward.

However, I believed what had to be kept in mind was that many of these allegations were ultimately found to be unsubstantiated, and even though the original SCI investigation led to Mr. Thomas' reassignment outside the classroom to a so called "rubber room" for 17 months, ultimately no charges were made against him. Therefore, while the Court

recognizes the value of knowledgeable citizens voluntarily coming forward, there is also value that the investigation be concerned with truth and accuracy, which most often can be tested by public review and examination of that investigation.

Having said this, both gentleman agreed that the personal information of the individuals who were interviewed should not be disclosed. Therefore, such personal details as addresses, phone numbers, social security numbers, medical records, or anything of a purely personal nature should all be redacted. Also, there was an agreement that any statements or references to students should be withheld. Therefore, with regard to a number of audio tapes made in connection with the investigations, to the extent any were by students giving statements or to the extent there was information given about students, all should be redacted.

There was also an agreement that observation reports, wherein school personnel visited a classroom and wrote their opinions evaluating the teacher's performance, should be exempt and not disclosed. On balance, these reports have very little to do with the investigations and were almost exclusively opinions of supervisors appraising teachers. However, since I am directing that Mr. Thomas' complete personnel record be disclosed to him, to the extent that these contain observations of his teachings, those documents are not exempt and should be turned over.

Further as to exempt material, included here is any information with regard to the criminal history of an informant or witness. This should not be disclosed because it has very little to do with the investigations and could certainly cause embarrassment to the individuals involved. However, to the extent that Mr. Thomas himself has a criminal history, if one exists, that should be disclosed.

Finally, in the area of handwritten memos or reports, these for the most part express the opinion of the writers of these notes and also should be exempt. However, if any of the documents that fit into this category were followed very closely by a final decision vis-a-vis whistleblower requests or the SCI investigation, then those should be turned over. In other words, under such circumstances, I find they lose their exempt status.

In light of the fact that this Court has enumerated those categories of documents that are deserving of non-disclosure, one can assume correctly that all the rest of the documents should be disclosed. I find that on balance the substance of what was alleged and the identity of the people making such allegations, be they members of the Education Department or school administration or not, such as private citizens who were members of the Parent Teachers Association, should be disclosed. Nothing has been put forth by respondents to show that the identity of these informants is deserving of special protection. Nothing has been shown that the disclosure of their identities (most of which are already known) would subject these individuals to extreme embarrassment or worse. See, *Matter of Johnson v NYC Police Department*, 257 AD2d 343 (1st Dep't 1999).

Further, virtually all of these witness statements and summaries of their statements concern factual data. I acknowledge that there are certain opinions expressed as well, but to attempt to separate fact from opinion here would not only be time-consuming but ultimately not worthy of the effort.

There were final determinations made in each of these investigations. The whistleblower status requests were denied. In the SCI investigation, about the time it was concluded, a decision was made to take Mr. Thomas out of the classroom. Therefore, to be able to say that these were merely intra-agency or inter-agency materials not based on

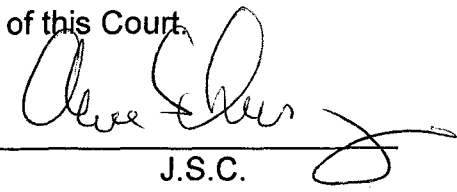
facts or not leading to final decisions would be plainly wrong. Finally, I see no distinction here between information provided by public employees as distinct from private citizens. Individuals in both categories were involved in these investigations. See, *Hernandez v Office of Mayor of the City of New York*, 100 AD3d 555 (1st Dep't 2012), *lv denied* 2013 NY Slip Op. 72484 (2013).

As the conference ended, respondents' counsel, who was at all times well prepared and cooperative, asked the Court to give him and his office as much time as possible so as to be able to comply. I have tried to do that. So the dates given for such compliance are as follows: By December 20, respondents will turn over the written documents including the tapes that are designated "Thomas tapes", meaning that Thomas himself was the subject of these interviews. There should be no need for anyone to review these tapes. However, in order to make proper redactions, as described above, to the majority of the tapes, more time is needed. Therefore, respondents are to turn over the redacted tapes, if redaction is needed, no later than January 20, 2014. Finally, if there is still some uncertainty about any particular document, I am giving permission for respondent to initiate a conference call with the Court and Mr. Thomas. Respondent's counsel is directed to retrieve the *in camera* materials from the Part Clerk in Room 222 without delay.

This constitutes the decision, order and judgment of this Court.

Dated: November 26, 2013

NOV 26 2013

FILED 
J.S.C.

NOV 29 2013

ALICE SCHLESINGER

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