

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF SUFFOLK

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In re Application for a Judgment under Article 78 of	:
the Civil Practice Law and Rules by	:
	: Index No.: 606534/2020
CHARLES LANE,	:
	:
Petitioner,	:
	:
-against-	:
	:
HAMPTON BAYS UNION FREE SCHOOL DISTRICT	:
	:
Respondent.	:
-----	X

**MEMORANDUM OF LAW IN SUPPORT OF  
ARTICLE 78 PETITION OF CHARLES LANE**

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## PRELIMINARY STATEMENT

This Article 78 proceeding seeks to compel disclosure under the Freedom of Information Law, Pub. Off. Law § 87, *et seq.* (“FOIL”), of information sought by an award-winning journalist in connection with an ongoing investigation into the potentially discriminatory treatment of Latinx students by Respondent Hampton Bays Union Free School District (“HBSD”). Petitioner Charles Lane seeks access to photographs taken by HBSD in an effort to identify the residences of Latinx students attending the District’s schools and to their associated metadata files that will disclose when and where the photos were taken.

Following leads he received about an apparent effort by HBSD to remove Latinx students attending its schools wherever possible, Lane requested copies of photograph files taken by the school district’s Director of School Safety and Transportation, John Moran. HBSD allegedly asked Moran to follow Latinx students to their place of residence and photograph them in order to confirm if they actually resided within the district’s boundaries. Disclosing these records is important to understanding the extent to which HBSD surveils its students and whether it unfairly targeted minorities.

HBSD is violating its legal obligations under FOIL by largely refusing to disclose the photographs and their associated metadata. HBSD does not deny taking the surveillance photos, but claims that a statutory exemption for student privacy allows it to withhold any photo that has an image of a student. But that statute, by its own terms, has no application to any of the photos. Even if it did, the narrow exemption would not permit an entire photograph and all metadata to be withheld, but would at most allow HBSD to redact identifiable images of specific students. HBSD is violating its FOIL disclosure obligation, and this Court should order disclosure of the photos and metadata.

## STATEMENT OF FACTS

### A. Parties

Petitioner Charles Lane is a senior reporter at WSHU Public Radio, an National Public Radio (NPR) station serving Connecticut and Eastern Long Island. He is an award-winning journalist whose work has appeared on NPR, Deutsche Welle, Radio Netherlands, Soundprint, Penthouse, the Religion News Service and the Catholic World Report. His reporting on issues in Long Island has won him three Public Service Awards from the Society of Professional Journalists and a national Edward R. Murrow Award.

Respondent Hampton Bays Union Free School District is a public school district located in Long Island's Suffolk County, with a principal address of 86 East Argonne Road, Hampton Bays, NY 11946. HBSD oversees three schools and serves just over 2,000 students in grades PK-12.

### B. Petitioner's FOIL Request 4 and Administrative Appeal

Lane has made a number of FOIL requests to HBSD as part of his investigation into possible discriminatory actions by the school district. On November 13, 2019, he submitted his fourth request ("Request 4") seeking photographs taken by John Moran, the school district's Director of School Safety and Transportation. Verified Petition ("Pet.") ¶¶ 7, and Exh. A. Lane sought to inspect these photos after he heard complaints that HBSD had instructed Moran to surveil students of Latinx descent and photograph them entering and leaving their place of residence, causing discomfort among the community's Latinx members.

Request 4 sought the photographs taken by Moran and information about them, including but not limited to the file name, the date the photo was taken, the exposure

time, and the name of the camera—information typically recorded in metadata embedded in the digital file of the photo.

On December 5, 2019, HBSD denied Lane’s request, claiming that Request 4 was “too broad.” Pet. ¶ 9, and Exh. B. On the same day, Lane submitted an administrative appeal. Pet. ¶ 10, and Exh. C. HBSD responded by withdrawing its initial denial and providing some of the requested photographs, but it then invoked a student privacy exemption under the Family Educational Rights and Privacy Act (“FERPA”), 20 U.S.C. § 1232g (2018), to withhold any photograph containing an identifiable image of a student. *Id.*, Pet. ¶ 11, and Exh. C. Lane received 64 digital photographic files; the original metadata was stripped from each of them. Pet. ¶ 11.

