To be argued by:
Stacey Van Malden
15 minutes requested

Sullivan County Supreme Court Index No. E2023-260

Supreme Court of the State of New York
Appellate Division, Third Department

MARC ANTHONY,

Plaintiff-Respondent,

- against -

KAITLIN HAAS and THE TOWN BOARD OF THE TOWN OF HIGHLAND

Respondents.

JOSEPH ABRAHAM,

Non-party Appellant

Docket No. CV-24-1707

BRIEF ON APPEAL OF PLAINTIFF/RESPONDENT MARC ANTHONY
On Appeal from the Supreme Court of the State of New York,
County of SULLIVAN

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TABLE OF CONTENTS

Table of Authorities…….. 3

Counter-Statement of Questions Presented……..……. 4

Statement of the Case…… 5

Argument…….. 9

I. The Press Shield Law's Absolute Protection of Confidential Information in Inapplicable in this case…… 9

II. Did The Motion Court Err In Holding That Plaintiff Satisfied The Three-Part Test Required For Overcoming The Qualified Privilege?..... 11

The Information Requested Is Highly Material And Relevant…….. 13

The Information Sought Is Critical Or Necessary To Sustain Plaintiff's Cause Of Action For Defamation…….. 16

Unavailable From Any Other Source…… 17

The Information Requested Is Narrowly Tailored To Elicit Solely The Information Necessary To Plaintiff's Defamation Cause Of Action…… 18

There Is An Important Public Interest Compelling Disclosure.. 20

Conclusion…… 23

Printing Compliance Statement……..…… 24

TABLE OF AUTHORITIES

CASES	PAGE
Braunstein v. Day 95 A.D.3d 589, 590, 144 N.Y.S.3d 624, 625, 2021……..	15
Laguerre v. Maurice, 192 AD3d 44, 49, 138 NYS3d 123 [2020].....	15
O'Neill v. Oakgrove Constr., Inc. 71 N.Y.2d 521,529, 523 N.E.2d 277, 528 N.Y.S.2d 1 [1988]…..	20
Orange County Publications v. Council of the City of Newburgh, 60 AD2d 409, 415 aff'd 45 NY 2d 947 (1978)…….	21
People v. Knight 80 N.Y.2d 845, 847, 587 N.Y.S.2d 588, 600 N.E.2d 219 ……	16
People v. Nasser 2007 NYLJ LEXIS 673, *4……..	16
People v. Santiago 2007 N.Y. Misc. LEXIS 7757, *12, 36 Media L. Rep. 1011, 238 N.Y.L.J. 87…….	16
Krase v. Graco Children Prods. (In re National Broadcasting Co. 79 F.3d 346,351 (2d Cir. 1996)…….	16
Trussell-Slutsky v McIlmurray, 2018 N.Y. Misc. LEXIS 8146, *26, 2018 NY Slip Op 33496(U)..	12

OTHER AUTHORITIES	
C.R.L §79-h.....	*passim*
General Municipal Law §805-A(1)(b)……	21
C.P.L.R. §5519…….	8

COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. Did the Motion Court err in Holding that the Absolute Protection against Disclosure of Confidential Information was Inapplicable in this Action?

Answer Below: The Motion Court correctly held that the information was not Confidential, and therefore was subject to the Qualified Privilege of the Press Shield Law.

II. Did the Motion Court err in Holding that Plaintiff Satisfied the Three-Part Test Required for Overcoming the Qualified Privilege?

Answer Below: The Motion Court Correctly Held that Plaintiff satisfied the three-part test to overcome the Qualified Privilege

I. STATEMENT OF THE CASE

On or about June 13, 2023, Plaintiff-Respondent herein filed his Amended Complaint/Petition pursuant to Article 78 in the Sullivan County Supreme Court. Plaintiff alleged a number of causes of action against both the Town Board of the Town of Highland, and Kaitlin Haas, as an individual. R. 42. Ms. Haas was, and remains a member of the Town Board of the Town of Highland.

