SCANNED ON 1/10/2011

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

PRESENT: Kern CYNTHIA S. KERN J.S.C. Justice — PART 52

Mulgrew, Michael, UFT

-v-

Bd. of Ed. City of N.Y

INDEX NO. 113813/10

MOTION DATE

MOTION SEQ. NO. 01

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for Art 78

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed decision.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk, and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must E-File certificate requesting Entry of Judgment with a copy of the order and/or judgment attached.

Dated: 1/10/11

CK

CYNTHIA S. KERN J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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

Reread it at SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 52

----------x

MICHAEL MULGREW, as President of the UNITED FEDERATION OF TEACHERS, Local 2, American Federation of Teachers, AFL-CIO, on behalf of all represented employees in the City School District of the City of New York,

Petitioner, Index No. 113813/10

-against-

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK and JOEL I. KLEIN, as Chancellor of the City School District of New York,

Respondents.

For a Judgment Pursuant to Article 78 of the CPLR and for Declaratory Relief Pursuant to CPLR 3001

----------x

HON. CYNTHIA KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :_____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Answering Affidavits and Cross Motion.....	2
Replying Affidavits.....	3
Exhibits.....	4

Petitioner seeks an order directing respondents to redact and keep confidential the names of any teachers that appear in any Teacher Data Reports ("TDRs") released to the public. Various news organization with pending FOIL requests to release the TDRs with the teachers' names included now move to intervene in this proceeding (the "Press Intervenors"). For the reasons set

forth below, the Press Intervenors' motion to intervene is granted without opposition and the petition to redact the teachers' names is denied.

As an initial matter, this court is not making a *de novo* determination as to whether the TDRs with the teachers' names should be released. This petition has been filed under Article 78. The only question before this court is whether the decision by the Department of Education ("DOE") to release the TDRs in a form that discloses teachers' names was arbitrary and capricious under the law. This court is not passing judgment on the wisdom of the decision of the DOE, whether from a policy perspective or from any perspective, or whether the DOE had discretion under the law to make a different decision, nor is this court making any determination as to the value, accuracy or reliability of the TDRs. This court is deciding the only issue before it, the purely legal issue under Article 78 of whether the DOE's decision was without a rational basis, rendering it arbitrary and capricious.

The relevant facts are as follows. Beginning in the 2007-08 school year, the DOE launched a pilot program in which a student's predicted improvement on state tests is compared with the student's actual improvement. The comparison is then used to determine that child's teacher's "value added" -- it attributes the gain or loss in test scores to the child's teacher while controlling for other factors that influence student achievement such as poverty and English-language learner status. Beginning on August 16, 2010 and continuing through October 27, 2010, the Press Intervenors made nine separate requests under the Freedom of Information Law ("FOIL") specifically requesting TDRs, including disclosure of teachers' names. Previous FOIL requests for the TDRs had not explicitly requested the teachers' names. The DOE had responded to those previous requests by redacting teachers' names and releasing the redacted TDRs only.

Upon learning that the DOE had determined that it would comply with these most recent FOIL requests in a manner that would disclose the teachers' names as requested, petitioner the United Federation of Teachers (the "UFT") commenced the instant petition.

This court finds that the UFT has standing to bring this proceeding to challenge the DOE's determination to release the records even though it is not the entity which requested the records pursuant to FOIL. FOIL does not explicitly address the issue of whether the subject of records may challenge their disclosure and there is no case law directly on point. However, the parties do not cite any case in which such a party was prohibited from bringing a proceeding. In fact, several courts have permitted such cases to go forward while declining to explicitly rule on the issue. *See Anonymous v Board of Education for the Mexico Central School District*, 162 Misc.2d 300 (Sup. Ct., Oswego Cty 1994); *Capital Newspapers Div. of Hearst Corp. v Burns*, 67 N.Y.2d 562 (1986). In *Verizon New York Inc. v Mills*, 24 Misc.3d 1230(A) (Sup. Ct., Westchester Cty, 2007), *aff'd*, 60 A.D.3d 958 (2nd Dept 2009), the court held that a party will have standing to challenge the release of records of which it is the subject if it can establish that the administrative action will have a "harmful effect" on it and that it is within the "zone of interest" to be protected by the statute. *See* 24 Misc.3d 1230(A) (*citing Dairylea Cooperative, Inc. v Walkely*, 38 N.Y.2d 6 (1975)).

In the instant case, this court holds that the UFT has standing to bring this proceeding. The UFT has established that the administrative action will have a harmful effect on it and that it is within the zone of interest encompassed by the statute. FOIL is intended to promote disclosure by government but also to protect the interests of parties who would be harmed by such disclosure if the subject records fall into one of the exceptions enumerated under FOIL. *See*

Dairylea, 38 N.Y.2d 6.

