Case Number: PC-2021-05116
Filed in Providence/Bristol County Superior Court
Submitted: 8/5/2021 6:53 AM
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Reviewer: Victoria H

STATE OF RHODE ISLAND **PROVIDENCE, SC.**	**SUPERIOR COURT**
NATIONAL EDUCATION ASSOCIATION RHODE ISLAND, et al., ***Plaintiffs,***	
vs.	**C.A. No. PC 21-05116**
SOUTH KINGSTOWN SCHOOL COMMITTEE, et al., ***Defendants.***	

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER/PRELIMINARY INJUNCTION PENDING JUDICIAL REVIEW

The Plaintiffs, National Education Association Rhode Island ("NEARI") and National Education Association – South Kingstown ("NEASK") (collectively referred to as "NEA" or the "Union") hereby submit the following memorandum of law in support of its Motion for Temporary Restraining Order and Preliminary Injunction to temporarily prohibit the Defendants, South Kingstown School Committee, et al. ("School Committee" or "School Department") from responding to certain public records requests and/or otherwise disclosing certain records pursuant to the Access to Public Records Act ("APRA"), G.L. 1956 § 38-2-1 et seq., contained in Appendix B to the Verified Complaint ("Ver. Cmplt.").

I. BRIEF INTRODUCTION.

The instant dispute arises from the requests of several private citizens for records from the South Kingstown School Committee relying upon APRA. See Ver. Cmplt., App. B. In short, the Union contends that: (a) some of the records scheduled for disclosure are not public records because they do not relate to the official business of the School Department; (b) some

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records are not public records because they may not be disclosed pursuant to certain exemptions contained within APRA; and (c) some of the records in (b) are exempted because they are so-called personnel records pursuant to §38-2-2(4)(A)(I)(b). With regard to the documents described in (c), they cannot be disclosed absent this Court first conducting an in camera inspection to first determine whether the public interest in the particular documents outweighs the personal privacy interests of the public-school teachers identified in the records.

Considering the likelihood of establishing that such documents are not subject to disclosure and/or not subject to disclosure prior to employing the balancing test, and the irreparable harm that certainly results when records not subject to disclosure are released, this Court should grant the injunctive relief requested by the Union

II. FACTS AND TRAVEL.

The NEA

For approximately forty years, the NEA has been the certified collective bargaining representative of teachers employed in South Kingstown. Ver. Cmplt. ¶ 3, 4; Exhibit A, *Labor Board Certification*. As the certified bargaining representative, the NEA has executed a series of CBAs, with the School Committee, governing the terms and conditions of their members' employment. Exhibit B, *CBA*. The collective bargaining relationship between the Union and the School Committee is governed by the statutory provisions and procedures set forth generally, in Chapter 28, Title 7, the State Labor Relations Act ("SLRA") and in Chapter 28, Title 9.3, the Certified School Teachers' Arbitration Act (the "Michaelson Act"). These statutes set forth the parties' obligations to each other and the public policy which underlies the relationship in general.

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The APRA Requests

The South Kingstown School Department's recent difficulties have been highly publicized. In or about April 2021, Defendant Solas sent an e-mail to the Principal of a South Kingstown School with a list of questions and/or requests designed to gather information about, among other things, whether the school includes "critical race theory" it in its curriculum. Ver. Cmplt., App. A; ¶ 13. The e-mail noted that Solas and the Principal had a phone conversation and that the list of questions stemmed from that conversation. Id. The list included a request for a variety of things, including a "[d]isclosure of all special guests who have promoted or spoken about antiracism, gender theory, antiracism [sic], race relations, race in general, and any political topic. This includes but is not limited to a drag queen reading to children, a transgender person reading a book to children about sexuality or gender or simply speaking to students about those topics, a political activist meeting with a teacher or administrative personnel and any politically affiliated guest hosted or invited by the school." Id. In response to the e-mail the Principal told Solas to file a request pursuant to APRA to obtain the information she sought. Id. at ¶ 14.

According to a statement published on a website called "legalinsurrection.com" Solas wrote "I am a mother in the South Kingstown School District in Rhode Island *investigating through public records requests how critical race and gender theories are integrated into lessons, school policies and contracts.* Now the School Committee is considering suing me to stop me." Id.; see also App. C (emphasis added). Solas appeared on Fox News and on other internet sites which garnered South Kingstown national attention.[1] Id.

[1] Although the term "critical race theory," existed for many years, it only recently generated national discourse following the issuance of a September 2020 Memorandum published by the United States Office of Management and Budget that included instructions from then-President Donald Trump to end any federal training that includes anti-racism because according to the

By June 2, 2021, Solas had filed about **two hundred (200) APRA requests**, many of which contain multiple requests within each request. Ver. Cmplt., App. B. The requests made by Solas call for a vast variety of records on many topics. Id. Following Solas' requests, the School Department began receiving more requests from other individuals and entities. Id. For example, there are a vast number of similar requests from another individual, Defendant Adam Hartman. Id. In total, the School Department received over three hundred (300) APRA requests from April 2021 to July 2021, many of which are still pending. Id.[2]

The Union has filed the instant suit only as it relates to certain categories of documents

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President, such training was anti-American. Exhibit C, *Memorandum No. 20-34.* As noted by the New York Times, the then-President's:

> "focus on C.R.T. seemed to have originated with an interview he saw on Fox News, when Christopher F. Rufo, a conservative scholar now at the Manhattan Institute, told Tucker Carlson about the 'cult indoctrination' of critical race theory. Use of the term skyrocketed from there, though it is often used to describe a range of activities that don't really fit the academic definition, like acknowledging historical racism in school lessons or attending diversity trainings at work. The Biden administration rescinded Mr. Trump's order, but by then it had already been made into a wedge issue. Republican-dominated state legislatures have tried to implement similar bans with support from conservative groups, many of whom have chosen public schools as a battleground." Exhibit D, *N.Y. Times Article.*

For a scholarly discussion of critical race theory, see K. Williams Crenshaw, Twenty Years of Critical Race Theory, Looking Back to Moving Forward, 43 Conn. L. Rev. 1253 (2011).

[2] In the course of the dispute, many members of the School Committee and the Superintendent, Linda Savastano ("Savastano") resigned. Exhibit E, *Providence Journal Article, 6/29/21.* Upon information and belief, the APRA requests have required that the School Department devote a significant amount of time and resources to keep track of the requests and conduct appropriate searches. To date, those searches have resulted in the production of at least one response that included over 6,000 pages of records. Ver. Cmplt., ¶ 46.

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implicated by the 300 requests. As to many of the requests, the Union expresses no opinion. For example, whether a private citizen is entitled to copies of school curriculum or information about legal expenses of a particular school district is not at issue here. In fact, labor organizations often utilize APRA requests to obtain pertinent information about *the official business* of the government.

However, certain categories of documents requested in Appendix B are simply not public records and/or implicate serious privacy interests of public employees. Accordingly, given the unprecedented nature of the scope and volume of the requests, and the risk of improper disclosure, the Union seeks court intervention.

To be clear, for some of the categories of documents that implicate records with personally identifiable information about individual teachers, this motion is directed primarily at the merits of the question of whether the Union is entitled to have the Court employ a balancing test prior to disclosure as contemplated in Department of the Air Force v. Rose, 425 U.S. 352, 96 S.Ct. 1592, 48 L.Ed.2d 11 (1976) ("Rose") and more recently as outlined by the Rhode Island Department of Attorney General in Lyssikatos v. Narragansett Police Department, PR 21-12 (April 15, 2021) (included as Exhibit F) and this Court in Lyssikatos v. Goncalves, PC 2017-3678 (J. Long, March 18, 2019), cert. denied, May 22, 2020 (included as Exhibits G and H). Only if the balancing test is conducted can disclosure be contemplated.

Upon information and belief, the School Department is presently working on a response that contemplates the release of ***an additional 90,000 records*** toward the middle or end of August 2021. Accordingly, for the following reasons, the Union respectfully requests that the Court grant the instant Motion.

III. STANDARD OF REVIEW.

The standard for temporary and preliminary injunctive relief has long been established. Most significantly, the primary function of an injunction is to preserve or restore the status quo. See E.M.B. Assocs. v. Sugarman, 372 A.2d 508, 509 (1977) ("a restraining order is meant to preserve or restore the status quo and that this status quo is the last peaceable status prior to the controversy.") (citing 11 Wright & Miller, *Federal Practice and Procedure* § 2948 at 465 (1973)); see also Pawtucket Teachers' Alliance, Local 920, AFT, AFL-CIO v. Brady, 556 A.2d 556 (R.I. 1989) ("Brady") (upholding trial justice's decision granting injunction to prohibit Pawtucket School Committee from disclosing records pursuant to APRA request). Accordingly, "[i]n determining whether to issue an injunction, a trial justice should consider four factors: (1) whether the plaintiff has a reasonable likelihood of success on the merits of the case, (2) whether the plaintiff will suffer irreparable harm if the injunction is denied, (3) whether an adequate remedy at law exists, and (4) whether the threatened injury to the plaintiff outweighs the harm to the defendant or to the public if the injunction is granted." Id. at 557.

IV. ARGUMENT.

A. Categories of Records at Issue.

The Union has filed the instant suit only as it relates to certain categories of records implicated by the requests. In particular, the categories of records at issue are:

- **Records that implicate labor relations or collective bargaining matters or otherwise contain information about protected concerted activity between or among union members.** Documents which may contain such information may be produced in response to Request No. 48 which calls for "digital copies pertaining to the AFL-CIO in the last four months," and Request No. 100 which calls for "digital copies of public documents relating to Patrick Crowley in the months of March, April, and May 2021." **This category will hereinafter be referred to as "labor relations records."**

- **Records that implicate teacher discipline and performance.**

Documents which may contain such information may be produced in response to Request No. 158 submitted which calls for "all complaints against Robin Wildman;"[3] Request No. 182 which calls for "*all disciplinary actions and relevant details taken against any teacher in the school district in the past three years*. If actions or details are not public information, provide how many disciplinary actions are private and against which teachers;" Request No. 202 which calls for records related to a song performed by the South Kingstown High School choir and for records reflecting "what qualifications Ryan Muir [has] to talk about race and equality with choir students?;" and Request No. 241 which requests records such as "CVs, contracts, job descriptions and *all documents related to hiring of the first 50 teachers listed in the staff directory on the website of South Kingstown High School*." **This category will hereinafter be referred to as "teacher discipline and performance records."**