#### **C. Petitioner’s FOIL Request 7 and Administrative Appeal**

On December 18, 2019, Lane filed a separate FOIL request (“Request 7”) to HBSD, asking for the metadata associated with all photographs taken by Moran, including both the 64 photographs Lane had received and those that were withheld in response to his Request 4.<sup>1</sup> Pet. ¶ 12, and Exh. D.

On December 20, 2019, HBSD sent Lane a letter stating that it had denied Request 7 since the photos “were not extracted with meta-data” and the district did not “maintain a separate record responsive to the request.” Pet. ¶ 13, and Exh. E. On the same day, Lane filed an administrative appeal challenging the denial of Request 7. Pet. ¶ 14, and Exh. F. On January 7, 2020, HBSD denied Lane’s appeal of Request 7, stating

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<sup>1</sup> To be clear, Lane was entitled to the metadata under Request 4, since the metadata is a part of each digital photographic file that Lane requested. Lane submitted Request 7 separately seeking the metadata only after discovering that HBSD had withheld it from its response to Request 4.



that it did not have the original metadata and “the district is not required to create a record.” Pet. ¶ 15, and Exh. G.

On February 24, 2020, HBSD sent Lane a separate letter, revising their previous explanation for denying Request 7. Pet. ¶ 16, and Exh. H. Rather than withholding the original metadata because disclosure would require creating a new record, HBSD clarified that it was denying the request only because it no longer had the metadata. *Id.* HBSD claimed that the photographic files lost their original metadata when the files were moved in December from Moran’s computer onto a folder on the HBSD network. *Id.*

The letter did not explain why the files lost their original metadata in the process of a routine transfer. Nor did it clarify the photographic files’ chain of custody, or indicate whether files with the metadata still exist, either on Moran’s computer or his camera. Lane’s counsel sent an email to HBSD’s Record Appeal Officer Michael Carlson seeking clarification, but received no response. Pet. ¶ 17, and Exh. I.

## ARGUMENT

### I.

#### **HBSD HAS FAILED TO ESTABLISH THAT THE WITHHELD IMAGES ARE EXEMPT FROM DISCLOSURE**

##### **A. Respondent’s Burden and Standard of Review Under FOIL**

FOIL is founded on the fundamental premise that “the public is vested with an inherent right to know and that official secrecy is anathematic to our form of government.” *Fink v. Lefkowitz*, 47 N.Y.2d 567, 571 (1979). Accordingly, New York courts have long held that FOIL is to be “liberally construed and its exemptions narrowly interpreted so that the public is granted maximum access to the records of government.” *Capital Newspapers, Div. of Hearst Corp. v. Whalen*, 69 N.Y.2d 246, 252 (1987); see

*also Gould v. N.Y.C. Police Dep't*, 89 N.Y.2d 267, 275 (1996); *Washington Post Co. v. N.Y. State Ins. Dep't*, 61 N.Y.2d 557, 564 (1984); *Fink*, 47 N.Y.2d at 571.

New York's FOIL requires that an agency "make available for public inspection and copying all records" except those that fall under a very specific set of statutory exemptions. Pub. Off. Law § 87(2). The government bears the burden of justifying nondisclosure under an exemption. Pub. Off. Law § 89(4)(b); *see, e.g., Hanig v. N.Y. Dep't of Motor Vehs.*, 79 N.Y.2d 106, 109 (1992); *Capital Newspapers Div. of Hearst Corp. v. Burns*, 67 N.Y.2d 562, 570 (1986). "It is the agency's burden to establish 'that the material requested falls squarely within the ambit of one of [the] statutory exemptions.'" *Town of Waterford v. N.Y. State Dep't of Env'tl. Conservation*, 18 N.Y.3d 652, 657 (2012) (quoting *Newsday, Inc. v. Empire State Dev. Corp.*, 98 N.Y.2d 359, 362 (2002)). To meet this burden, the agency must "articulat[e] a particularized and specific justification for denying access," *Burns*, 67 N.Y.2d at 566, and it must do so "in more than just a plausible fashion." *Data Tree, LLC v. Romaine*, 9 N.Y.3d 454, 462 (2007) (internal quotation marks omitted).