This court now turns to the substance of the UFT's petition. As discussed above, the only issue before the court in this Article 78 proceeding is whether the DOE was "arbitrary and capricious" in determining that the unredacted TDRs would be released because the names of individual teachers did not fall into any exception under FOIL. The question of whether this court would have made a *de novo* determination to release the teachers' names is not before this court. Under Article 78, this court may only determine whether the DOE's determination was "without sound basis in reason and...taken without regard to the facts." *Pell v Board of Education*, 34 N.Y.2d 222, 231 (1974). Whether an agency's determination to release records was arbitrary and capricious must be viewed in light of the fact that the burden of proving that the requested material is exempt from disclosure falls on the agency seeking to withhold that material. *See Capital Newspapers Div. of Hearst Corp. v Burns*, 67 N.Y.2d 562 (1986).

FOIL mandates the disclosure of agency records unless they are subject to a specific exemption. See NY Public Officers Law ("POL") §87(2) ("Each agency *shall*... make available for public inspection and copying all records, except...") (emphasis added). While an agency *must* release records to which no exemption applies, it is within the agency's discretion whether to withhold records to which an exemption applies ("such agency *may* deny access to records or portion thereof that... [exceptions listed]") (emphasis added). POL §87(2). The potentially relevant exceptions in this case include "inter-agency or intra-agency materials which are not: (i) statistical or factual tabulations of data" and items which, "if disclosed, would constitute an unwarranted invasion of personal privacy under the provisions of subdivision two of section eighty-nine of this article." POL §87(2)(g) and (b). The DOE determined that none of the

relevant exceptions to disclosure under FOIL applied to the teachers' names on the TDRs and that, accordingly, the names would be released.

The DOE's determination that teachers' names were not subject to any of the aforementioned exemptions was not arbitrary and capricious. Regarding the exception for inter-agency or intra-agency materials that are not statistical or factual tabulations, the DOE could have rationally determined that, although the unredacted TDRs were intra-agency records, they are statistical tabulations of data which must be released. POL §87(2)(g)(i). Such a determination is not arbitrary or capricious. The UFT's argument that the data reflected in the TDRs should not be released because the TDRs are so flawed and unreliable as to be subjective is without merit. The Court of Appeals has clearly held that there is no requirement that data be reliable for it to be disclosed. *See Gould v New York City Police Dept.*, 89 N.Y.2d 267, 277 (1996). In *Gould,* the court held witness statements must be released under FOIL "insofar as [they] embod[y] a factual account of the witness's observations," regardless of whether the witness's account was actually credible and/or correct. *Id.* As the court explained, "factual data... simply means objective information, in contrast to opinions, ideas or advice..." *Id.* at 276. Therefore, the unredacted TDRs may be released regardless of whether and to what extent they may be unreliable or otherwise flawed.

The UFT's reliance on *Elentuck v Green*, 202 A.D.2d 425 (2nd Dept 1994), in which the court held that it was proper to withhold lesson observation reports, is misplaced. The court there held that lesson observation reports are not statistical or factual data as they consist solely of advice, criticisms, evaluations and recommendations prepared by the school's assistant principal. In the present case, unlike in *Elentuck* , the determination by the DOE that the TDRs

are statistical data has a rational basis. Unlike lesson observation reports, which are individual opinions of a teacher's lesson, the unredacted TDRs are a compilation of data regarding students' performance.

The DOE could have also rationally determined that releasing the teachers' names was not an "unwarranted invasion of personal privacy". FOIL permits withholding records if disclosure would constitute "an unwarranted invasion of personal privacy" under POL §89(2). POL §87(2)(b). POL §89(2) provides that "an unwarranted invasion of personal privacy includes, but shall not be limited to" various categories of data illustrated by a list of six items including employment, medical and credit histories, information that would be used for solicitation or fund-raising purposes, information that would result in economic or personal hardship or simply personal information that is not relevant to the work of the agency. The statute specifically states that the list is not comprehensive. The Court of Appeals has held that the proper test to determine whether the release of records which do not fall into any of the listed categories constitute an "unwarranted" invasion of personal privacy is a balancing test in which the "privacy interests at stake" are balanced against the "public interest in disclosure of the information." *The New York Times Co. v City of New York Fire Dept.*, 4 N.Y.3d 477, 485 (2005). "What constitutes an unwarranted invasion of personal privacy is measured by what would be offensive to a reasonable [person] of ordinary sensibilities." *Hoyer, Newcomer, Smiljanich and Yachunis, P.A. v State of New York*, 27 Misc.3d 1223(A) (Sup. Ct. New York Cty 2010) (*citing Matter of Humane Society of U.S. v Fanslau*, 54 A.D.3d 537 (3rd Dept 2008)); *Physicians Committee for Responsible Medicine v Hogan*, 2010 WL 4536802 at *7 (Sup. Ct. Albany Cty 2010) (*citing same*).