- **Records that implicate teacher e-mails.** Documents which may contain such information may be produced in response to Request No. 164 which calls for all e-mails between Linda Savastano (the former Superintendent) and Robin Wildman for a period of two years, Request No. 85 which calls for "digital copies of emails of Michael Alper in March 2021," Request No. 86 which calls for "digital copies of e-mails of Amber Lambert for the month of March.;" Request No. 47 which calls for "digital copies of Linda Savastano's emails in the last six months;" Request No. 59 which calls for "exactly one hour's worth of work to provide digital copies of Linda Savastano's most recent emails;" and Request No. 297 which calls for "all Savastano emails from May 17, 2021, to the date this request is fulfilled." **This category will hereinafter be referred to as "teacher e-mails."**

B. The Rhode Island APRA and balancing test applicable to certain types of records.

1. The Rhode Island APRA.

"With the passage of chapter 2 of title 38, the Rhode Island Legislature enhanced the First Amendment right of the public and the press to know and have access to information held by various public agencies." Brady, 556 A.2d at 558 (citing The Rake v. Gorodetsky, 452 A.2d 1144, 1146-47 (R.I. 1982)). Pursuant to § 38-2-1, the purpose of APRA is as follows:

> "The public's right to access to public records *and the individual's right to dignity and privacy* ***are both*** *recognized to be principles of the utmost importance in a free society*. The purpose of this chapter is to facilitate public access to public records. **It is also the intent**

[3] While Wildman is now retired, she was a teacher and member of NEA during the time period for which the e-mails are requested.

> **of this chapter to protect from disclosure information about particular individuals maintained in the files of public bodies when disclosure would constitute an unwarranted invasion of personal privacy**." § 38-2-1.[4] (emphasis added).

Accordingly, while the Rhode Island Supreme Court is "mindful that the basic policy of the act is in favor of disclosure. * * * [], the dual purpose of APRA makes clear that **the Legislature did not intend to bestow upon the public *carte blanche* access to all publicly held documents.**" Id. (emphasis added); Direct Action for Rights and Equality v. Gannon, 713 A.2d 218 (R.I. 1998) ("DARE") (reiterating this principle in context of request for police civilian complaint reports).

APRA's provisions make clear that not all records held by a public entity are automatically public. In fact, APRA contains a specific definition of a public record which provides that a "'Public record' or 'public records' shall mean all documents, * * * computer stored data * * * or other material regardless of physical form or characteristics made or received pursuant to law or ordinance or *in connection with the transaction of official business by any agency*." § 38-2-2(4) (emphasis added). **In short, to be considered a public record subject to APRA a record must first be related to the transaction of official business**.

Of additional importance is the fact that the General Assembly has made clear that it has a "desire to limit accessibility of certain documents in order to protect individuals from unwarranted invasions of privacy and to avoid the disclosure of confidential information * * * evinced by the numerous exemptions contained in § 38-2-2." Brady, 556 A.2d at 558. Accordingly, when it comes to any records that contain "personal individually identifiable" information about employees, such documents are not public if they are "otherwise deemed

[4] The purpose of APRA was amended in 1998. It was at that point the General Assembly added the emphasized language placing individual privacy on equal footing with public right of access.

confidential by federal or state law or regulation, ***or the disclosure of which would constitute a clearly unwarranted invasion of personal privacy*** pursuant to 5 U.S.C. § 552 et seq.; provided, however, with respect to employees, and employees of contractors and subcontractors *working on public works projects that are required to be listed as certified payrolls*, the name, gross salary, salary range, total cost of paid fringe benefits, gross amount received in overtime, and any other remuneration in addition to salary, job title, job description, dates of employment and positions held with the state, municipality, or public works contractor or subcontractor on public works projects, employment contract, work location, and/or project, business telephone number, the city or town of residence, and date of termination shall be public." § 38-2-2(4)(A)(I)(b) (emphasis added).[5]

Accordingly, when documents that may contain individually identifiable information are at issue, a balancing test must be employed prior to disclosure that considers the privacy interests of the employee at issue with "the public's right to know this information." Brady, 556 A.2d at 559; see also Exhibits F, G.

2. Recent Rhode Island APRA Cases Demonstrate the Appropriate Protocol when a Public Employee's Individually Identifiable Information is at Issue.

Both the 2019 Superior Court decision involving Lyssikatos and the City of Pawtucket, as well as the more recent 2021 decision of the Attorney General's Office involving Lyssikatos and the Town of Narragansett should guide the Court on the instant motion as it relates to the records that fall within § 38-2-2(4)(A)(I)(b) (personnel or personal individual identifiable records). A review of those matters makes the point.

[5] The Plaintiffs' members are not working on public works projects involving certified payroll.