In reviewing the denial of a FOIL request, courts do not defer to the agency's decision as they would in other contexts. "While typically an agency action is reviewed under an 'arbitrary and capricious' standard, a court must apply a far different rule when reviewing the denial of a FOIL request" and must instead require the agency to show "that the records fall squarely within an exemption to disclosure." *Newsday v. Suffolk Cnty. Dep't of Pub. Works*, NY Slip Op. 30582(U) (2012), \*4; *see also N.Y. Comm. for Occupational Safety & Health v. Bloomberg*, 892 N.Y.S.2d 377, 380 (1st Dep't 2010) (stating that the arbitrary and capricious standard does not apply to judicial review of an

agency's denial of a FOIL request); *Bahnken v. N.Y.C. Fire Dep't*, 794 N.Y.S.2d 312, 313-14 (1st Dep't 2005) (same). The rationale for this policy is simple: "construction of the statutory exception from disclosure . . . involves pure statutory reading and analysis, [and so] there is no basis to rely on any special expertise of the [agency] and thereby accord its statutory interpretation any particular deference." *Burns*, 490 N.Y.S.2d 651, 653 (3d Dep't 1985), *aff'd*, 67 N.Y.2d 562 (1986).

**B. Respondent Has Failed to Satisfy FOIL's Rigorous Requirements for Exempting Records From Disclosure**

HBSD's conclusory justifications for denying Request 4 are wholly inadequate under FOIL. In its initial denial of Request 4, HBSD merely stated that the request was "too broad" to permit a search. Pet. ¶ 9, and Exh. B. On administrative appeal, HBSD retracted its initial denial without explanation and released some but not all of the photographs. It provided no rationale for withholding some photographs beyond the conclusory assertion that releasing them would "violate federal law, notably the Family Educational Rights and Privacy Act." Pet. ¶ 11, and Exh. C. Though HBSD invoked FERPA as an exemption to FOIL, the district "failed to specify with particularity the basis for its refusal" to disclose the requested records. *Cornell Univ. v. City of N.Y. Police Dep't*, 544 N.Y.S.2d 356, 358 (1989). In particular, HBSD failed to articulate with any specificity *how* the requested records invade the student privacy protected by FERPA or *why* the records could not at least be disclosed in a redacted form.

In its denials to Request 4, HBSD "tendered only references to sections, subdivisions and subparagraphs of the applicable statute" and provided no "factual basis on which to determine whether the material sought . . . fell outside the scope of mandated

disclosure . . . .” *Church of Scientology of N.Y. v. State*, 46 N.Y.2d 906, 908 (1979). This utterly fails the burden of articulating a “particularized and specific justification for denying access,” *Burns*, 67 N.Y.2d at 566, that the courts of this State have long required. *See Data Tree*, 9 N.Y.3d at 462-63; *Konigsberg v. Coughlin*, 68 N.Y.2d 245, 251 (1986); *M. Farbman & Sons v. N.Y.C. Health & Hosps. Corp.*, 62 N.Y.2d 75, 80 (1984); *Fink*, 47 N.Y.2d at 571.

**C. The Withheld Images Are Not Educational Records Within the Meaning of FERPA**

Respondent alleges that the photographs Lane requested are exempt from federal statute, the Family Educational Rights and Privacy Act, known as FERPA. 20 U.S.C. § 1232g (2018). Although HBSD’s explanation of its theory about FERPA’s application is wholly inadequate, what little information HBSD does provide makes clear that FERPA has no proper application to the photos at issue.

