

Since 1975



FREEDOM OF INFORMATION



Connecticut Freedom of Information Commission • 18-20 Trinity Street, Suite 100 • Hartford, CT 06106
Toll free (CT only): (866)374-3617 Tel: (860)566-5682 Fax: (860)566-6474 • www.state.ct.us/foi/ • email: foi@po.state.ct.us

Marissa Lowthert,
Complainant(s)
against

Notice of Meeting

Docket #FIC 2014-276

Gary Richards, Superintendent of Schools, Wilton Public Schools; Cheryl Jensen-Gerner, Principal, Miller Driscoll School, Wilton Public Schools; and Wilton Public Schools,
Respondent(s)

March 23, 2015

Transmittal of Proposed Final Decision

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 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, April 8, 2015**. 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 March 30, 2015**. 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 March 30, 2015**. **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 **fourteen (14) copies** be filed **ON OR BEFORE March 30, 2015**, 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: Marissa Lowthert
Anne Littlefield, Esq.

2015-03-23/FIC# 2014-276/Trans/wrbp/VDH/CAL

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

Report of Hearing Officer

Marissa Lowthert,

Complainant

against

Docket #FIC 2014-276

Gary Richards, Superintendent of
Schools, Wilton Public Schools;
Cheryl Jensen-Gerner, Principal,
Miller Driscoll School, Wilton
Public Schools; and Wilton
Public Schools,

Respondents

March 23, 2015

The above-captioned matter was heard as a contested case on December 8, 2014, at which time the complainant and the respondents appeared, stipulated to certain facts and presented testimony, exhibits and argument on the complaint. For purposes of hearing, the matter was consolidated with the Docket #FIC 2014-260; Marissa Lowthert v. Gary Richards, Superintendent of Schools, Wilton Public Schools; and Wilton Public Schools; Docket #FIC 2014-265; Marissa Lowthert v. Gary Richards, Superintendent of Schools, Wilton Public Schools; Cheryl Jensen-Gerner, Principal, Miller Driscoll School, Wilton Public Schools; and Wilton Public Schools; and Docket #FIC 2014-289; Marissa Lowthert v. Gary Richards, Superintendent of Schools, Wilton Public Schools; and Wilton Public Schools.

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 email dated April 4, 2014, the complainant sent the following request for copies of public records to Dr. Cheryl Jensen-Gerner, the Principal of Miller Driscoll School:

I. For the period beginning 8-23-13 continuing through to the date of your response.¹

¹ The Commission notes, and it was explained at the contested case hearing, that the end date of the request in this case was the date of the records request itself—April 4, 2014.

II. Copies of all communication including e-mails, letters, new letters on any subject, you either received from or sent to anyone listed in III.

III. Listed individuals who are the subject of this e-mail/other communications record request:

1. **Supt Richards** (or his Secretary Moll Robinson);
 2. **BOE Chair Likely**;
 3. **WPS Medical Advisor Dr. Freilich**;
 4. **Any other BOE member:** i.e. C. Stroup, C. Finkelstein, L. Schwemm, G. Hemmerle, L. Rothstein and, prior to 12-5-13, G. Bray or K. Birck;
 5. **J. Murphy- Operations Manager**;
 6. **K. Post- Finance and Operations Manager**;
 7. **M. Esposito- HVAC Specialist**;
 8. **Eleana White- MD guidance Counselor**;
 9. **Special Services Director Ann Paul**;
 10. **Any member of the MD PTA Board:** Susan Price, Clarissa Cannavino, Sue Totten, Gretchen Jeans, Kerri Mimms, Kendra Drozd;
 11. **Any PTA counsel (sic) member**;
 12. **Mrs. McGann-** My son's MD teacher;
 13. **Mrs. Margolin-** My daughter's MD teacher; and
 14. **Any Wilton Education Union Officer** including but not limited to D. Nelson or A. Nicsaji.
- (All emphasis in original).