In the Pawtucket case, Lyssikatos sought the "last 2 years of internally generated reports investigated by the [Pawtucket Police Department's] Internal Affairs Division that were not the result of a citizens' complaints against police officers." Exhibit I, *Pawtucket's Memorandum of Law*, p. 1. The City identified 57 reports that were responsive to the request, but denied disclosure based on its interpretation of the Rhode Island Supreme Court's decision in DARE. Id. In particular, the City determined DARE did not require release of records since the investigations at issue were not initiated by citizen complaint. Id.[6]

The City determined the records requested were more akin to personnel records and were exempt from disclosure pursuant to § 38-2-2(4)(A)(I)(b). As the City stated in its Memorandum in Support of Summary Judgment, "(1) the reports were not presumptively public; (2) public interest in the reports was negligible; and (3) the disclosure of the reports would constitute a clearly unwarranted invasion of personal privacy." Id. at p. 2.

In response, Lyssikatos filed suit seeking disclosure. On summary judgment the City argued:

> "The language of R.I. Gen. Laws § 38-2-2(4)(A)(I)(b) ***contemplates a balancing test whereby the public interest in disclosure is weighed against the applicable personal privacy of the individual employee.*** * * * In determining whether to release the documents, a court must weigh the public interest and the privacy interest involved to determine whether disclosure of the records would constitute 'a clearly unwarranted invasion of privacy.'" Id.

[6] In DARE, the Supreme Court ordered the disclosure of internal affairs records in redacted form, but those records were reports that reflected the outcome of citizens' complaints, which arguably carries a higher degree of public interest in the workings of the police department. In all events, whether redaction adequately addresses privacy interests is an issue highly dependent upon the record at issue. Furthermore, if a record is not public in the first place, it need not be produced at all and redaction never comes into play.

The City further relied upon the United States Supreme Court decision in Rose, pointing out that this "limitation of a clearly unwarranted invasion of personal privacy provides a proper balance between the protection of an individual's right of privacy and the preservation of the public's right to Government information by excluding those kinds of files the disclosure of which might harm the individual."[7]

With regard to the balancing test it sought, the City pointed out that Lyssikatos could not establish that disclosure was warranted because he had not seen the documents, and thus, he could not make realistic arguments that the public interest outweighed the privacy rights at issue. As the City wrote, "[t]he challenged documents simply call for an independent review, by the Court, mindful of the applicable criteria. Consequently, as a matter of law, Plaintiff cannot succeed in showing that the public interest in disclosure outweighs the particular privacy interests involved in each applicable report. Plaintiff cannot challenge what he does not know. ***Defendants submit that the only proper course in this instance, and in all future circumstances where there is a challenge to a public agency's decision to withhold documents under the specific balancing test set out above, is for the Court to review the records in camera and determine whether the purported public interest outweighs the privacy interests of the individual(s) involved in each record***." Id. at p. 8 (emphasis added).

In March 2019, this Court rendered a decision denying Lyssikatos' motion for summary judgment. Ex. G. In other words, the Court did not order the City to produce the 57 internal

[7] Rose involved a request for case summaries of honor and ethics hearings at the Air Force Academy. The Court held that the personnel record exemption in FOIA contemplated "an exemption that would require a balancing of the individual's right of privacy against the preservation of the basic purpose of the [FOIA]" and that it "vested the courts with the responsibility ultimately to determine 'de novo' any dispute as to whether the exemption was property invoked in order to constrain agencies from withholding nonexempt matters." 425 U.S. 352, 379.

affairs records sight unseen. Instead, the Court held that "[i]n light of prior case law, particularly Department of Air Force v. Rose, Direct Action for Rights and Equality v. Gannon and Providence Journal Company v. Kane, ***I don't believe the Court can determine whether the Defendants are right or wrong about their bases for denial of this case without reviewing the records***." Id. at p. 3 (emphasis added). Although the City urged the Court to adopt a protocol in all similar cases, the Court declined to do so. But as it relates to the instant case, the significant take away is that in a case implicating personnel records under § 38-2-2(4)(A)(I)(b), this Court held that an in camera review was appropriate to weigh the public interest in the documents against the personal privacy interests of the persons identified in the records at issue prior to ordering disclosure.[8]

By 2021, the Department of Attorney General had the benefit of this line of cases when it faced another request by Lyssikatos, this time for "all final reports of investigations into police misconduct, whether initiated internally or by members of the public completed between 1/1/15 and 12/31/18." Ex. F, p. 2. The Town denied access to any of the requested records relying on § 38-2-2(4)(A)(I)(b). In the Narragansett case, the Attorney General reiterated its opinion that before denying access, a balancing test must be conducted considering the factors set forth in Farinelli v. City of Pawtucket, PR 20-48 which includes the following non-exhaustive list:

> "Whether the [records] requested are likely to shed light on overall government functions rather than only reveal information about a particular isolated incident;
> Whether the allegations of misconduct were determined to be founded;
> The nature and severity of the alleged misconduct that is the subject of the [record] * * *

[8] Following the trial justice's March 2019 decision, Lyssikatos filed a Petition for Writ of Certiorari seeking review of the decision which found the balancing test must be employed prior to disclosure. That Petition was denied. Exhibit H, *Order*.

> Whether there is any evidence of governmental impropriety in investigating the allegations;
>
> Any particular public interest in disclosure that is apparent or identified by the requestor;
>
> The extent to which the [record] reveals personal or private information about [employees] and/or private citizens or would unfairly harm the reputation of the [employees] or private citizens;
>
> Whether redaction of names or other identifying information can effectively ameliorate any privacy concerns." Id.