After motion practice, not relevant to the instant appeal, two causes of action remained. NYSCEF #69.[1] The first is for Racial Discrimination as against the Town Board, and the second is for Defamation as against individual defendant Kaitlin Haas. Id, R. 42. It is this Defamation action which is relevant to the appeal by non-party Joseph Abraham.

These facts serve as background to the instant appeal. On or about April 12, 2022, the Town of Highland suspended its entire Constabulary Force. R. 42. Plaintiff, Marc Anthony had been a Town Constable for approximately 30 years. Prior to April 12, 2022, the Town of Highland, through its Constable Committee, prepared a "Constable Report," which tended to serve as the basis for the disbandment of the Constabulary. This report contained numerous untrue statements about Constable Anthony.

[1] Although not included in the Record on Appeal submitted by Appellant, Respondent would respectfully request that this Honorable Court take Judicial Notice of the Documents which are contained upon the Docket of the underlying case, Sullivan County Index No. E2023-260.

The untrue statements, detailed specifically in the amended complaint were that, Plaintiff "did not have Peace Officer Training," "did not have Taser training" and "did not have handgun qualifications to permit him to carry a weapon while on duty." The report also detailed various unsubstantiated reports made by the general public against Constable Anthony. It was demonstrated below that these statements were indeed untrue, by the filing of Plaintiff's certificates of completion of required courses, receipts for training paid for by the Town for Plaintiff's Peace Officer Training, Taser and handgun qualifications for the relevant time period, and proof that Plaintiff was the only Constable to have completed the Basic Course for Police Officers at the Orange County Police Academy, a 600 hour course from September 9, 2000-March 9, 2001. R. 108.

Various redacted versions of the report had been circulated throughout the community, but it was not until October 4, 2023, that the Town, through a press release, publicly released details in an unredacted form of the Constable Report, specifically naming Constable Anthony. R. 94.

However, the cause of action herein accrued on August 19, 2022, when the Sullivan County Democrat published an article detailing the contents of the Constable Report in unredacted form, specifically naming Constable Anthony. R. 42. The Sullivan County Democrat is a Newspaper serving Sullivan County, New York, and is widely read by its residents, business owners, and other Town

Supervisors and Town Boards responsible for staffing of their police forces and Constabularies.

According to the publisher of the Sullivan County Democrat, Fred Stabbert, the unredacted report was found inside a drop box in front of the news building at 5 Lower Main Street in Callicoon, NY. R. 90. Prior to publishing this anonymously delivered report, the newspaper needed to confirm its authenticity. To that end, Appellant, Mr. Abraham confirmed the authenticity of the report from an "unnamed Town Source." R. 77. Plaintiff believes that the unnamed Town Source is Kaitlin Haas.

Only Town Board members, the Town attorney and the District Attorney had copies of the unredacted report on August 19, 2022. R.93. The Report was written by Kaitlin Haas and Christopher Tambini. Id. As set forth supra, the Town had not authorized the dissemination of the unredacted report until October of 2023, and all Town Board members deposed denied being the unnamed source. R. 86-87.

Because the identity of the unnamed Town Source was unable to be found from any of the individuals who had access to the unredacted report prior to its publication in August of 2022, the only alternative source was Mr. Abraham. Plaintiff issued an initial subpoena to Mr. Abraham on April 22, 2024. NYSCEF #87. Plaintiff was seeking information about the Town Source, and confirmation that the newspaper would not have published the Constable Report, which it had received anonymously, without confirmation of its contents. Due to service of

process issues, the subpoena was successfully quashed upon cross-motion by Mr. Abraham. NYSCEF #111. Another subpoena was issued on July 8, 2024. R. 79-80. Mr. Abraham moved to quash this subpoena as well. R. 55. This application was denied by the Court on September 10, 2024, but the Court granted a 60 day stay. R. 3. The Court held that each of the three prongs to overcome the Press Shield qualified privilege had been met by the Plaintiff. R. 14. Mr. Abraham moved for an additional stay pursuant to C.P.L.R. §5519, but the Court has not decided this motion as of the date of this brief. NYSCEF 141,144. Mr. Abraham has not yet been deposed.