In order for the FERPA exemption to apply, Moran’s photographs must constitute an “education record” under 20 U.S.C. § 1232g (2018). FERPA defines “education records” to include “those records that are: (1) [d]irectly related to a student; and (2) [m]aintained by an educational agency or institution or by a party acting for the agency or institution.” 34 C.F.R. § 99.3. Courts have narrowly interpreted this statutory language to include only records that are related to a student’s educational performance and “kept by a single central custodian.” *Owasso Indep. Sch. Dist. No. I-011 v. Falvo*, 534 U.S. 426, 435 (2002); *see also Jacobson v. Ithaca City Sch. Dist.*, 39 N.Y.S.3d 904, 908 (N.Y. Sup. Ct. 2016). The photographs requested by Lane meet neither requirement and thus are not subject to FERPA.

First, under FERPA, “education records” must be related to the performance of students in the classroom, and the photographs taken by Moran clearly do not meet this requirement. Courts understand that FERPA “was intended to protect records relating to an individual student’s performance.” *Culbert v. City of New York*, 254 A.D.2d 385, 387 (1998). For this reason, “education records” “must relate to an individual student’s educational performance.” *Jacobson*, 39 N.Y.S.3d at 908 (holding that the video recording of students in classroom does not constitute an educational record); *see also Rome City Sch. Dist. v. Grifasi*, 806 N.Y.S.2d 381 (N.Y. Sup. Ct. 2005) (holding that the security videotape of student fighting does not constitute an educational record). Photographs of students taken outside school hours and off the school’s premise certainly do not pertain to student’s performance in the classroom, and thus are not educational records within the meaning for FERPA.

Second, a “central custodian” must maintain the records in question in order for them to qualify as potential education records. Courts have narrowly followed this requirement to the point that “assuming a teacher’s grade book is an education record, grades on students’ papers are not covered by [FERPA] at least until the teacher has recorded them [in the grade book].” *Owasso Indep. Sch. Dist. No. I-011*, 534 U.S. at 427. Although HBSD has not been forthcoming with the photographs chain of custody, Respondent’s February 24 letter demonstrates that the photographs were stored on Moran’s computer until mid-December, at which point they were transferred to a network drive in preparation for replacing Moran’s computer. Pet. ¶ 16, and Exh. H. Thus, the photographs were not “maintained with, referenced in, or indexed to, any individual student files maintained by the central registrar or custodian of student records.”

*Jacobson*, 39 N.Y.S.3d at 908. The picture files, therefore, do not qualify as educational records for this reason as well.

Finally, Moran took the photographs in his capacity as the Director of School Safety and Transportation. FERPA specifically excludes from its privacy protections “records maintained by a law enforcement unit of the educational agency or institution that were created by that law enforcement unit for the purpose of law enforcement.” 20 U.S.C. § 1232g (2018). A “law enforcement unit” includes individuals like Moran, who as the Director of School Safety and Transportation is authorized to “maintain the physical security and safety of the agency or institution.” 34 C.F.R. § 99.8. Insofar as photographing students fall within Moran’s professional responsibilities, those records pertain to “[e]nforc[ing] any local, State, or Federal law, or refer to appropriate authorities a matter for enforcement of any local, State or Federal law against any individual.” *Id.* They, therefore, do not meet the statutory definition of educational records under FERPA for multiple reasons.

**D. If FERPA Did Apply, HBSD Would Still Be Obligated To Redact Images of Students and Disclose Remaining Portions of the Photos**

Even if Moran’s photographs contain content subject to an exemption, HBSD has a duty to segregate and redact. The presence of exemptible material does not mean the entire record can be withheld. “Even if a document contains exempt portions, the remainder of the document must be disclosed.” *Newsday, Inc. v. N.Y.C. Police Dep’t*, 518 N.Y.S.2d 966, 974 (App. Div. 1987) (Carro & Smith, JJ., dissenting). Accordingly, courts have repeatedly held that agencies must redact records rather than withhold them in their entirety. *See, e.g., The New York Times Co. v. City of N.Y. Fire Dep’t*, 4 N.Y.3d

477, 485 (2005) (ordering release of 911 call tapes from September 11, 2001 with redaction of portions that were exempt); *Xerox Corp. v. Town of Webster*, 65 N.Y.2d 131, 133 (1985) (per curiam) (remanding for *in camera* review and redaction of any portions exempt).

