SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ERIE

NEXSTAR MEDIA INC., AS OWNER OF TELEVISION STATION WIVB, BUFFALO NY and DANIEL TELVOCK, AS INVESTIGATIVE PRODUCER FOR TELEVISION STATION WIVB

Petitioners,

-vs-

THE VILLAGE OF DEPEW, NEW YORK,

Respondent.

For a Judgment pursuant to Article 78 of the New York Civil Practice Law and Rules.

DECISION and ORDER

Index No. 804772/2021

Appearances of Counsel

FisherBroyles LLP (Richard Cohen, Esq. and Cynthia Counts, Esq., of counsel) for Nexstar Inc., Nexstar Media Inc. and Daniel Tevlock

Hodgson Russ LLP (Hugh M. Russ III, Esq., of counsel) for Village of Depew

Decision and Order

Petitioners brought this Article 78 proceeding to compel respondent to disclose certain materials under the Freedom of Information Law [FOIL]. By a decision and order dated June 1, 2021, this court directed respondent to submit a police report and a video of the incident in questions for an in camera review. Respondent did so, and then filed a motion for leave to conduct discovery.

In support of the motion, the court has read the affirmation of Hugh M. Russ III, Esq., dated June 14, 2021 and the reply affirmation of Hugh M. Russ III Esq., dated July 20, 2021. In

opposition to the motion, the court has read the informal letter motion of Cynthia Counts, Esq., dated July 16, 2021. The court heard argument virtually, via MS Teams, and reserved decision.

In its moving papers, respondent alleges that petitioners claimed that the video in their possession was incomplete. Respondent states that it wishes to conduct discovery in order to "test the truth of those representations." Petitioners answer that under FOIL, it is immaterial whether they have a complete or incomplete version of the video.

Since the purpose of special proceedings is speed and economy, leave to conduct discovery is granted only on a showing of good cause [Siegel and Connors, *New York Practice*, §555 (Thomson/Reuters 2018)]. As was noted in this court's earlier decision dated June 1, 2021, petitioners are not required to demonstrate that they have need of the requested materials. [*Data Tree LLC v. Romaine*, 9 N.Y.3d 454, 463 (2007)]. Thus, whether they have a complete or incomplete version of the video is not a material issue in this proceeding. Respondent has not shown good cause for leave to conduct discovery, and so its motion should be and hereby is denied.

The standard of review applicable to this entire proceeding is whether respondent's determination was affected by an error of law [*Spring v. County of Monroe*, 141 A.D.3d 1151 (4th Dept. 2016)].

The standard for deciding what, if anything, should be disclosed pursuant to an in camera examination, is for the court to weigh the public's interest in the materials requested against the privacy interest of the individual involved [*Irwin v. Onondaga County Resource Recovery Agency, A.T.*, 72 A.D.3d 314 (4th Dept. 2010)]. It is up to respondent to demonstrate to the court that the claimed privacy interest outweighs the public interest in disclosure [*Thomas v. Condon*,

128 AD..3d 528 (1st Dept. 2015)].

Where a public official's conduct is involved, there is a public interest in the disclosure of records that are relevant to the performance of that person's official duties, and a corresponding lack of public interest in the disclosure of records not relevant to the performance of official duties. [*Thomas v. New York City Dept. Of Education*, 103 A.D.3d 495 (1st Dept. 2013)].

The test for whether the disclosure of records would constitute an invasion of personal privacy is whether it "would be offensive and objectionable to a reasonable person of ordinary sensibilities" [*Hawley v. Village of Penn Yan*, 35 A.D. 3d 1270 (4th Dept. 2006)].

Applying these standards and the relevant caselaw, the court's in camera examination reveals that the individual involved, Justice John Michalski, has a privacy interest in the requested materials, which depict or describe what appears to be an attempted suicide. As the court noted in its earlier decision, the disclosure of a video or a detailed description of an apparent suicide attempt qualifies as an invasion of personal privacy [*Morales v. Ellen*, 840 S.W.2d 519 (Ct. Appeals1992) (attempted suicide involved intimate or embarrassing information, the publication of which would be highly objectionable to a reasonable person); FOIL-AO-14584 (2004) (while blanket denial of disclosure of contents of suicide note would be improper, depending on nature of contents, disclosure could be an unwarranted invasion of personal privacy].

The court's in camera examination also reveals that there is nothing in the police report or video that could be the object of a legitimate public interest. Nothing in the requested materials pertains, however slightly, to the performance of Justice Michalski's official duties. Voyeurs and the merely curious might want disclosure, but the public interest is not served by the publication

of "sensational fare" that the media may wish to deliver to their audience [*New York Times v City of New York Fire Dept.*, 4 N.Y.3d 477 (2005)]. Therefore, the court finds that the privacy interest in the requested materials outweighs the public interest in their disclosure, such that disclosure is unwarranted. To that extent, respondent's determination was not affected by an error of law.

There is, however, a reasonable possibility that certain information in the report could be used to collect other information, the disclosure of which might be in the public interest. These are the names and addresses of the witnesses to the incident, the names of authors of reports concerning the incident, as well as the existence of another video and photographs. The witnesses may have seen or heard things not described in the report or depicted in the video. Justice Michalski, on the other hand, has no privacy interest in this information per se, and so the possible public interest in disclosure of this information outweighs his lack of interest in its non-disclosure.

There is nothing in the record before the court to indicate that any representations or promises were made to these witnesses that their names or addresses would be kept confidential or that they consented to the use of their names and addresses only for a particular purpose [cf. *Irwin*, supra; *Harbatkin v. New York City Dept. of Records and Information Services*, 19 N.Y.3d 373 (2012)]. Accordingly, there is nothing to counterbalance the presumption in favor of disclosure of this information.

The names and addresses of the witnesses to the incident, the names of the authors of reports concerning the incident and the information concerning the other video and photographs will be set forth in Exhibit 1 attached to this decision and order.

This decision shall also constitute the order of this court. Pursuant to CPLR 7806, petitioners shall submit a judgment on notice to respondent within twenty days of the date of this decision and order.

Dated: August 18, 2021
Belmont NY

Honorable Thomas P. Brown
Acting Justice of the Supreme Court