During the litigation of the Motions to Quash, Mr. Abraham submitted two affirmations. NYSCEF # 102, R. 76-77. In his first affirmation, Mr. Abraham affirmed that the paper relied upon two sources in publishing the article. NYSCEF #102. The first source was an anonymous source that provided the copy of the unredacted report. Id. The other source was an unnamed Town Source who confirmed the authenticity of the report. Id. In his second affirmation, Mr. Abraham affirmed that the anonymous source was promised confidentiality, which contradicted his initial affirmation. R. 76-77. He also affirmed that the other source was an unnamed Town Source. Id. There is no mention at all that this unnamed source requested confidentiality, nor is there any evidence in the docket or the Record in which the unnamed Town Source requests confidentiality. Rather, the publisher of the Sullivan County Democrat stated that the unredacted report was

found in a drop box in front of the newspaper offices, and that no one knew where it came from. R. 90.

Mr. Abraham filed a notice of appeal.

ARGUMENT

I. THE PRESS SHIELD LAW'S ABSOLUTE PROTECTION OF CONFIDENTIAL INFORMATION IN INAPPLICABLE IN THIS CASE

New York's Civil Rights Law §79-h does indeed provide the highest protections to journalistic confidential sources. Plaintiff/Respondent Marc Anthony does not dispute this. Nor has he ever requested confidential information from a journalist protected by C.R.L. §79-h. Mr. Anthony seeks only to learn the name of the "unnamed" Town source that confirmed an anonymous, defamatory report, was authentic, and as a result, caused the Newspaper to publish the article. The record is wholly devoid of any evidence that the Town source requested confidentiality. Therefore, Appellant's argument that the Motion Court erred when it failed to Quash a subpoena that requested confidential information, is nothing more than a red herring, and a waste of valuable time.

Respondent submits to this Honorable Court that Plaintiff is not seeking to find out from Appellant the name of the anonymous person who left the unredacted Constable Report in the newspaper's drop box. This is not information held by this

potential witness. However, because Appellant has made this argument, it is necessary to briefly point out that there is no confidential source in this entire matter.

In his first affirmation, Mr. Abraham affirmed that the paper relied upon two sources in publishing the article. NYSCEF #102. The first source was an anonymous source that provided the copy of the unredacted report. Id. This is consistent with the information gained from the Publisher that the report was found in a drop box. The other source was an unnamed Town Source who confirmed the authenticity of the report. Id. In his second affirmation, Mr. Abraham swore that the anonymous source was promised confidentiality, which contradicted his initial affirmation. R. 76-77. He also affirmed that the other source was an unnamed Town Source. Id. Given two chances, Mr. Abraham never provided evidence that the Town source requested confidentiality. The only source Mr. Abraham says was promised confidentiality was the anonymous person who dropped the report into a box in front of the paper. This non-sensical argument flies in the face of the evidence in this matter. The bottom line here is that if Mr. Abraham or any reporter at the Sullivan County Democrat had been able to actually speak with the "anonymous confidential" source that provided the report, it would not have had to authenticate the report with another Town Source. This is true because only Town officials[2] had

[2] The Sullivan County District Attorney also had access to the report, but is not a "Town" source, nor does it seem logical that the District Attorney would violate various provisions of the Town Law and Open Meetings Law.

access to the unredacted report. R. 93. Moreover, the Defendant below provided incomplete texts between Mr. Abraham and Defendant Kaitlin Haas, demonstrating that Mr. Abraham did not know who provided the unredacted report, and therefore could not have promised confidentiality. In that message, Mr. Abraham states that he is looking forward to "one day discovering who the leaker is." R. 105.

This "doubling down" on an untrue allegation is unworthy of the press.

