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# FREEDOM OF INFORMATION



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Susan McCall,  
Complainant(s)  
against

Notice of Meeting

Docket #FIC 2015-640

William Brennan, First Selectman, Town of Wilton; Bruce Hampson, Chairman, Miller-Driscoll Building Committee; Karen Birck, Chair, Miller-Driscoll Building Committee; Kevin Smith, Superintendent of Schools, Wilton Public Schools; Wilton Public Schools; and Town of Wilton,

Respondent(s)

September 1, 2016

## Transmittal of Proposed Final Decision Dated September 1, 2016

In accordance with Section 4-179 of the Connecticut General Statutes, the Freedom of Information Commission hereby transmits to you the proposed finding and decision dated September 1, 2016, prepared by the hearing officer in the above-captioned matter.

This will notify you that the Commission will consider this matter for disposition at its meeting which will be held in the Freedom of Information Commission Hearing Room, 18-20 Trinity Street, 1st floor, Hartford, Connecticut, at **2 p.m. on Wednesday, September 14, 2016**. At that time and place you will be allowed to offer oral argument concerning this proposed finding and order. Oral argument shall be limited to ten (10) minutes. For good cause shown, however, the Commission may increase the period of time for argument. A request for additional time must be made in writing and should be filed with the Commission *on or before September 12, 2016*. Such request **MUST BE (1) copied to all parties, or if the parties are represented, to such representatives, and (2) include a notation indicating such notice to all parties or their representatives.**

Although a brief or memorandum of law is not required, if you decide to submit such a document, an **original and fourteen (14) copies** must be filed *on or before September 12, 2016*. **PLEASE NOTE: Any correspondence, brief or memorandum directed to the Commissioners by any party or representative of any party MUST BE (1) copied to all parties, or if the parties are represented, to such representatives, (2) include a notation indicating such notice to all parties or their representatives and (3) be limited to argument. NO NEW EVIDENCE MAY BE SUBMITTED.**

If you have already filed a brief or memorandum with the hearing officer and wish to have that document distributed to each member of the Commission, it is requested that **fifteen (15) copies** be filed *on or before September 12, 2016* and that **notice be given to all parties or if the parties are represented, to their representatives, that such previously filed document is being submitted to the Commissioners for review.**

By Order of the Freedom of  
Information Commission

W. Paradis  
Acting Clerk of the Commission

Notice to: Susan McCall  
Attorney Patricia C. Sullivan  
Attorney Jessica Richman-Smith and Attorney Anne H. Littlefield

2016-09-01/FIC# 2015-640/Trans/wrbp/PSP//CAL

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FREEDOM OF INFORMATION COMMISSION  
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

Second Report of Hearing Officer

Susan McCall,

Complainant,

Docket # FIC 2015-640

against

William Brennan, First Selectman, Town of Wilton; Bruce Hampson, Chairman, Miller-Driscoll Building Committee; Karen Birck, Chair, Miller-Driscoll Building Committee; Kevin Smith, Superintendent of Schools, Wilton Public Schools; Wilton Public Schools; and Town of Wilton,

Respondents

September 1, 2016

The above-captioned matter was heard as a contested case on January 29, 2016 and May 20, 2016, at which times the complainant and the respondents appeared, stipulated to certain facts and presented testimony, exhibits and argument on the complaint.

On June 24, 2016, pursuant to an order of the hearing officer, respondents Kevin Smith, Superintendent of Schools, Wilton Public Schools and Wilton Public Schools (collectively, the "School District respondents") submitted an after-filed exhibit which has been marked as School District Respondents' Exhibit 7: Common Interest Agreement. Subsequently, on August 26, 2016, pursuant to a second order of the hearing officer, the School District respondents submitted an after-filed exhibit which has been marked as School District Respondents' Exhibit 8: Letter to Hearing Officer, dated August 26, 2016, with attachment (5 pages).

