MEMORANDUM

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 SUFFOLK COUNTY

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

In the Matter of the Application of
John R. McGeehan,

Petitioner,

For a Judgment under Article 78 of the
Civil Practice Law and Rules

-against-

East Hampton Union Free School District, Richard J. Burns, in his official capacity as Superintendent of Schools, East Hampton Union Free School District, Kerri S. Stevens in her official capacity of East Hampton Union Free School District Records Access Officer,

Respondents.

Motion Sequence No.: 001; MD
Motion Date: 5/16/16
Submitted: 9/21/16

Index No.: 02667/2016

Petitioner Pro Se:

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In this proceeding pursuant to CPLR Article 78 petitioner John R. McGeehan seeks an order and judgment declaring that the denial by respondents, East Hampton Union Free School District, Richard J. Burns, as Superintendent of Schools, and Kerri S. Stevens, as District Records Access Officer, of petitioner's Freedom of Information Law (FOIL) request for access to certain records was contrary to the letter and intent of NYS Public Officers Law Article 6. In essence, petitioner seeks to obtain records that were reviewed in connection with the determination by Superintendent Burns not to recommend the former high school softball coach for the 2016 season. By letter dated September 28, 2015, petitioner requested disclosure of the following information from the respondents:

> (1) Public records that (a) were reviewed by the East Hampton Superintendent and East Hampton School Board to consider the renewal of the contract of Lou Reale as coach of the East Hampton Girl's [*sic*] Softball program, including but not limited to any communication between anyone and East Hampton Schools or any of its employees; (b) were reviewed by the East Hampton Superintendent and East Hampton School Board to conclude that the contract of Lou Reale should not be renewed as coach of the East Hampton Girl's [*sic*] Softball program, including but

> not limited to any communication between anyone and East Hampton Schools or any of its employees; (c) relate to, refer to, evidences or constitutes the conduct of East Hampton School's business in determining that the contract of Lou Reale should not be renewed as coach of the East Hampton Girl's [*sic*] Softball program and which were prepared, owned, used, or retained by the East Hampton Schools, including but not limited to any memoranda, emails, letters, phone texts, phone records, and all records that the records retention schedule promulgated by the State Archives and Records Administration, a unit of the State Education Department, requires.
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> (2) School board approved policies in place during Coach Reale's tenure addressing procedures which permit the public to submit complaints against district employees (coaches) in an appropriate way.
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> (3) Minutes from the Open Session and the Executive Session of the East Hampton School Board held on July 14, 2015.

By letter dated October 15, 2015, the school district provided copies of three emails, two of which were from Lou Reale to respondent Burns, and the third of which forwarded an email to Burns from Reale dated July 6, 2015 in which it was stated, "Please accept my retirement as the EH softball coach effective July 1, 2015." The respondent's FOIL response indicated that additional documents responsive to the request for records relating to the coaching contract are exempt from disclosure under FOIL and/or the Family Educational Rights and Privacy Act (FERPA) (*see* 20 USCS § 1232g). Petitioner was referred to the school district website for a compilation of district policies and for the minutes of the July 14, 2015 public school board meeting. The response also stated that "minutes are not kept of any portion of a meeting of the Board of Education during which it has adjourned to executive session." Petitioner appealed the determination, and by letter dated November 17, 2015 the decision of the Records Access Officer was affirmed.

Although it is immaterial to this proceeding, the parties agree that school district coaching positions are "annual appointments which require an annual affirmative action of the district to rehire the candidate". Thus, a former coach has no legal right to be reappointed to a coaching position.