If HBSD determined that disclosing the withheld photographs would invade student privacy, it should have redacted the students' faces rather than withholding the entire photographs altogether. Courts have found, for example, that blurring students' faces from a video taken inside the classroom is sufficient to "protect the identities of the students involved in the event." *Jacobson*, 39 N.Y.S.3d at 908. Respondent cannot plausibly argue that similar redactions would not achieve the same ends here. For Lane, the redacted photographs would still help confirm allegations levied against HBSD and provide valuable leads for future reporting.

## II.

### **HBSD HAS FAILED TO ESTABLISH THAT THE REQUESTED METADATA IS EXEMPT FROM DISCLOSURE**

#### **A. System Metadata Is Subject to Disclosure Under FOIL**

The electronic picture files that Lane requested include metadata that provides basic documentation about the rest of the image file, typically including the creation date and location. As explained in *Irwin v. Onondaga Cty. Res. Recovery Agency*, 895 N.Y.S.2d 262, 267 (App. Div. 4th Dep't, 2010), "file names and extensions, sizes, creation dates and latest modification dates of digitally-stored photographs are 'system metadata,'" which is subject to disclosure under FOIL

For purposes of FOIL, system metadata of a photograph is the "electronic equivalent of notes on a file folder indicating when the documents stored therein were

created or filed, [thus] constitutes a ‘record’ subject to disclosure under FOIL.” *Irwin*, 895 N.Y.S.2d at 268. This treatment of metadata under FOIL is consistent with its treatment by other states. *See, e.g., Fagel v. Dep’t of Transp.*, 991 N.E.2d 365, 371-72 (Ill. App. 1st Dist. 2013) (affirming that an unlocked Excel spreadsheet, including metadata, must be provided in response to an Illinois Freedom of Information Act request); *O’Neill v. City of Shoreline*, 240 P.3d 1149, 1152 (Wash. 2010) (holding that the metadata associated with an email sent to a public official constituted a public record subject to disclosure under Washington’s Public Records Act); *Lake v. City of Phoenix*, 218 P.3d 1004, 1007-08 (Ariz. 2009) (“When a public officer uses a computer to make a public record, the metadata forms part of the document as much as the words on the page.”).

In short, the photographic metadata revealing when and where an image was recorded is part of the digital file of the image, *Irwin*, 895 N.Y.S.2d at 264, and this metadata should have been disclosed in response to Petitioner’s Request 4, without the need for a separate Request 7 specifically referencing the metadata.

**B. Respondent Has Presented No Proper Basis to Withhold Metadata**

HBSD identifies no proper basis for withholding the metadata requested by Lane and its refusal to disclose the metadata also violates FOIL.

1. Respondent’s duty to segregate extends to system metadata.

In response to Request 4, HBSD wrongly withheld the system metadata of the picture files that Lane requested. Just as Lane should at least have received versions of the withheld photographs with the children’s images concealed even if FERPA applied, he should also have received the metadata for the withheld images as well. The duty to



segregate extends to the metadata that is a component part of the requested image files.

Although Lane did not mention metadata in Request 4, the system metadata is part of a photograph's electronic file, does not contain any personally identifiable information, and therefore should have been segregated and disclosed. *See Irwin*, 895 N.Y.S.2d at 266 (“[A]lthough the FOIL request could have been phrased more precisely . . . the petitioner's request for ‘[a]ll computer records that are associated with published [photographs] . . .’ included a demand for the metadata associated with those images.”).

2. Retrieving metadata does not constitute the creation of a new document.

In any event, Lane specifically requested the metadata in Request 7. In response, HBSD wrongly asserted that retrieving the metadata would constitute the creation of a new document, which “the district is not required to create.” Pet. ¶ 15, and Exh. G. This is not so.