On June 28, 2016, pursuant to an order of the hearing officer, the respondents William Brennan, First Selectman, Town of Wilton; Bruce Hampson, Chairman, Miller-Driscoll Building Committee; Karen Birck, Chair, Miller-Driscoll Building Committee and Town of Wilton (collectively, the "Town respondents") submitted an after-filed exhibit which has been marked as Town Respondents' Exhibit 3A: Affidavit of William F. Brennan (dated June 27, 2016).

After consideration of the entire record, the following facts are found and conclusions of law are reached:

1. The respondents are public agencies within the meaning of §1-200(1), G.S.

2. It is found that, by the same email dated August 30, 2015, the complainant made identical requests to the Town and School District respondents, for copies of “all PCB related documents (reports, summaries, emails, etc) pertaining to Miller-Driscoll Elementary School.” The complainant requested that the Town and School District respondents provide the documents electronically and that they “prioritize providing [her] with the TRC report (conducted around January 2015) and reports submitted to the State of CT in the past year.” In addition, she requested that the Town and School District respondents provide the documents on a rolling basis and that they respond, with documents, by September 4, 2015.

#### TOWN RESPONDENTS

3. It is found that on September 4, 2015, the Town attorney, on behalf of the Town respondents, emailed the complainant approximately 800 pages of documents, free of charge, in response to her August 30<sup>th</sup> request. It is found that the Town respondents identified those documents as the documents that the complainant requested be prioritized. The Town respondents also requested that the complainant clarify the portion of the August 30<sup>th</sup> request in which she sought “all PCB related documents (reports, summaries, emails, etc) pertaining to Miller-Driscoll Elementary School.” The Town respondents expressed that clarification, particularly with regard to a timeframe and the terms “PCB related” and “etc,” would help them locate other documents responsive to her request.

4. It is found that, by email dated September 8, 2015, the complainant replied to the Town respondents’ September 4<sup>th</sup> email, described in paragraph 3, above. The complainant reiterated that she sought “all PCB related documents for Miller-Driscoll.” The complainant defined the terms “PCB related” as “any document that directly or indirectly refers to PCBs or any other toxic/hazardous substance” and the term “etc” as “an abbreviation of et cetera, [t]he Webster definition of et cetera is ‘and others especially of the same kind: and so forth.’ Therefore, I seek any PCB related document.” The complainant also expressed that it seemed to her that she needed “to make a broader request” and that her “intention [was] to understand the hazardous materials and conditions that exist at [Miller-Driscoll] and determine the health impacts on my children and the other students.” In addition, as to the timeframe for the August 30<sup>th</sup> request, the complainant informed the Town respondents that she sought the “the full history of MD PCBs” including “historical data” dating back at least to the 1950s. The complainant also informed the Town respondents that if they had a list of PCB related documents, she would be happy to review such list and narrow her request. The complainant requested that the Town respondents prioritize providing emails beginning January 1, 2013.

5. It is found that, by email dated September 8, 2015, the Town’s attorney informed the complainant that the Town respondents did not have a list of “PCB related” documents. The Town’s attorney also expressed that the Town respondents believed that the documents provided to the complainant on September 4<sup>th</sup> as described in paragraph 3, above, were the most complete and comprehensive documents with regard to the complainant’s concerns. The Town’s attorney requested that if there were other documents that she wanted prioritized to please specify such documents.

6. It is found that, in an effort to provide documents responsive to the August 30<sup>th</sup> request, on a rolling basis, as requested by the complainant, the Town respondents provided additional documents to the complainant on September 9, 2015, September 16, 2015, October 9, 2015, October 22, 2015, and November 16, 2015. It is found that, as of December 4, 2015, the Town respondents had provided the complainant with more than 1,800 pages of documents in response to her August 30<sup>th</sup> request. It is found that such documents were provided in the format requested by the complainant and free of charge.

#### SCHOOL DISTRICT RESPONDENTS

7. It is found that, by email dated September 4, 2015, the respondent Superintendent, on behalf of the School District respondents and in response to the August 30<sup>th</sup> request, provided the complainant with a number of records that the School District respondents maintained in their files. The Superintendent informed the complainant that the School District respondents were continuing to search for and review responsive records, and would provide her with additional non-exempt responsive records, if any, as they were available. He also asked the complainant for clarification as to whether she sought duplicate copies of responsive records that the Town's attorney was providing to the complainant on behalf of the Town respondents.