Accordingly, the Attorney General's office advised the Town to reconsider its initial decision and then, for those that were still withheld, *conducted the balancing test as to each report prior to disclosure*. Id.; see also The Providence Journal Co. v. Town of West Warwick, 2004 WL 1770102, at *2 (R.I. Super., filed July 22, 2004) (On review of requests for certain records requested by newspaper concerning the Station Nightclub Fire, trial justice holding that the dual purposes of APRA "require a balancing analysis when confronted with a specific record request.").

With this background in mind, we now turn to the specific requests at issue.

C. The Union is likely to establish a basis for injunctive relief as the records requested are exempt from disclosure or otherwise require an in camera review and application of balancing test prior to disclosure.

1. Teacher discipline and performance records.

The request for teacher discipline, performance and hiring records implicate separate considerations under APRA. First, it is well-settled that APRA exempts from disclosure "[a]ny individually identifiable evaluations of public school employees made pursuant to state or federal law or regulation." § 38-2-2(Z). Thus, to the extent any records requested implicate performance, those documents are exempted from disclosure. For example, one request calls for a teacher's "qualifications" or competence to teach a certain class or song. Because that type of request would call for evaluative documents, no such documents may be disclosed.

Furthermore, any other records that are "personal individually identifiable" records, they also may not be disclosed if they implicate the privacy interests of teachers absent employing the balancing test. For example, it goes without saying that teacher discipline records, hiring records and complaints about teachers implicate serious teacher privacy interests. The hiring records of the first 50 teachers on the seniority list is certain to contain personal information, medical information and other individually identifiable information and the requestors have set forth no information about what public interest exists in such information. These records must be segregated from all others and subject to in camera review as suggested in subsection (2) supra.

In that context, the requestor must identify the public interest in the documents at issue. In this case, Solas initially requested information and records directed at school curriculum related to her daughter, a prospective student. However, when she was told to seek records through APRA, she then filed nearly two hundred (200) separate requests that expanded her "investigation" beyond curriculum and into things like complaints, discipline, hiring and performance of teachers. It is entirely unclear what relevance teacher discipline, performance, or even identity has to do with her interest in critical race theory as part of the curriculum. This is why it is so important to examine the documents and discern whether sufficient public interest even exists for disclosure.

Significantly, APRA is not an alternative to the civil discovery process. See, e.g., Columbia Packing Co., Inc. v. United States Department of Agriculture, 563 F.2d 495, 499 (1st Cir. 1977) (in FOIA action involving requests for records relative to federally inspected meat packing company, court noting that: [t]o the extent that the public interest in an adequate meat supply and fair administrative proceedings are just a restatement of Columbia's private interest in enlarged discovery, we think that these asserted 'public interests' are unrelated to FOIA's

purpose of 'inform(ing) the public about agency action' and are therefore of little weight in determining whether to order disclosure.").[9] Here, a request for all personnel related records of first 50 teachers on the School Department's roster is clearly a fishing expedition, which an abuse of the purpose of APRA. See, e.g., Cause of Action v. IRS, 253 F. Supp.3d 149, 160 (D.D.C. 2017) ("The law is clear that FOIA does not provide requestors with the right to demand 'all encompassing fishing expedition' of files in every office within an agency.").

To be sure, even if there does not exist a high degree of privacy interest, if there is no public interest in disclosure then the balancing test weighs in favor of non-disclosure "[s]ince 'something, even a modest privacy interest, outweighs nothing every time,'" then no disclosure is warranted. Pavement Coatings Technology Council v. United States Geological Survey, 995 F.3d 1014, 1024 (D.C. Cir. 2021) (holding that government properly withheld records reflecting personal information about study participants).

Accordingly, because the Union is likely to succeed in establishing that teacher discipline records are not public records and/or that the privacy interest outweighs any public interest in disclosure, a temporary order should enter so that the Court may make this determination on a full record.

2. Teacher e-mails.

The requests that call for e-mails of teachers (whether to and from other teachers, or between teachers and administrators) implicate separate concerns as follows.

a. Personal e-mails are not public records.

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[9] In Columbia Packing, the Court ultimately ordered disclosure of information about two meat inspectors but only after conducting the balancing test and determining that the inspectors had been convicted of taking bribes from meat packing companies and whose illegal activities were already highly publicized and therefore their privacy interests were outweighed by the public interest. Id. at 499-500.

One possible sub-category of teacher e-mails are personal e-mails which are e-mails that happen to exist on the school e-mail system but do not relate to the official business of the School Department. This could include e-mails from teacher to personal friends or family members on any topic or about a personal issue to a co-worker or supervisor. None of these relate to the official business of the School Department.

Personal teacher e-mails are not public records and thus, they cannot be disclosed, and no balancing test is necessary because the documents are not public in the first place. A recent case from Michigan makes the point. See Howell Education Association, MEA/NEA v. Howell Board of Education, 798 N.W.2d 495 (Ct. App. Mich. 2010); see also Schill v. Wisconsin Rapids School District, 786 N.W.2d 177 (Wis. 2010) (holding that teacher personal e-mails with no connection to government function are not public records and upholding trial court decision granting teachers injunctive relief).