When Plaintiff/Respondent is not seeking any confidential information held by a journalist, there is no absolute bar to requiring Mr. Abraham to sit for an Examination Before Trial. As a result, the Motion Court did not err when it denied appellant's motion to quash.

II. DID THE MOTION COURT ERR IN HOLDING THAT PLAINTIFF SATISFIED THE THREE PART TEST REQUIRED FOR OVERCOMING THE QUALIFIED PRIVILEGE?

Having properly found that the information sought by plaintiff from appellant was not confidential, the Motion Court correctly went on to determine that plaintiffhad satisfied the three-prong test required to override the qualified privilege set forth in C.R.L §79-h(c). Because the information is highly material and relevant, is critical to the maintenance of Plaintiff's defamation claim and is not obtainable from a non-journalistic source, the Motion Court was correct, and its decision must be affirmed.

As set forth supra, given two chances to state that the Town Source requested confidentiality, and unable to do so, the information sought is not confidential. Only a qualified privilege applies in this matter.

C.R.L. §79-h (c) states that there exists only a qualified protection for news which is not confidential, under certain circumstances. When "news was not obtained or received in confidence," and a "party seeking such news has made a clear and specific showing that the news: (i) is highly material and relevant; (ii) is critical or necessary to the maintenance of a party's claim, defense or proof of an issue material thereto; and (iii) is not obtainable from any alternative source" a "court shall order disclosure only of such portion, or portions, of the news sought as to which the above-described showing has been made and shall support such order with clear and specific findings made after a hearing." C.R.L. §79-h(c). "[W]here such news [or source] was not obtained or received in confidence," the Shield Law allows judicial compulsion of disclosure upon a heightened showing of necessity. *Trussell-Slutsky v McIlmurray*, 2018 N.Y. Misc. LEXIS 8146, *26, 2018 NY Slip Op 33496(U), 15(citing, *Matter of Beach*, 62 NY2d at 251, 79-h[c]). In the instant matter, the information sought by plaintiff below was not confidential. Thus, when plaintiff demonstrated to the Motion Court that the information was absolutely essential to his action for defamation, it correctly determined that Appellant Abraham must disclose the name of the "unnamed" Town Source that confirmed the contents of the Constable Report.

As is often the case in civil matters, a plaintiff will, with a good faith basis, make allegations in their complaint upon information and belief. As discovery continues, and more information is gained through investigation, these initial allegations can be, and often are, expanded or refined. Hence that last motion at a civil trial to conform the pleadings to the proof. In the instant matter at inception, Plaintiff's theory was that the unredacted Constable Report was provided directly to the Sullivan County Democrat by Kaitlin Haas, and that the unnamed Town source and the provider of the unredacted report were one and the same individual. Through discovery and further investigation, it was learned that the report itself was provided anonymously, and only published after confirmed and authenticated by this unnamed Town source. The plaintiff believes the source is defendant Kaitlin Haas. That is, but for the confirmation and authentication, this defamatory report does not get published, and no defamatory cause of action would accrue.

THE INFORMATION REQUESTED IS HIGHLY MATERIAL AND RELEVANT

Mr. Abraham avers that the defamation cannot be proven, and therefore his testimony is not material nor necessary. This is as untrue as the statements published after confirmation and authentication of the Constable Report by the unnamed Town Source.

To prove defamation, a plaintiff must demonstrate that false information was, intentionally published, causing damages to plaintiff. As an intentional tort, damages are presumed. In the instant matter, Plaintiff has alleged that the unredacted Constable Report, authored by Kaitlin Haas, contained false information concerning Plaintiff's livelihood, and was caused to be published by defendant Kaitlin Haas when she confirmed and authenticated the report to the Sullivan County Democrat, allowing them to publish an anonymously received report.

It is undisputed that Kaitlin Haas was an author of the report. It is also undisputed that Town of Highland, and the members of its Town Board including Kaitlin Haas, did not Officially release the unredacted report until nearly one year after the publication of the report in the Sullivan County Democrat. While the defendant below may contest the falsity of the report, there has been sufficient proof submitted to the Motion court to demonstrate the report's falsity.