8. It is found that, by email dated September 18, 2015, the respondent Superintendent provided additional records to the complainant in response to her August 30<sup>th</sup> request, and informed her, again, that they would continue to search for, review and redact (as appropriate) responsive records and to provide such records on a rolling basis.

9. By email dated September 27, 2015, the complainant appealed to this Commission, alleging that the Town and School District respondents violated the Freedom of Information ("FOI") Act by failing to promptly provide her with copies of all records responsive to her request, described in paragraph 2, above. The complainant also requested that civil penalties be imposed against all respondents.

10. Section 1-200(5), G.S., defines "public records or files" as:

any recorded data or information relating to the conduct of the public's business prepared, owned, used, received or retained by a public agency, or to which a public agency is entitled to receive a copy by law or contract under section 1-218, whether such data or information be handwritten, typed, tape-recorded, printed, photostated, photographed or recorded by any other method.

11. Section 1-210(a), G.S., provides in relevant part that:

Except as otherwise provided by any federal law or state statute, all records maintained or kept on file by any public agency, whether or not such records are required by any law or by any rule or regulation, shall be public records and every person shall have the right to (1) inspect such records promptly during regular office or

business hours . . . (3) receive a copy of such records in accordance with section 1-212.

12. Section 1-212(a), G.S., provides in relevant part that “any person applying in writing shall receive, promptly upon request, a plain, facsimile, electronic or certified copy of any public record.”

13. It is found that the records requested by the complainant are public records and must be disclosed in accordance with §§1-200(5), 1-210(a) and 1-212(a), G.S., unless they are exempt from disclosure.

14. At the hearings in this matter, the complainant acknowledged that she had received hundreds of pages of documents from the Town and School District respondents that were responsive to her August 30<sup>th</sup> request. She contended, however, that many of the documents were duplicates and were not promptly provided. The complainant also claimed that additional “PCB related documents” were withheld by all respondents (*e.g.*, legal bills, appendices to a Self-Implementing Cleanup Plan (SIP) that included raw data). In addition, specifically with respect to the Town respondents’ response, the complainant alleged that the respondent First Selectman failed to search other Town departments, and that the Town respondents contracted away the public’s right to know by deliberately maintaining records with third party, private companies hired to work on the Miller-Driscoll building renovation project, rather than in the Town respondents’ physical possession. Further, specifically with respect to the School District’s response, the complainant claimed that they improperly withheld a seven page document on the grounds that it was exempt under the attorney-client privilege. The complainant also alleged that the School District respondents purposefully kept the electronic search terms narrow despite utilizing many terms related to PCBs interchangeably (*e.g.*, “hazardous material” “IAZMAT”).

15. With respect to the complainant’s claim that the records were not provided to her “promptly,” the Commission has held that the meaning of the word “promptly” is a particularly fact-based question. In Advisory Opinion #51, In the Matter of a Request for Declaratory Ruling, Third Taxing District of the City of Norwalk, Applicant (Notice of Final Decision dated January 11, 1982), the Commission advised that the word “promptly,” as used in §1-210(a), G.S., means quickly and without undue delay, taking into consideration all of the factors presented by a particular request.

16. The advisory opinion goes on to describe some of the factors that should be considered in weighing a request for records against other priorities: the volume of records requested; the time and personnel required to comply with a request; the time by which the person requesting records needs them; the time constraints under which the agency must complete its other work; the importance of the records to the requester, if ascertainable; and the importance to the public of completing the other agency business without the loss of the personnel time involved in complying with the request. In addition, common sense and good will ought to be the guiding principles.

### TOWN RESPONDENTS

17. At the hearing and in their post-hearing brief, the Town respondents maintained that they made a significant effort and acted in good faith to promptly provide the complainant with records that they believed were responsive to the August 30<sup>th</sup> request and that they had in their possession at the time of such request.