Howell involved a public records request under Michigan FOIA law by an individual who requested "all e-mail beginning January 1, 2007, sent to and from three HPS teachers; plaintiffs Doug Norton, Jeff Hughey, and Johnson McDowell." Id. at 497. Each of these teachers were union officials and apparently there existed a heated contract negotiation. Id. at 497-98. The union objected to the release of personal e-mails and e-mails related to union business arguing that they were not public records subject to disclosure under Michigan's FOIA. Id. at 498. The school department's counsel suggested a "friendly suit" to resolve the dispute. Id.

After the filing of the suit, the Court appointed a special master to review approximately 5,500 e-mails. Id. The trial court found the plaintiffs lacked standing to assert the claim because only the public agency could assert the right not to disclose the documents and held that "as to

the claimed exemptions, the trial court concluded that those issues were moot 'because the disputed emails have been released to the intervenor,' resulting in the lack of an actual controversy. Finally, the trial court concluded that 'any emails generated through the District's email system, that are retained or stored by the district, are indeed 'public records' subject to FOIA * * *." Id. at 499-500.

The Court of Appeals rejected the lower court's decision on appeal. Initially, the court noted that "'*mere possession of a record by a public body' does not render the record a public document*." Id. at 500 (quoting Detroit News, Inc. v. Detroit, 516 N.W.2d 151 (1994)). "*Rather, the use or retention of the document must be 'in the performance of an official function.' * * * For the e-mails, at issue to be public records, they must have been stored or retained by defendants in the performance of an official function*." Id. (emphasis added).

Drawing a distinction from a prior case involving a document containing student names and addresses, the Court found that no official function was at issue with respect to the personal e-mails. "There is nothing about the personal e-mail given that by their very definition they have nothing to do with the operation of the schools, which indicates that they are required for the operation of an education institution. * * * Furthermore, 'unofficial private writings belonging solely to an individual should not be subject to disclosure merely because that individual is a state employee." Id. (citing Kestenbaum v. Mich. State Univ., 327 N.W.2d 783 (1982)).

The Michigan Court found that "[a]bsent specific legislative directive to do so, we are unwilling to judicially convert every e-mail ever sent or received by public body employees into a public record subject to FOIA." Id. In reaching this conclusion, the court relied upon federal FOIA cases examining whether an item was an "agency record." Id. at 501 (citing Bloomberg, L.P. v. United States Securities & Exch. Comm., 357 F. Supp.2d 156 (D.D.C. 2004)). In

Bloomberg an electronic calendar back up system captured both official and personal calendar entries of agency employees. Id. In ruling that the personal aspects of the calendar were not public records the Bloomberg Court found that the calendar system did not distinguish between SEC business-related documents and personal documents but that "employing agency resources, standing alone, is not sufficient to render a document an 'agency record.'" Id. (citing Bloomberg, at 164). *In the end, the court easily determined that "an e-mail sent by a teacher to a family member or friend that involves an entirely private matter such as carpooling, childcare, lunch or dinner plans, or other personal matters, is wholly unrelated to the public body's official function. Such e-mails simply are not public records." Id.* (emphasis added).

The same rationale applies here. In this case, the requestors have submitted several requests for teacher e-mails without regard to the substance of the e-mail, essentially assuming that all e-mails sent by and between teachers and administrators are public records. This simply is not the case. Accordingly, the Union is likely to succeed in its argument that personal e-mails of teachers are not subject to disclosure. In the alternative, the Union is likely to succeed on its argument that before any documents are subject to disclosure, given the possible categories of non-public records at issue, in camera review should be conducted prior to disclosure.

b. E-mails that may be related to official government function but are subject to a balancing test that considers teacher privacy interests.

The scope of the exemption in § 38-2-2(4)(A)(I)(b) extends beyond only those documents that may be found in a pure personnel file. The idea is that *any records of employees* with personally identifiable information, wherever located, may implicate employee privacy rights. While personnel records generally contain "'highly personal' information 'such as work-performance evaluations, past criminal convictions, and employment-related disciplinary

matters' and 'less intimate data' such as 'place of birth, date of birth, date of marriage, employment history and comparable data" if that information is located in other records, it is also exempt from disclosure. Providence Journal v. Kane, 577 A.2d 661 (R.I. 1990) (upholding decision of trial justice denying newspaper records about state workers based on the 1990 version of the APRA personnel-record exemption and more particularly, finding that such information about public employees was "confidential" and to disclose such information would be an invasion of privacy).[10]

In short, teacher e-mails may just as easily contain personally identifiable information such as medical information, job performance information, information about discipline or any other information that could just as easily be kept in a personnel file. See, e.g., Adelante Alabama Worker Center v. United States Dep't of Homeland Security, 376 F. Supp.3d 345 (S.D.N.Y. 2019) (discussing fact that all records "on an individual which can be identified as applying to that individual" constitute the type of records that can harm an individual and invade personal privacy). As noted in Adelante, "[a]s the Supreme Court has further explained, 'the protection of an individual's right of privacy, which Congress sought to achieve by preventing the disclosure of [information] which might harm the individual, surely was not intended to turn upon the label of the file which contains the damaging information * * * Indeed, the record need not even be a file." Id. at 365. So long as the record contains such information pertaining to an individual, the balancing test must be conducted. Id. at 366.