As set forth supra, the defamatory statements published are that Plaintiff "did not have Peace Officer Training," "did not have Taser training" and "did not have handgun qualifications to permit him to carry a weapon while on duty."

These are specific statements set forth in the Complaint.

In the Record, at R. 108-127, are Plaintiff's certificates of completion, and receipts for training paid for by the Town of Highland for Plaintiff's Peace Officer Training, Taser and handgun qualifications for the relevant time period covered by the unredacted Constable Report. It should be noted that Plaintiff was the only

Constable to have completed the Basic Course for Police Officers at the Orange County Police Academy, a 600-hour course from September 9, 2000-March 9, 2001. Plaintiff was indeed qualified to be a Peace Officer, had taser training and handgun and long gun qualifications at the time that the unredacted report was published, and all members of the Town Board either knew or are chargeable with knowledge of this, having access to Plaintiff's records over a thirty-year period, and having paid for the yearly qualifications. Not only were the statements defamatory, but having been made knowingly, they were maliciously made. *Braunstein v. Day*, 195 A.D.3d 589, 590, 144 N.Y.S.3d 624, 625, 2021 N.Y. App. Div. LEXIS 3548, *3, 2021 NY Slip Op 03438, 1, 2021 WL 2213779(citing, *Laguerre v Maurice*, 192 AD3d 44, 49, 138 NYS3d 123 [2020]).

Having knowledge of the falsity of these statements, the unnamed Town Source knowingly, intentionally and maliciously confirmed and authenticated the unredacted Constable Report to the Sullivan County Democrat, which then published the report based upon these representations of the unnamed Town Source.

Without the information which indicates who the Town Source is, Plaintiff cannot prove who caused the publication and therefore will not be able to proceed on his defamation cause of action. Simply put, if the Town source is defendant Kaitlin Haas, Plaintiff is able to prove his cause of action for defamation. If the Town source is not Kaitlin Haas, his cause of action fails. This evidence is evidence which has a tendency to make the existence of any fact that is of consequence to the

determination of the action more probable or less probable than it would be without the evidence. Evidence is material when it is relevant to the very issues that the trier of fact must decide. *People v. Nasser*, 2007 NYLJ LEXIS 673, *4 (citing, *People v. Knight*, 80 N.Y.2d 845, 847, 587 N.Y.S.2d 588, 600 N.E.2d 219). As a result, the information requested is the very definition of relevance, and the Motion Court was correct in holding that Plaintiff met the first prong of the test set out in C.R.L. §79-h (c).

THE INFORMATION SOUGHT IS CRITICAL OR NECESSARY TO SUSTAIN PLAINTIFF'S CAUSE OF ACTION FOR DEFAMATION

"Critical or necessary has been defined by courts to mean that the proponent's case must "rise or fall" without the material sought. The rise or fall test is "not merely that the material be helpful or probative, but whether or not the defense of the action may be presented without it.' " *People v. Santiago*, 2007 N.Y. Misc. LEXIS 7757, *12, 36 Media L. Rep. 1011, 238 N.Y.L.J. 87 (citing, *Krase v. Graco Children Prods. (In re National Broadcasting Co.)*, 79 F.3d 346,351 (2d Cir. 1996). As set forth supra, the identity of the unnamed Town Source is absolutely critical to Plaintiff's defamation claim. With it, all parties will know whether the defamation claim can proceed against defendant Kaitlin Haas, or whether it must be dismissed. As stated to the Motion Court, without this information, Summary Judgment on this cause of action would necessarily be granted to defendant Kaitlin Haas. Thus, it is exceptionally clear that this information is critical to Plaintiff's claim.