18. At the May 20, 2016 hearing, respondent Karen Birck, the former Vice Chair of the Miller-Driscoll Building Committee, testified that she and Bruce Hampson, the former Chairman of the Miller-Driscoll Building Committee, searched their personal computers for emails and other electronic files for documents that may have been responsive to the August 30<sup>th</sup> request, and forwarded such documents to the Town attorney to be reviewed and then forwarded to the complainant. The Building Committee members did not have Town email accounts.

19. Ms. Birck also testified that she interpreted the August 30<sup>th</sup> request as a request for records relating to the testing of PCBs and the health concerns of the complainant's children and other children who attended the Miller-Driscoll School. She testified that she did not think the August 30<sup>th</sup> request for "PCB related documents" included copies of legal bills. It was not until after the filing of the complaint in this matter that the complainant informed the Town respondents that she sought legal bills. In addition, Ms. Birck testified that her initial search for responsive records included the search term "PCB," only. However, when her search did not generate certain documents that she believed should exist that might generate "PCB related" records, she utilized other terms (*e.g.*, the name of the hygienist who conducted the testing for PCBs at the Miller-Driscoll School).

20. Ms. Birck also testified that there were certain records that the Building Committee members did not have in their possession at the time of the August 30<sup>th</sup> request but were subsequently provided to the complainant and/or made available on the Town of Wilton Miller-Driscoll Building Project website.<sup>1</sup> For example, with respect to the raw data sought by the complainant, referenced in paragraph 14, above, Ms. Birck testified that the Committee did not have possession of such information because of technical difficulties involving the storage and transfer of large electronic files. The Building Committee had also decided that certain preliminary information such as the raw data would not be circulated, even to the Committee, because such preliminary information without context or analysis relating to the handling and remediation of the contamination could be misleading. The Building Committee decided that such preliminary information would only be circulated, in writing, after experts had evaluated the data and certain governmental agencies (*i.e.*, Environmental Protection Agency and Department of Energy and Environmental Protection) had completed reviewing and analyzing the information.

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<sup>1</sup> The Commission takes administrative notice of the Town of Wilton Miller-Driscoll Building Project website at which numerous documents related to the Miller-Driscoll renovation project are posted. See <http://www.millerdriscollbp.com/>.

21. With respect to the Building Committee members' response to the August 30<sup>th</sup> request, it is found that Ms. Birck's interpretation of the complainant's request was reasonable. It is also found that she conducted a thorough and diligent search for responsive documents, and that she, through the Town attorney, provided the complainant with all documents that Ms. Birck reasonably believed were responsive and that she had in her physical possession at the time of the August 30<sup>th</sup> request.

22. Notwithstanding the findings in paragraph 21, and recognizing that the Building Committee had technical difficulties with the storage and transferring of large electronic files, it is found that with respect to the preliminary information and raw data, described in paragraph 20, above, the Building Committee respondents cannot avoid disclosure of a public record merely by avoiding physical possession of such records. See e.g., First Selectmen, Town of Columbia v. State of Connecticut, Freedom of Information Commission and John M. Leahy, Docket No. CV 00-06501055, Judicial District of New Britain, November 28, 2000 (Owens, J.); Docket #FIC 2015-101; Susan Kniep v. Executive Director, East Hartford Housing Authority, Town of East Hartford; and Housing Authority, Town of East Hartford (January 13, 2016); Docket #FIC 2002-075; Briggs v. Rolfe W. Wenner, Superintendent of Schools, Amity Regional School District No. 5 (July 10, 2002); Docket #FIC 2001-467; Eileen Miller v. Superintendent of Schools, Amity Regional School District No. 5 (August 14, 2002); and Docket #FIC 1978-071; George A. Athanson v. City and Town of Hartford and Assistant Corporation Counsel of the City and Town of Hartford (June 14, 1978).

23. It is further found that the Town respondents failed to prove that Mr. Hampson conducted a diligent search for responsive records.

24. With respect to the respondent First Selectman's response to the August 30<sup>th</sup> request, William Brennan, who was the First Selectman at the time of the August 30<sup>th</sup> request, affirmed, by affidavit dated June 27, 2016, that he searched both his paper files and computer files in an attempt to locate documents which would be responsive to the complainant's request, and that he did not locate any responsive documents.