3. It is further found that the complainant requested that the documents described in paragraph 2, above, "be provided digitally," and, with regard to any document claimed to be exempt from disclosure, that the respondents provide her with a privilege log.²

4. It is found that, by email dated April 11, 2014, Superintendent Richards acknowledged the request on behalf of the respondents. It is further found that the superintendent stated that, given that the scope of the request was "quite broad," he was unable to estimate how long it would take the respondents to review and, if necessary,

² The complainant further defined the scope of the records that she was seeking from Principal Jensen-Gerner, as follows: 1. **Communications addressed to you individually or collectively as part of a group from anyone listed in III;** 2. **Emails received by you as a cc or bcc recipient from anyone listed in III;** 3. **E-mails or other communications you sent to anyone listed in III individually or collectively as part of a group or as cc or bcc recipient;** 4. **Forwarded to you from a 3rd party BUT originally issued by or forwarded by anyone listed in Section III;** 5. **Received by you from anyone listed in III BUT Forwarded by you to any 3rd party;** 6. **Sent to your WPS e-mail account used for this request (i.e. email address listed above) or any other e-mail account you have ever used for any WPS communications including a personal account;** and 7. **Sent from your WPS account above or any other e-mail account you have ever used for WPS communications.** (All emphasis in original).

redact the responsive records. It is further found that the superintendent requested that the complainant “consider narrowing the scope” of her request.

5. It is found that, by email dated April 14, 2014, the complainant responded to the superintendent’s correspondence, stating that she did not believe her request was “unreasonably broad,” and further stating: “. . . I suggest you begin at either the top or the bottom of the list as you see fit and begin providing responses immediately in a staggered process as you have done on several other requests.”

6. By email dated and filed May 8, 2014, the complainant appealed to this Commission, alleging that the respondents violated the Freedom of Information (“FOI”) Act by failing to provide her with copies of the records described in paragraph 2, above. The complainant requested that the Commission consider the imposition of a maximum civil penalty against Superintendent Richards and Principal Jensen Gerner, as well as various other remedies, including the admonishment of the superintendent and the principal “for repeatedly failing to discharge their lawful obligations” under the FOI Act.

7. Section 1-200(5), G.S., provides:

“Public records or files” means 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.

8. 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, (2) copy such records in accordance with subsection (g) of section 1-212, or (3) receive a copy of such records in accordance with section 1-212.

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

10. It is found that the requested records are public records within the meaning of §§1-200(5), 1-210(a), and 1-212(a), G.S.

11. It is found that Dr. Gary Richards was the Wilton Public Schools' Superintendent of Schools until approximately June 30, 2014. It is found that, on July 1, 2014, Dr. Kevin Smith took over the position of Superintendent of Schools and he continues to hold that position. It is further found that Moira Rollinson was the primary assistant to the former superintendent and is the primary assistant to the current superintendent. It is found that one of Ms. Rollinson's responsibilities is responding to FOI Requests.

12. It is found that Ms. Rollinson spent approximately six hours reviewing, redacting, and assembling three separate installments of records, which were ultimately provided to the complainant in this case. See ¶¶ 13-15, below.

13. It is found that, under cover of email dated May 9, 2014, the respondents provided the complainant with a first installment of records. It is found that the installment was comprised of 101 pages of records.

14. It is further found that, under cover of email dated May 23, 2014, the respondents provided the complainant with a second installment of records. It is found that the installment was comprised of 235 pages of records.

15. It is further found that, under cover of email dated June 13, 2014, the respondents provided the complainant with a third installment of records. It is found that the installment was comprised of approximately 445 pages of records.

16. Finally, it is found that, by email dated November 5, 2014, the respondents informed the complainant that a fourth and final installment of records was available for her to collect at the respondents' district office. It is found that such installment was comprised of over 1,000 pages of records. It is found that some of the records in this fourth installment were redacted by the respondents' counsel.

17. At the contested case hearing, the respondents claimed that the redactions were based on attorney-client privilege and the Family Educational Rights and Privacy Act, 20 U.S.C. §1232g ("FERPA"). The respondents further claimed that certain other records were withheld in their entirety based on the attorney-client privilege.

18. At the conclusion of the hearing, the complainant moved to have the Commission order the respondents produce the records that had been redacted or withheld to the Commission for an in camera inspection (hereinafter the "in camera records"). The complainant's motion was granted. On January 7, 2015, the respondents submitted the in camera records to the Commission.

19. The Commission notes that the complainant challenged the partial redaction and withholding of a total of fifty-three records. The in camera records will be referred to as follows: IC-Ex. H-2014-276-1³; IC-Ex. K-2014-276-1; and IC-Ex. K-2014-276-4

³ The complainant challenged the redactions in Exhibit H, which is a one-page document, as well as the redactions in Exhibit K, a fifty-four page document. The complainant submitted the

through IC-Ex. K-2014-276-54.⁴

20. It is found that, once engaged in the preparation of their in camera submission, the respondents determined that certain redactions were erroneous. The respondents subsequently disclosed the following records to the complainant without redactions: IC-Ex. K-2014-276-1; IC-Ex. K-2014-276-4; IC-Ex. K-2014-276-6; IC-Ex. K-2014-276-7; IC-Ex. K-2014-276-8⁵; IC-Ex. K-2014-276-20; IC-Ex. K-2014-276-25; IC-Ex. K-2014-276-26; IC-Ex. K-2014-276-48⁶; IC-Ex. K-2014-276-49⁶; IC-Ex. K-2014-276-50; IC-Ex. K-2014-276-51; IC-Ex. K-2014-276-52; and IC-Ex. K-2014-276-54.