UNAVAILABLE FROM ANY OTHER SOURCE

The last prong of the test is whether the information is available from another source not protected by the Shield Law. Appellant suggests that Ms. Haas herself is an alternate source. However, Ms. Haas cannot be considered a reliable source when the allegation is that she, herself, was the person who confirmed and authenticated the report. Moreover, Ms. Haas' failure to produce the entire text conversation between Ms. Haas and Appellant tends to demonstrate that she is hiding information relevant to this exact question. R. 104-107.[3]

Instead, the evidence in this matter below demonstrates that no one on the Town Board will admit to being the Town Source. Kaitlin Haas and two other members of the Town Board were deposed, and each denied being the Town Source. (Or to knowing who the Town Source was). As per a press release dated October 4, 2023, (over a year after the publication of the unreacted report) the Town stated that they had "not publicly released details" of the Constable Report prior to October 4, 2023. R.95. Thus, all Board members have gone on record as stating they did not disclose or confirm this information, and there is no non-journalist alternate source for this information. As a result, the third prong of the test was satisfied as found by the motion court.

[3] Perhaps Defendant Kaitlin Haas would prefer an adverse inference based upon Ms. Haas' refusal to provide complete discovery on this issue in lieu of Mr. Abraham's limited testimony.

THE INFORMATION REQUESTED IS NARROWLY TAILORED TO ELICIT SOLELY THE INFORMATION NECESSARY TO PLAINTIFF'S DEFAMATION CAUSE OF ACTION

Appellant, once again, has asked this Court to go on yet another wild goose chase by asserting that Appellant has been asked to produce numerous documents. This is as untrue as Appellant's assertion that Constable Anthony is seeking confidential information. The Motion Court specify requested that Plaintiff provide the questions that would be asked of Appellant. To this end, Plaintiff provided the following as an exhibit in Opposition to the Motion to Quash: R.98

> Did you hold a position at the Sullivan County Democrat in August of 2022?
>
> Are you familiar with this article? (Respondent's JA-7 for ID)
>
> Do you know a Fred Stabbert?
>
> Who is he?
>
> I'd like to show you what has been marked Exhibit JA-6 for identification.
>
> Would you read that?
>
> Is the information contained in Mr. Stabbert's response correct?
>
> So, the information published by the Sullivan County Democrat as set forth in Exhibit JA-7 was not from a confidential source, was it?
>
> Would it be fair to say the source was anonymous?
>
> Was it your practice as associate editor to publish anonymous information without any substantiation of the content?
>
> In Exhibit JA-7, on page 2, 3rd paragraph, it states that "The Town" has confirmed the contents of the unredacted report…"

Who exactly confirmed the contents of the report?

Show JA-8

Did you ever speak to Ms. Haas's attorney about this defamation case as you indicated you would in this text?

If yes—did you reveal the name of the person at Town of Highland who confirmed the report as indicated in JA-7?

Of these few questions, there is only one question which is ostensibly subject to the qualified privilege, to wit: Who exactly confirmed the contents of the report? The other questions concern simple background and procedure at the newspaper. Each question is relevant to Plaintiff's case. The answers tend to make the existence of a fact necessary to proof of the defamation cause of action more or less likely. Thus, these limited questions are relevant. The overreaching Appellant speaks of in his brief is non-existent.

Subsection (g) of C.R.L. §79-h also provides another reason why the Motion Court correctly decided the Motion to Quash. C.R.L §79-h(g) states, "Notwithstanding the provisions of this section, a person entitled to claim the exemption provided under subdivision (b) or (c) of this section waives such exemption if such person voluntarily discloses or consents to disclosure of the specific information sought to be disclosed to any person not otherwise entitled to claim the exemptions provided by this section. (Emphasis supplied). Defendant below provided an incomplete text conversation between defendant Kaitlin Haas and

Appellant. Within that limited part of the conversation, Defendant Kaitlin Haas asked Appellant if he would speak to her attorney about the defamation claim, and Appellant consented to the disclosure. Defense counsel is not a person entitled to claim the exemptions provided by C.R.L. §79-h. Upon this statutory language, it does not matter whether that conversation took place or not. What matters is that Appellant consented to speak about this very issue to one not entitled to claim this privilege. As a result, he cannot claim the protections of C.R.L. §79-h.