Accordingly, in these cases, so long as there is a privacy interest sufficient to trigger § 38-2-2(4)(A)(I)(b), the "burden [should] fall to the requester to establish that disclosure 'would

[10] In Kane, there was no need to employ a balancing test because the version of APRA at that time contained a blanket disclosure of all such documents.

serve a public interest cognizable under FOIA.'" Id. (internal citations omitted). In that regard, "[t]he public's interest in disclosure involves considerations of 'the extent to which disclosure of the information sought would she[d] light on an agency's performance of its statutory duties or otherwise let citizens know what their government is up to." Id. (internal citations omitted).

One of the teachers' concerns in the instant case is the potential for public harassment in the age of so-called "doxing," and other forms of online harassment.[11] As the articles attached to the Verified Complaint indicate, there is a widespread interest in the topic of critical race theory being taught in schools. But the concern here is that the requestors seek not only to obtain those curriculum-related records but to find out information about teachers who may be associated with the curriculum in any respect. Should the requestors then publish records and/or records of identities and associate the teachers identified as supporting the theory controversial with their associates, the individual teachers may sustain harassment. As noted in Adelante, "the threat to privacy 'depends on the consequences likely to ensue from disclosure.'" Id. For example, "[t]he Second Circuit has upheld the redaction of individual's identities where public disclosure would expose those individuals to 'embarrassment and harassment in the conduct of their official duties and personal affairs.'" Id. (quoting Halpern v. FBI, 181 F.3d 279, 296-97 (2d Cir. 1999)).

It is precisely this risk of harm and violation of privacy at issue that can only be addressed by employing the balancing test in conjunction with in camera review. Accordingly, the Union is likely to succeed in its argument that teacher e-mails are not subject to disclosure. In the alternative, the Union is likely to succeed on its argument that before any documents are

[11] According to Wikipedia, "doxing" "is a neologism that has evolved over its brief history. It comes from a spelling alteration of the abbreviation 'docs' (for 'documents') and refers to 'compiling and releasing a dossier of personal information on someone.' Essentially, doxing is revealing and publicizing the records of an individual, which were previously private or difficult to obtain." See https://en.wikipedia.org/wiki/Doxing.

subject to disclosure, given the possible categories of non-public records at issue, in camera review should be conducted prior to disclosure.

3. Labor relations records.

Again, this category involves distinct issues. First, any "[r]eports and statements of strategy or negotiation involving labor relations or collective bargaining," are exempt from disclosure pursuant to § 38-2-2(H). Accordingly, any such documents are not subject to disclosure.

Documents that relate to the AFL-CIO or Patrick Crowley (and NEA employee) may also constitute another form of personal records that are not related to the official business of the School Department. In other words, communications by and amongst union members and their representatives are not public records. This issue also arose in Howell. In that case, the Court found:

> "Having determined that the personal e-mails are not 'public records' subject to FOIA, the next question is whether e-mails involving 'internal union communications' are personal e-mails. We conclude that they are. **Such communications do not involve teachers acting in their official capacity as public employees, but in their personal capacity as HEA members or leadership**. Thus, any e-mail sent in that capacity is personal. This holding is consistent with the underlying policy of FOIA, which is to inform the public 'regarding the affairs of government and the official acts of * * * public employees * * * The release of e-mail involving internal union communications would only reveal information **regarding the affairs of a labor organization, which is not a public body**.
>
> We define "internal union communications" to mean those communications sent only between or among HEA members and leadership, involving union business or activities, including contract negotiation, grievance handling, and voting. Any e-mail involving these topics that is sent to the district is no longer purely between or among HEA members and leadership and, therefore, does not fall under this category.

Based on the reasoning in Howell, the Union asserts that any records which constitute or involve the affairs of the Union (not a public body) are not public records and may not be disclosed in response to the requests for such documents.

D. The Union and its members will suffer irreparable harm absent an injunction.

In this case, Plaintiffs' members will suffer irreparable harm absent injunctive relief. See, e.g., K-Mart Corp. v. Oriental Plaza, 875 F.2d 907, 914 (1st Cir. 1989) ("The necessary concomitant of irreparable harm is the inadequacy of traditional legal remedies."); Gianfresco v. A.R. Bilodeau, Inc., 112 A.3d 703 (R.I. 2015); DePina v. State, 79 A.2d1284, 1289-90 (recognizing the potential irreparable harm associated with disclosure of medical records); Allen v. Creative Services, Inc., 1992 WL 813643, at *3 (R.I. Super., filed July 6, 1992) (granting injunction and finding disclosure of confidential business information would constitute irreparable harm).

In Gianfresco, the Rhode Island Supreme Court had occasion to review a trial justice's decision to grant injunctive relief in a dispute between two business landowners. The trial justice granted injunctive relief to the plaintiff diner owner which meant the defendant truck business could not trespass on plaintiff's property. The trucking business claimed it had a valid prescriptive easement and its actions did not constitute trespassing. Id. at 706-707.

