



ACLU Successfully Argues Confidentiality Agreements Must Yield to Litigation Discovery

Insights

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The United States District Court for the District of Minnesota recently upheld a magistrate judge's decision to issue a protective order precluding a school from enforcing confidentiality obligations against employees who disclose information in connection with "formal and informal discovery" in a lawsuit commenced by the ACLU.

The ACLU filed suit against Tarek ibn Ziyad Academy ("TiZA") arguing that its use of public funds violates the First Amendment because TiZA advances and prefers Islam over other religions and nonreligious approaches. To aid its investigation, the ACLU sought to interview current and former TiZA employees to ask questions about how the school operates. During these interviews, employees expressed reluctance because they feared the school would take steps to enforce a confidentiality clause in its Staff Handbook. The ACLU contacted the school to seek confirmation that it would not commence legal action against employees who cooperate, but the school refused and reaffirmed its belief that the confidentiality clause applied. In response, the ACLU sought a protective order from the court specifying that individuals can disclose information in connection with this case without fear of sanctions resulting from the secrecy clauses in the school handbook and related non-disclosure agreements.

The magistrate judge issued a briefly worded order stating that "[p]ursuant to its inherent authority to maintain the integrity of the proceedings, this Court orders TiZA not to commence legal action against its former or current employees for disclosures they may make in connection with this litigation." TiZA appealed this order to the district court, but the district court was even less understanding. Observing that TiZA does not want its employees to provide information relevant to the lawsuit, the district court threatened that it "may be required to weigh the evidentiary implications of TiZA's conduct should TiZA attempt to prevent current or former employees from providing information in this action." The court noted that such "implications" may include drawing adverse inferences about how the school operates, and it further warned TiZA that its conduct "may not sit well with a fact-finder such as a jury."

In fairness, the district court's decision was heavily premised on TiZA's status as a "public entity." In fact, the court observed that TiZA was "behaving more like a private institution by maintaining that a confidentiality clause in its employee handbooks may be grounds for termination or legal action if a current or former employee provides relevant, public information in this action." Regardless, the court's opinion expressly left undecided the issue of whether the confidentiality clause was

court's opinion expressly left undecided the issue of whether the confidentiality clause was unenforceable because the school was a public entity. Instead, it found that TiZA's threats on the record before it were not "consistent with a good faith search for the truth." Whether the court would reach the same result in a case involving a private entity is debatable.

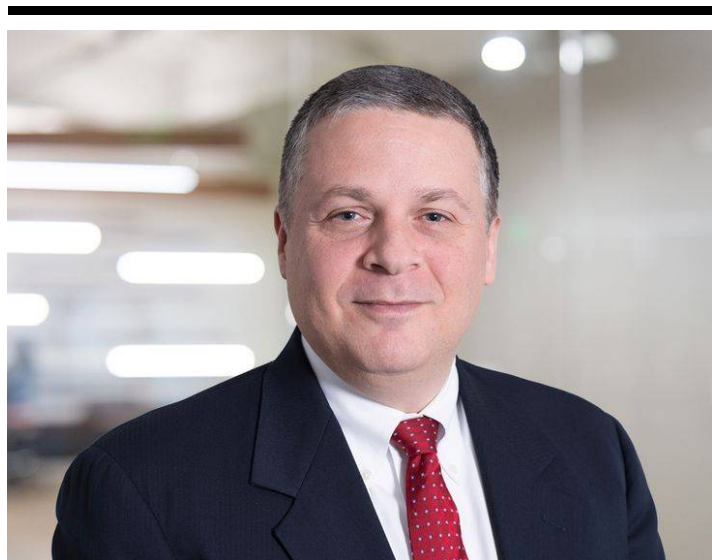
A copy of the district court's opinion, the magistrate judge's order, and the ACLU's memorandum of law are available in pdf format below.

[ACLU v. Tarek ibn Ziyad Academy District Court Order.pdf \(20.82 kb\)](#)

[ACLU v. Tarek ibn Ziyad Academy Magistrate Judge OrderL.pdf \(10.41 kb\)](#)

[ACLU's Memorandum re Motion for Protective Order.pdf \(42.30 kb\)](#)

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