25. It is found that, contrary to the complainant's assertions, the First Selectman did not have a duty to inquire of other town departments, officials or employees as to whether they had possession of any documents that would be responsive to the complainant's request. See Lash v. Freedom of Information Commission, 116 Conn. App. 171, 187 (2009). It is further found, however, that the Town respondents failed to prove that Mr. Brennan conducted a diligent search for responsive records.

26. It is concluded that the Town respondents violated §§1-210 and 1-212, G.S., by failing to promptly provide the complainant with all records responsive to the August 30<sup>th</sup> request.

#### SCHOOL DISTRICT RESPONDENTS

27. At the hearing and in their post-hearing brief, the School District respondents maintained that they conducted multiple diligent searches and acted in good faith to provide the

complainant with all non-exempt records that they believed were responsive to the August 30<sup>th</sup> request. The School District respondents withheld certain records from the complainant, claiming that they were exempt from disclosure pursuant to the attorney–client privilege and the Family Educational Rights and Privacy Act (“FERPA”) and §1-210(b)(17), G.S.<sup>2</sup> The School District respondents also withheld certain records that they claimed were duplicative of records already provided to the complainant by the Town respondents, which the complainant agreed she did not need to receive again.

28. It is found that, upon receiving the August 30<sup>th</sup> request, the respondent Superintendent directed his Administrative Assistant, Lucille DeNovio, to conduct a search for documents that may be responsive to such request. It is found that the search consisted of the following: emails of all School District employees and hard copy reports concerning the Miller-Driscoll School that were maintained in files located in the Superintendent’s office, School District’s facilities and finance departments, and Miller-Driscoll School. It is found that the School District’s IT Department, at the request of Ms. DeNovio, conducted the search for electronic records utilizing the terms “PCB and Miller-Driscoll.” The IT Department then delivered the electronic records to Ms. DeNovio’s computer mailbox to be reviewed.

29. At the hearing, the respondent Superintendent characterized the August 30<sup>th</sup> request as broad and vague. He testified that he was trying to be specific to such request and believed that the use of the terms “PCB and Miller-Driscoll” in searching for electronic records was reasonable. He testified that he did not interpret the August 30<sup>th</sup> request to include such records as legal bills, believed that most documents dealing with the Miller-Driscoll renovation project were housed with the Building Committee, and that there were documents (*e.g.* SIP) that he did not have at the time of the August 30<sup>th</sup> request. The respondent Superintendent also testified that he believed, in good faith, that the School District respondents had fully responded to the August 30<sup>th</sup> request by September 18, 2015.

30. It is found that in December 2015, the respondent Superintendent became aware that the complainant believed that the School District respondents were withholding records, and promptly conducted additional searches. It is found that the School District respondents modified their previous search query, described in paragraph 28, above, as follows: broadened the search by utilizing the search term “PCB,” only, extended the timeframe searched, and added the personal email accounts of the Wilton Board of Education members to the locations searched. It is found that the new searches yielded additional records which were reviewed and provided to the complainant in December 2015 and January 2016.

31. At the hearing, Ms. DeNovio also testified that the August 30<sup>th</sup> request was difficult and time-consuming. She spent approximately 200 hours responding to the August 30<sup>th</sup> request including during her regular work hours, at night, on weekends and during vacation time.

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<sup>2</sup> The complainant did not contest the withholding of the records claimed to be exempt pursuant to FERPA. Therefore, such records shall not be further addressed herein.



32. It is found that the School District respondents' interpretation of the August 30<sup>th</sup> request was reasonable. It is further found that they conducted thorough and diligent searches for responsive documents.