In reviewing the trial justice's decision, the Court noted that "although the hearing justice's bench decision setting forth his reasons for granting plaintiff's request for a preliminary injunction was somewhat scant in the analysis of each prong, we are of the opinion that he adequately addressed the issues and did not err in his findings; *especially considering his emphasis on plaintiff's likelihood of success on the merits and the potential for the large trucks*

to cause irreparable harm to plaintiff's business. See School Committee of North Kingstown v. Crouch, 808 A.2d 1074, 1077 (R.I.2002) (although the hearing justice 'did not make extensive findings; nor did he elaborate on the factors he considered in granting a preliminary injunction,' he 'evidently focused on the [petitioner's] likelihood of success on the merits of its claims as the lynchpin for granting a preliminary injunction,' and, "[g]iven the centrality of that issue to th[e] case," he did not err). As we have previously explained, '***prospective damage*** to a business's good will and reputation "is precisely the type of irreparable injury for which an injunction is appropriate."' Id. at 711 (emphasis added).

Accordingly, the Court upheld the granting of injunctive relief because the plaintiff had adequately established that there was "prospective" damage to its business caused by the large trucks. See also Iggys's Doughboys, Inc. v. Giroux, 729 A.2d 701, 705 (R.I. 1999) ("prospective damage to a business's good will and reputation 'is precisely the type of irreparable injury for which an injunction is appropriate.'") (internal citations omitted).

While not completely on point, the First Circuit has previously held that failure to grant injunctive relief would destroy a party's rights to "meaningful review" in a case involving the disclosure of FBI records sought by the Providence Journal. See Providence Journal Co. v. Federal Bureau of Investigation, 595 F.2d 889, 890 (1st Cir. 1979). In that case, the Journal sought records from the FBI and the trial court ordered that they be disclosed. On appeal, the First Circuit issued a stay because "[f]ailure to grant a stay will entirely destroy appellants' rights to secure meaningful review. On the other hand, the granting of a stay will be detrimental to the Journal (and to the public's interest in disclosure) *only to the extent that it postpones the moment of disclosure assuming the Journal prevails by whatever period of time may be required for us to hear and decide the appeals*. Weighing this latter hardship against the total and immediate

divestiture of appellants' rights to have effective review in this court, we find the balance of hardship to favor the issuance of a stay. Id. at 890.

In this case, there is no adequate legal remedy (i.e., no money damages could remedy the harm at issue if no injunction is granted). If no injunction is granted the documents at issue will be disclosed absent a review of the legal issues outlined supra causing potential harm to Plaintiff's members' privacy rights. In this case, as of mid-August, 2021, the School Department is planning to release at least ***another 90,000 pages of records***.[12] Once released, there will be no way to undo the disclosure or any harm resulting from the disclosure. Accordingly, under these circumstances, an injunction is warranted.

E. The remaining elements weigh in favor of granting injunctive relief.

As noted supra, in order to warrant the granting of injunctive relief, the moving party must typically show that there is no adequate remedy at law and that the equities weigh in the party's favor. With respect to the potential harm to the requestors or to the public, no harm will be caused by a slight delay in response to the APRA requests. In that regard, the Union notes that given the volume of requests, it has taken the School Department many months to cull through the records and a few additional weeks or months will not make any difference if the records are ultimately deemed appropriate for disclosure. Furthermore, the Union notes that there are at least thirty (30) requests to which the School Department has already responded, compromising of many thousands of records, and there are other pending requests to which the

[12] Although the School Department's burden associated with responding to these requests is not necessarily the Union's direct problem, it should be noted that "[a]n agency need not honor a request that requires an unreasonably burdensome search,' * * * or would require the agency 'to locate, review, redact, and arrange for inspection a vast quantity of material.' * * * This is so because 'FOIA was not intended to reduce government agencies to full-time investigators on behalf of requestors." Sack v. Central Intelligence Agency, 53 F. Supp.3d 154, 163 (D.D.C. 2014) (internal citations omitted).

Union has no objection. Accordingly, the harm to the requestors and/or the public is limited to potential delay of only a certain segregable category of records, all of which implicate important privacy interests.

Accordingly, the threatened injury to the Union's members outweighs the harm to the School Department, the requestors and the public if the injunction is granted.

Finally, given the foregoing, the ultimate purpose of injunctive relief, to preserve the status quo, is served by awarding temporary relief to the Union until such time as a ruling can be made on the issues raised supra.

V. CONCLUSION.

Based on the foregoing, the Union respectfully requests that the Court grant the instant motion for temporary and preliminary injunction relief, enjoining the School Committee from disclosing any records within the specific requests outlined above: Requests Nos. 47, 48, 59, 85, 86, 100, 158, 164, 182, 202, 241 and 297, as well as any other requests not specifically identified but may call for the disclosure of labor relations records; teacher discipline and performance records and/or teacher e-mails as described supra. Such injunction should be granted to maintain the status quo pending a determination of the legal issues relative to disclosure of these records and/or an in camera review of any records slated for release and subject to the balancing test contemplated by § 38-2-2(4)(A)(I)(b).

Plaintiffs,
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By their Attorney,

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CERTIFICATION

I hereby certify that, on the 5th day of August 2021, I filed and served this document through the electronic filing system and that it is available for viewing and/or downloading from the Rhode Island Judiciary's Electronic Filing System to counsel of record. This document was also e-mailed to counsel for the Defendants as well as to the individual Defendants at the e-mail addresses listed below:

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