21. In addition, it is found that IC-Ex. K-2014-276-5 and IC-Ex. K-2014-276-22 are emails that each contained a redaction at the top margin. It is further found that such redactions are neither part of the header nor the body of the actual emails. The respondents represented that what was redacted was the name of the person who printed out the particular emails. The respondents further represented that they cannot locate unredacted versions of these emails. The Commission accepts the respondents' representations. Because this Commission does not have jurisdiction over records that do not exist or that cannot be located after a thorough search, it is concluded that the respondents did not violate the FOI Act by not disclosing these two particular documents to the complainant without redactions. See Vigneri v. Victor Rayhall, President, Windham First Taxing Dist., et al., Docket #FIC 1995-254 (July 10, 1996).

22. However, with regard to IC-Ex. K-2014-276-5, the Commission notes that this email contained one additional redaction in the body of the record, which redaction the respondents claim was made pursuant to FERPA. The respondents were able to locate a version of this record with this second redaction revealed, and they submitted this version of the record to the Commission for an in camera inspection. Accordingly, the appropriateness of such redaction is addressed below. See ¶¶ 45-51, below.

redacted versions of Exhibit H and Exhibit K as evidence at December 8, 2014 contested case hearing.

⁴ For clarity's sake, the complainant challenged the redactions on one additional record. The complainant's contention was that, while she had received the particular record in the instant case without redactions, she had received the same record in connection with a separate case with redactions. The Commission declines to consider whether the redactions on a record disclosed in a separate case were proper. For this reason, IC-Ex. K-2014-276-2 (the redacted version of the record disclosed in a previous matter) and IC-Ex. K-2014-276-3 (the unredacted version of the record disclosed in this instant matter) are not described in paragraph 20, below.

⁵ The Commission notes that IC-Ex. K-2014-276-8 was an email that contained an attachment, which attachment was also disclosed to the complainant without redactions.

⁶ The Commission notes that, while IC-Ex. K-2014-276-48 and IC-Ex. K-2014-276-49 are not listed on the index to in camera records, these documents are contained in the in camera submission, printed on green paper. In a January 7, 2015 letter to the hearing officer, which accompanied the in camera submission, the respondents noted that all records that were subsequently determined not to be exempt from disclosure were printed on green paper, included in the in camera submission, and disclosed to the complainant. Accordingly, it is logical to find that IC-Ex. K-2014-276-48 and IC-Ex. K-2014-276-49 were disclosed to the complainant without redactions.

23. In addition to the attorney-client and FERPA exemptions claimed at the hearing, the respondents also claimed the following two exemptions in their index to in camera records: first, the respondents claimed that two documents were redacted pursuant to Conn. Gen. Stat. §10-151c (records concerning teacher performance and/or evaluation); and, second, the respondents claimed that the same documents for which they raised the attorney-client privilege were also exempt pursuant to §1-210(b)(4), G.S. (records pertaining to strategy and negotiations with respect to pending claims or pending litigation). Each of these exemptions will be addressed in turn.

24. The respondents claim that the following records are partially exempt pursuant to the attorney-client privilege: IC-Ex. H-2014-276-1; IC-Ex. K-2014-276-9; IC-Ex. K-2014-276-29; IC-Ex. K-2014-276-38; and IC-Ex. K-2014-276-43.

25. In addition, the respondents claim that the following records are entirely exempt pursuant to the attorney-client privilege: IC-Ex. K-2014-276-10 through IC-Ex. K-2014-276-19; IC-Ex. K-2014-276-30 through IC-Ex. K-2014-276-37; IC-Ex. K-2014-276-39 through IC-Ex. K-2014-276-42; and IC-Ex. K-2014-276-44 through IC-Ex. K-2014-276-47.

26. In relevant part, §1-210(b)(10), G.S., permits the nondisclosure of “communications privileged by the attorney-client relationship....”

27. The applicability of the exemption contained in §1-210(b)(10), G.S., is governed by established Connecticut law defining the privilege. That 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.

28. 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. . . .

29. The Supreme Court has stated that “both the common-law and statutory privileges protect those communications between a public official or employee and an attorney that are confidential, made in the course of the professional relationship that exists between the attorney and his or her public agency client, and relate to legal advice sought by the agency from the attorney.” Maxwell, *supra.* at 149.