33. With respect to the records that the School District respondents claimed were exempt from disclosure, after the January 29, 2016, hearing in this matter, the School District respondents submitted seven pages of unredacted documents to the Commission for in camera review, which are identified as IC-2015-640-1 through IC-2015-640-7.<sup>3</sup> On the in camera index, such records are described as legal advice, request for legal advice and draft reflecting legal advice regarding project rationale for building renovation. The Commission notes that the School District respondents submitted a total of seven pages for review, but claimed that IC-2015-640-4 was the only page that contained information responsive to the August 30<sup>th</sup> request. According to the School District respondents, they submitted all seven pages for review because the pages demonstrate that IC-2015-640-4 is part of an attorney-client privileged record reflecting legal advice, and as such, was exempt from disclosure pursuant to §1-210(b)(10), G.S. The Commission also notes that on the in camera index the School District respondents claimed that only portions of IC-2015-640-1 and IC-2015-640-2 were exempt from disclosure pursuant to §1-210(b)(10), G.S.<sup>4</sup> The School District respondents claimed that IC-2015-640-3 through IC-2015-640-7 were exempt from disclosure in their entirety.

34. In addition, pursuant to an August 11, 2016 order of the hearing officer, the School District respondents submitted an unredacted copy of a five-page document labelled "Existing Website Copy." In a letter to the hearing officer, dated August 26, 2016, the School District respondents represented that such document is a copy of the document to which reference is made on page 2, line 5 of the in camera records at issue, and that a copy was mailed to the complainant on August 26, 2016. According to the School District respondents, such five-page document was not previously provided to the complainant because it did not reference PCBs and was not responsive to the August 30<sup>th</sup> request.

35. With respect to the five-page document described in paragraph 34, above, it is found that such document was not responsive to the August 30<sup>th</sup> request as reasonably interpreted by the respondents. It is found that the respondents did not violate the FOI Act by withholding such record from disclosure.

36. With respect to the School District's claim that IC-2015-640-1 through IC-2015-640-7 were attorney-client privileged records, section 1-210(b)(10), G.S., provides that mandatory disclosure is not required of "communications privileged by the attorney-client relationship...."

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<sup>3</sup> At the May 20, 2016 hearing, the School District respondents represented that a redacted copy of the in camera records was submitted into evidence in the instant matter and marked as School District respondents' Exhibit 5.

<sup>4</sup> Specifically, the School District respondents claimed that lines 1-3 and 4-9 of IC-2015-640-1 and lines 4-9 of IC-2015-640-2 were exempt from disclosure. The complainant received a copy of the remaining portions.

37. Established Connecticut law defining the attorney-client privilege governs the applicability of the exemption contained in §1-210(b)(10), G.S. Such law is well set forth in Maxwell v. FOI Commission, 260 Conn. 143 (2002). In that case, the Supreme Court stated that §52-146r, G.S., which established a statutory privilege for communications between public agencies and their attorneys, merely codifies “the common-law attorney-client privilege as this court previously had defined it.” Id., at 149.

38. Section 52-146r(2), G.S., defines “confidential communications” as:

all oral and written communications transmitted in confidence between a public official or employee of a public agency acting in the performance of his or her duties or within the scope of his or her employment and a government attorney relating to legal advice sought by the public agency or a public official or employee of such public agency from that attorney, and all records prepared by the government attorney in furtherance of the rendition of such legal advice. . . .

39. As our Supreme Court has stated, a four part test must be applied to determine whether communications are privileged: “(1) the attorney must be acting in a professional capacity for the agency; (2) the communications must be made to the attorney by current employees or officials of the agency; (3) the communications must relate to the legal advice sought by the agency from the attorney, and (4) the communications must be made in confidence.” Lash v. Freedom of Information Commission, 300 Conn. 511, 516 (2011), citing Shew v. Freedom of Information Commission, 245 Conn. 149, 159 (1998).

40. In addition, the Supreme Court has held that the privilege is waived when statements of the communications are made to third parties. Ullmann v. State, 240 Conn. 698, 711 (1994).

41. With respect to IC-2015-640-1 (lines 1-3 and lines 4-9), it is found that such communications consist of email exchanges between the School District respondents and their attorneys. It is also found that IC-2015-640-3 through IC-2015-640-7 comprise a cohesive document concerning a single subject.