THERE IS AN IMPORTANT PUBLIC INTEREST COMPELLING DISCLOSURE

In *O'Neill v. Oakgrove Constr., Inc.* 71 N.Y.2d 521,529, 523 N.E.2d 277, 528 N.Y.S.2d 1 [1988) the Court of Appeals held that "a party's request for a journalist's nonconfidential material calls for a balancing of "competing interests." Appellant cites to various authorities expounding on the First Amendment rights held by newspapers and how by disclosing the identity of the unnamed Town Board member this Court would be opening up the flood gates to constant subpoenas to journalists to disclose confidential information. This argument fails for any number of reasons, but the most important is that the information was not confidential. Moreover, asking an Editor if they confirm anonymous information prior to publishing cannot be considered an undue burden on the editorial process. Is it actually "News" if the information published is unconfirmed speculation? According to the Carnegie-

Knight Task Force, administered by the Project for Excellence in Journalism, the "discipline of verification is what separates journalism from other modes of communication, such as propaganda, fiction or entertainment." [4] Determining whether proper verification took place prior to publishing of an article appears to be required Editorial process. There is no burden in following basic principles of the craft.

In the instant matter, however, a member of the Town Board of the Town of Highland disseminated untrue, confidential information to a newspaper to the detriment of the plaintiff.

This dissemination of information was in violation of the General Municipal Law §805-A(1)(b), which prohibits disclosure by any municipal officer of confidential information "acquired by him in the course of his official duties…"

It is also likely that dissemination of this confidential information, unauthorized by the Town Board, would violate sections of Town Law and the Open Meetings Laws.

The Open Meetings Law is of particular import to the People of the State of New York. '[E]very thought, as well as every affirmative act of a public official as it relates to and is within the scope of one's official duties is a matter of public concern." *Orange County Publications v. Council of the City of Newburgh*, 60 AD2d

[4] https://journalistsresource.org/home/principles-of-journalism/

409, 415 aff'd 45 NY 2d 947 (1978)]. The People of the State of New York, including the plaintiff herein, have an extraordinarily compelling interest in how they are being governed. They are entitled to know which person for whom they voted, violated various laws for the purpose of hurting a member of the community.

In weighing the balance of the equities in this matter it is clear that the motion court was correct in its decision, when Plaintiff specifically met each of the three prongs required to receive the information requested. It is also clear that the effect on the freedom of the press is *de minimus* under the facts of this case, while the effects of the violation of laws by the unnamed Town source are severe and wide ranging. When coupled with the fact that Appellant consented to speak with Defendant Kaitlin Haas' attorney about the subject matter of the article, it is clear that the Motion Court was correct. As a result, the Motion Court's decision must be affirmed.

Finally, Appellant asserts that the Motion Court's failure to specify its grounds for the denial of the Motion to Quash is sufficient for reversal. The Court's decision relies upon the arguments made in the hearing upon the motion. In that hearing, the Motion court agreed with Plaintiff's counsel, and disagreed with Appellant's counsel. Plaintiff's arguments are set forth on the record, and are consistent with the arguments made herein. Moreover, based upon prior litigation in this and other Courts which have been asked to decide cases under C.R.L. §79-h, it is apparent that the appellate courts decide these issues *de novo*, not unlike motions

for summary judgment. Thus, this Court's determination based upon the record, will be sufficient to comply with all aspects of CRL §79-h (c).

CONCLUSION

Plaintiff/Respondent most respectfully requests that the Decision of the Motion Court be affirmed, and for such other and further relief that this Honorable Court may deem just and proper.

Respectfully submitted,

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PRINTING SPECIFICATIONS STATEMENT

1.	Processing System:	Microsoft Word
2.	Font:	Times New Roman
3.	Point Size:	14
4.	Word Count:	4495