

Tom, J.P., Saxe, Acosta, Abdus-Salaam, JJ.

5156 Michael Mulgrew, etc., Index 113813/10
Petitioner-Appellant,

-against-

Board of Education of the City School
District of the City of New York, et al.,
Respondents-Respondents.

Dow Jones & Company, Inc., et al.,
Intervenors-Respondents.

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New York State United Teachers,
American Federation of Teachers
and National Education Association,
Amici Curiae.

Stroock & Stroock & Lavan LLP, New York (Charles G. Moerdler of
counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Victoria
Scalzo of counsel), for Board of Education of the City School
District of the City of New York and Joel I. Klein, respondents.

Levine Sullivan Koch & Schulz, LLP, New York (David A. Schulz of
counsel), for Dow Jones & Company, Inc., NYP Holdings, Inc.,
Daily News, L.P., The New York Times Company and NY1 News,
respondents.

Richard E. Casagrande, New York, for amici curiae.

Order and judgment (one paper), Supreme Court, New York
County (Cynthia S. Kern, J.), entered January 11, 2011, which, to
the extent appealed from as limited by the briefs, denied the

petition and dismissed the proceeding brought pursuant to CPLR article 78 seeking to enjoin respondents from releasing, in response to Freedom of Information Law (FOIL) requests, Teacher Data Reports that disclose teachers' names, unanimously affirmed, without costs.

Supreme Court improperly reviewed respondents' determination to release the requested reports under the "arbitrary and capricious" standard set forth in CPLR 7803(3). The court should have determined whether respondents' determination "was affected by an error of law" (CPLR 7803[3]). In any event, the matter need not be remanded since respondents properly determined that the requested reports should be released under FOIL (*cf. Matter of Verizon N.Y., Inc. v Devita*, 60 AD3d 956, 957 [2009]).

Public agency records, like the ones at issue here, 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 (Public Officers Law § 89 [5][e]; see *Matter of Bahnken v New York City Fire Dept.*, 17 AD3d 228, 229 [2005], *lv denied* 6 NY3d 701 [2005]). Petitioner, as the party claiming the exemption, failed to sustain that burden. Although the materials sought are, in fact, intra-agency materials under Public Officers Law § 87(2)(g), they are

nonetheless subject to disclosure as "statistical or factual tabulations or data" under § 87(2)(g)(I) (see *Matter of New York 1 News v Office of President of Borough of Staten Is.*, 231 AD2d 524, 525 [1996]). "The mere fact that some of the data might be an estimate or a recommendation does not convert it into an expression of opinion" subject to a FOIL exemption (*Matter of Polansky v Regan*, 81 AD2d 102, 104 [1981]; see also *Ingram v Axelrod*, 90 AD2d 568 [1982]).

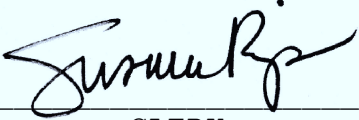
The requested reports also do not fall under the exemption for personal privacy set forth in Public Officers Law § 87(2)(b). Although privacy interests are implicated by the type of information sought to be redacted, the release of the information does not fall within one of the six examples of an "unwarranted invasion of personal privacy" set forth in Public Officers Law § 89(2)(b) (see *Matter of New York Times Co. v City of N.Y. Fire Dept.*, 4 NY3d 477, 485 [2005]). Further, when balancing the privacy interests at stake against the public interest in disclosure of the information (see *id.*), we conclude that the requested reports should be disclosed. Indeed, the reports concern information of a type that is of compelling interest to the public, namely, the proficiency of public employees in the

performance of their job duties (see *Stern v FBI*, 737 F2d 84, 92 [1984]).

We have considered the parties' remaining contentions and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: AUGUST 25, 2011



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