In its verified answer to the petition, respondents allege, *inter alia*, five affirmative defenses and objections in point of law. It is asserted that under FERPA, the school district is prohibited from releasing educations records containing "personally identifiable information" regarding current or former students to anyone other than the student's parent or the student who has attained legal age. Under 34 CFR § 99.3, personally identifiable information includes, but is not limited to, the student's name, the name of the student's parent or other family members and "[o]ther information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty". It is alleged as a second affirmative defense and objection in point of law that pursuant to Public Officers Law § 87 (2) (b), access to records or portions thereof may be denied if disclosure "would constitute an unwarranted invasion of personal privacy ..." In support of respondents' assertion, the affidavit of respondent Burns has been submitted in which it is averred that, with the exception of the three emails that were disclosed,

"the letters, emails and other correspondence received by the District regarding the former coach are exempt from disclosure because (1) they are education records which may not be disclosed, or (2) their disclosure would constitute an unwarranted invasion of person privacy." It is also averred by Burns that, as "East Hampton is a small community", the correspondence which was not disclosed "includes references to statements made by [the former coach] to students, and actions he took regarding students - all of which make the individual students involved readily identifiable - not just by the former coach - but by many people in the community." Furthermore, it is averred that the remaining correspondence that was received by Superintendent Burns identified the authors by name "or in other ways" and "revealed their opinions regarding the former coach and clearly involved details of the authors' lives" that would be regarded as private information and intended to be confidential. In his letter response to petitioner's appeal, Superintendent Burns noted that "the determination not to appoint Mr. Reale as Girls' Varsity Soft Ball coach for the 2016 season was the subject of significant public interest and controversy in the community" and that, according to petitioner, some parents, coaches and softball players were "angry" about the determination. Under the circumstances, Burns explained his position that "revealing the identity of those individuals who submitted opinions about Mr Reale's performance as a coach would constitute an unwarranted invasion of personal privacy, as doing so would likely subject the authors to unpleasant backlash and possibly personal danger."

Public agency records are presumptively open for public inspection and copying, and the party seeking an exemption from disclosure has the burden of proving entitlement to the exemption (***Mulgrew v Board of Educ. of the City School Dist.,*** 87 AD3d 506, 507, 928 NYS2d 701 [1st Dept 2011], citing Public Officers Law § 89 [5] [e]). In order to deny disclosure, it must be shown that the requested information "falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access" (***Matter of Data Tree, LLC v Romaine,*** 9 NY3d 454, 463-464, 880 NE2d 10, 849 NYS2d 489 [2007], quoting ***Capital Newspapers Div. of Hearst Corp. v Burns,*** 67 NY2d 565, 496 NE2d 665, 505 NYS2d 576 [1986]).

As to those records which are exempt from disclosure pursuant to the prohibition under FERPA against the release of education records containing personally identifiable information regarding a student or former student without consent, the school district has demonstrated that denial of disclosure of such records was appropriate. Letters, emails and other correspondence that were received by the school district which refer to current or former students and which describe their interaction with or their opinions regarding their experiences with the former coach are educational records that may not be disclosed without consent. Furthermore, records containing reports of incidents involving the former coach's interaction with particular students would render the students identifiable in the small community.

Pursuant to Public Officers Law § 87 (2) (b), an agency may deny access to records where disclosure would constitute an unwarranted invasion of personal privacy, and a court must decide whether any invasion of privacy is "unwarranted" by balancing the privacy interests at stake against the public interest in disclosure of the information (*see* ***Matter of Prall v New York City Dept. of Corrections,*** 129 AD3d 734, 10 NYS3d 332 [2d Dept 2015]). Respondents have met their burden of demonstrating that the information requested falls within the exemption. It is undisputed that appointment to a coaching position is done on a yearly basis and is not an entitlement.

Consequently, an individual who is not recommended for reappointment to a coaching position has no right to be provided with reasons for the non-appointment, and any public interest in disclosure of emails, letters and phone records pertaining to the appointment is minimal at best. Furthermore, the divisiveness over the appointment of a coach in the small school district community supports the conclusions that disclosure of the identities of persons making comments about the appointment would cause an unwarranted invasion of personal privacy, and that such persons had a reasonable expectation that their communications would remain private. Under the circumstances, it is the conclusion of this Court that petitioner is not entitled to disclosure of the records he requested.

Submit judgment.

Dated: 12/14/2016

William B. Rebolini

HON. WILLIAM B. REBOLINI, J.S.C.

__X__ FINAL DISPOSITION_____ NON-FINAL DISPOSITION