Courts have repeatedly held that release of job-performance related information, even negative information such as that involving misconduct, does not constitute an unwarranted invasion of privacy. *See, e.g. Faulkner v Del Giacco*, 139 Misc. 2d 790 (Sup. Ct. Albany Cty 1988) (authorizing release of the names of prison guards accused of inappropriate behavior); *Farrell v Village Board of Trustees*, 83 Misc.2d 125 (Sup. Ct. Broome Cty. 1975) (authorizing disclosure of written reprimands of police officers, including names of the officers); *Capital Newspapers Div. of Hearst Corp. v Burns*, 67 N.Y.2d 562 (1986) (authorizing release of report of sick days taken by individual police officer); *Anonymous v Board of Educ. for Mexico Central School Dist.*, 162 Misc.2d 300 (Sup. Ct., Oswego Cty 1994) (authorizing disclosure of settlement agreement between teacher and Board of Education resolving disciplinary charges); *Rainey v Levitt*, 138 Misc.2d 962 (Sup. Ct. NY Cty 1988) (authorizing disclosure of individuals' scores on civil service exam). In contrast, courts have held that releasing personal information such as birth dates and personal contact information such as email addresses of state employees would constitute such an unwarranted invasion of personal privacy. *See Hearst Corp. v State of New York*, 24 Misc.3d 611, 627-28 (Sup. Ct. Albany Cty 2009) (finding privacy interest in birth dates outweighs public interest in disclosure); *Physicians Committee*, 2010 WL 4536802 at *8 (finding privacy interest in personal contact data outweighs public interest in disclosure).

In the instant case, the DOE could have reasonably determined that releasing the unredacted TDRs would not be an "unwarranted" invasion of privacy since the data at issue relates to the teachers' work and performance and is intimately related to their employment with a city agency and does not relate to their personal lives. *See, e.g. Faulkner,* 139 Misc. 2d 790; *Farrell*, 83 Misc.2d 125; *Anonymous*, 162 Misc.2d 300. In *Faulkner*, *Farrell* and *Anonymous,*

the courts authorized release of information (reprimands, alleged misconduct, and a settlement of disciplinary charges, respectively) which would be potentially more damaging to the parties than simply poor job performance. *See Faulkner,* 139 Misc. 2d 790; *Farrell*, 83 Misc.2d 125; *Anonymous*, 162 Misc.2d 300. The data at issue here is more akin to that released in these cases than to the birth dates and personal contact information sought in *Hearst Corp.*, 24 Misc.3d 611, 627-28 and *Physicians Committee*, 2010 WL 4536802. In addition, in this case, the DOE could have rationally determined that the public's interest in disclosure of the information outweighs the privacy interest of the teachers. The public has an interest in the job performance of public employees, particularly in the field of education. Educational issues, including the value of standardized testing and the search for a way to objectively evaluate teachers' job performance have been of particular interest to policymakers and the public recently. This information is of interest to parents, students, taxpayers and the public generally. Although the teachers have an interest in these possibly flawed statistics remaining private, it was not arbitrary and capricious for the DOE to find that the privacy interest at issue is outweighed by the public's interest in disclosure.

Finally, the UFT's argument that the DOE assured teachers that the TDRs were confidential means that they cannot be disclosed under FOIL is without merit. The UFT relies on a letter dated October 1, 2008 from Chris Cerf, a Deputy Chancellor at the DOE, who wrote to then-UFT-president Randi Weingarten that "In the event a FOIL request for [TDRs] is made, we will work with the UFT to craft the best legal arguments available to the effect that such documents fall within an exemption from disclosure." The UFT also cites information about the TDRs provided to teachers and principals, assuring teachers of their confidentiality and directing

principals not to share the results with anyone other than the subject teacher. However, regardless of whether Mr. Cerf's letter constituted a binding agreement, "as a matter of public policy, the Board of Education cannot bargain away the public's right to access to public records." *LaRocca v Board of Educ. of Jericho Union Free School Dist.*, 220 A.D.2d 424, 427 (2nd Dept 1995) (*citation omitted*); *see also Washington Post Co. v New York State Ins. Dept.*, 61 N.Y.2d 557, 565 (1984); *Anonymous*, 162 Misc.2d at 303. Accordingly, the DOE's assurances that the TDRs would remain confidential cannot shield them from disclosure.

For the aforementioned reasons, the UFT's petition seeking an order directing the DOE to redact teachers' names from the TDRs prior to release is denied. This constitutes the decision, judgment and order of the court.

Dated: 1/10/11

CK
J.S.C.

CYNTHIA S. KERN