Under FOIL, if an agency can retrieve an electronic file with reasonable effort, they are required to do so. *See Data Tree*, 9 N.Y.3d at 464. “When an agency has the ability to retrieve or extract a record or data maintained in a computer storage system with reasonable effort, it shall be required to do so.” Pub. Off. Law § 89(3)(a). This includes “[a]ny programming necessary to retrieve a record maintained in a computer storage system and to transfer that record to the medium requested by a person.” *Id.* In amending Public Officers Law § 89 to include this language, the New York State Legislature stressed that retrieving data “*shall not* be deemed to be the preparation or creation of a new record.” N.Y. Bill Jacket, 2008 S.B. 962 Ch. 223 (emphasis added). Therefore, as long as retrieving the data can be retrieved with “reasonable effort,” HBSD is obligated under FOIL to do so.

HBSD should have been able to retrieve the metadata that Lane requested with a few keystrokes, and this would not exceed the “reasonable effort” that FOIL requires. When retrieving the information involves “[a] simple manipulation of the computer,” *Data Tree*, 9 N.Y.3d at 465, this burden does not excuse denial of a FOIL request. *Bloomberg*, 892 N.Y.S.2d at 382-83. As Lane made clear in his multiple exchanges with HBSD, picture files metadata can easily be exported to an excel file. If Respondent does not know how to export file metadata, there are plenty of online tutorials that can instruct Respondent on how to do so. Alternatively, HBSD could avail any number of free software available online that allows users to export metadata with a single click. Indeed, the attendant burden of retrieving the metadata that Lane requested is likely far less than the burden that routine FOIL disclosure like redactions imposes on agencies.

3. Respondent must retrieve metadata from sources under its control.

HBSD’s latest response to Lane asserted that HBSD does not possess the original metadata, claiming without explanation that it was somehow “modified” when the files were transferred from Moran’s device to a central network drive. Pet. ¶ 16, and Exh. H. Even if HBSD does not have the original metadata on its network drive, however, it still has an obligation under FOIL to retrieve the metadata from the camera or phone that Moran used to take the photographs. HBSD has not done so.

FOIL broadly defines the records subject to disclosure as including “any information kept, held, filed, produced or reproduced by, with or for an agency.” Pub. Off. Law § 86(4). Records subject to disclosure under FOIL include not only those in an agency’s immediate possession; records “kept” or “held” by a third party “for an agency” also “fall[] within the unambiguous definition of the term ‘records’ under FOIL.” *Encore*

*Coll. Bookstores, Inc. v. Auxiliary Serv. Corp. of State Univ. of N.Y. at Farmingdale*, 87 N.Y.2d 410, 417 (1995). Moran took the pictures at issue and generated the requested metadata at Respondent's direction in the course of his duties as HBSD's Director of School Safety and Transportation. The photographs with their metadata are subject to Respondent's review and inspection and have been "kept" or "held" by Moran for HBSD. The metadata thus remains within HBSD's possession for purposes of FOIL, *see Gould*, 89 N.Y.2d at 278-79, and HBSD has "both the responsibility and the obligation to gain access to" the files' original metadata. *Smith v. N.Y. State Office of the Att'y Gen.*, 973 N.Y.S.2d 404, 406 (App. Div. 3d Dep't 2013).

No valid reason exists for HBSD's refusal to disclose the requested metadata. The metadata does not provide private information for any identifiable student and should have been disclosed even if FERPA otherwise applied to the photos (which it does not).

### CONCLUSION

For the foregoing reasons, this Court should enter judgment: declaring that the Respondent has acted unlawfully in failing to disclose the requested picture files and accompanying metadata; requiring HBSD to produce promptly all records or non-exempt portions of records responsive to Lanes FOIL Request 4 and Request 7; and awarding Petitioner his litigation costs, including attorneys' fees, together with such other and further relief as is just and proper under the circumstances.

Dated: June 4, 2020

Respectfully submitted,

MEDIA FREEDOM &  
INFORMATION ACCESS CLINIC

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