42. Upon a careful examination of IC-2015-640-1 (lines 1-3 and lines 4-9) and IC-2015-640-3 through IC-2015-640-7, it is found that such records consist of written communications transmitted in confidence between a public official or employee of a public agency acting in the performance of his or her duties or within the scope of his or her employment and a government attorney relating to legal advice sought by the public agency or a public official or employee of such public agency from that attorney or in furtherance of the rendition of such legal advice, within the meaning of §1-210(b)(10), G.S. It is concluded that such communications are exempt from disclosure. Accordingly, the respondents did not violate the FOI Act by withholding such records from disclosure.

43. With respect to IC-2015-640-2 (lines 4-9), it is found that such communication consists of an email exchange between the Town respondents, Town's attorney and School District respondents.

44. The complainant claimed that IC-2015-640-2 (lines 4-9) is not exempt from disclosure pursuant to the attorney-client privilege. Specifically, she claimed that since the Town and School District respondents are separate legal entities and represented by different legal counsel, the inclusion of the School District respondents on the communication "broke the 'attorney client privilege' seal."<sup>5</sup> The School District respondents contended, however, that the Town and School District respondents had a Common Interest Agreement ("CIA")<sup>6</sup> with respect to certain matters concerning the Miller-Driscoll School Building which allowed the Town attorneys and the School District attorneys to share certain information on an attorney-client privileged basis.

45. The Commission notes that the Town respondents did not claim that IC-2015-640-2 (lines 4-9) was exempt from disclosure.

46. It is found that there is no evidence in the record that IC-2015-640-2 (lines 4-9) was covered by the CIA.

47. Upon a careful examination of IC-2015-640-2 (lines 4-9), it is found that such communications are not privileged by the attorney-client relationship, and are not exempt from disclosure pursuant to §1-210(b)(10), G.S. Accordingly, it is concluded that the School District respondents violated the FOI Act by withholding IC-2015-640-2 (lines 4-9) from disclosure.

48. Notwithstanding the conclusions reached in paragraphs 26 and 47, above, the Commission in its discretion declines to impose a civil penalty in this matter.

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<sup>5</sup> See Complainant's Post-Hearing Brief, dated June 3, 2016 (at page 1).

<sup>6</sup> The Common Interest Agreement was entered into by and among the attorneys acting for and on behalf of the Town of Wilton, the Wilton Board of Education and Bruce Likely, Chairperson of the Wilton Board of Education, respectively. The CIA explicitly states that each of the parties to the CIA "is a defendant in litigation threatened to be filed by Christopher and/or Marissa Lowther asserting claims of, among other things, violations of law related to school facilities and/or operations, violations of laws related to the education of students, personal injury, violations of laws related to the responsibilities of municipality and/or local board of education related to the construction, renovation, maintenance and/or management of school facilities (known as the "Facility-Based Claims"). The CIA further states that "all sharing and pooling of information pursuant to the [CIA] will be done within the context of and in furtherance of the Parties' common goal and effort in defending against the Facility-Based Claims" and that the sharing of information "is not intended to, and shall not, waive or diminish in any way the confidentiality of [defense] materials or their continued protection under the attorney-client privilege...."

The following order by the Commission is hereby recommended on the basis of the record concerning the above-captioned complaint:

1. The Town respondents shall forthwith undertake an additional search for records responsive to the complainant's request described in paragraph 2 of the findings, above. If the Town respondents discover additional records that they have not provided to the complainant, they shall provide copies of such records to the complainant, free of charge. If the Town respondents do not locate any additional records responsive to the complainant's request, they shall provide the complainant with an affidavit detailing the results of their search including the locations searched and search terms used.

2. In addition, if the Town respondents have not already done so, they are hereby ordered to provide the complainant with an electronic copy of the Self-Implementing Cleanup Plan and raw data attached thereto, described in paragraphs 14 and 20 of the findings, above.

3. The School District respondents shall forthwith provide the complainant with an unredacted copy of IC-2015-640-2 (lines 4-9), free of charge.

4. Henceforth, the Town and School District respondents shall strictly comply with the disclosure requirements of §1-210(a), G.S.

  
Paula S. Pearlman  
as Hearing Officer