30. The Supreme Court has further stated that, “[i]n Connecticut, the attorney-client privilege protects both the confidential giving of professional advice by an attorney acting in the capacity of a legal advisor to those who can act on it, as well as the giving of information to the lawyer to enable counsel to give sound and informed advice. Olson v. Accessory Controls and Equipment Corp., et al., 254 Conn. 145, 157 (2000). As a general rule, “communications between client and attorney are privileged when made in confidence for the purpose of seeking legal advice.” Id.; citation omitted. Moreover, although Connecticut courts have recognized that “statements made in the presence of third parties are usually not privileged because there is then no reasonable expectation of privacy,” they have also recognized that “the presence of certain third parties . . . who are agents or employees of an attorney or client, and who are necessary to the consultation, will not destroy the privilege.” Id.

31. Nonetheless, courts are reluctant “to extend the privilege to reports [or communications] compiled by third parties absent a clear indication that the information was submitted confidentially by an agent to the attorney for legal advice. Id. at 161; see, also United States Postal Serv. v. Phelps Dodge Refining Corp., 852 F. Supp. 156, 161 (E.D.N.Y. 1994) (court refused to extend attorney client privilege to communications made by consultants to the defendants and their in-house counsel; court noted that consultants were not employed by the defendants’ attorneys specifically to assist them in rendering legal advice, but were hired by the defendants to formulate a remediation plan).

32. After a careful inspection of the in camera records, it is found that redacted material in IC-Ex. H-2014-276-1 is exempt from disclosure pursuant to the attorney-client privilege. It is further found that the specifically identified parts of the following records are also exempt from disclosure pursuant to the attorney-client privilege: IC-Ex. K-2014-276-12: the email sent on March 3, 2014 at 11:04 AM; IC-Ex. K-2014-276-30: the email sent on March 3, 2014 at 11:04 AM; and IC-Ex. K-2014-276-46⁷: the email sent on March 3, 2014 at 11:04 AM. (It is found that IC-Ex. K-2014-276-12, IC-Ex. K-2014-276-30 and IC-Ex. K-2014-276-46 are the same email, which is contained in the in camera submission in three separate places).

33. It is further found that the portions of the records identified in paragraph 32, above, contain the legal advice that the respondents sought and/or received from their attorneys. It is further found that the respondents were acting within the scope of their duties with regard to current agency business when they sought and/or received this advice. It is further found that the communications were made in confidence. It is further found that the respondents did not waive their attorney-client privilege. Accordingly, it is concluded that the respondents did not violate the FOI Act when they denied the complainant unredacted copies of such records.

⁷ The Commission notes that there are five in camera records in a row that are labeled “38-47” on the lower left-hand corner. The Commission further notes that the notation “38-47” refers to pages 38 through 47 of Complainant’s Ex. K. IC-Ex. K-2014-276-46 corresponds to the fourth record in the in camera submission labeled “38-47.”

34. However, it is found that the respondents failed to prove that the remaining in camera records constitute records containing communications written in confidence between a public agency and a government attorney relating to legal advice sought by the public agency, or records prepared by the government attorney in furtherance of the rendition of such legal advice, within the meaning of §52-146r (2), G.S.

35. Specifically, it is found that the following portions of the in camera records are not communications between the respondents and their attorney:

- a. IC-Ex. K-2014-276-10: the entire page;
- b. IC-Ex. K-2014-276-15: the email sent on March 3, 2014 at 8:06 AM;
- c. IC-Ex. K-2014-276-16: the email sent on February 24, 2014 at 1:54 PM;
- d. IC-Ex. K-2014-276-17 through IC-Ex. K-2014-276-19: the entire page⁸;
- e. IC-Ex. K-2014-276-33: the email sent on March 3, 2014 at 8:06 AM;
- f. IC-Ex. K-2014-276-35: the email sent on February 24, 2014 at 1:54 PM and the email sent on February 24, 2014 at 1:33 PM;
- g. IC-Ex. K-2014-276-36 through IC-Ex. K-2014-276-37: the entire page⁹; and
- h. The second in camera record labeled “38-47”: the entire page.

36. With regard to the remaining in camera records, it is found that, in some of the communications, as the respondents communicated with their attorney, they included a third party in the communications. It is further found that, in other communications, a third party initiated the communications, directing the communications simultaneously to both the respondents and their attorney. Finally, it is found that, with regard to the remaining communications, as respondents’ attorney communicated with the respondents, the attorney simultaneously directed such communications to a third party.¹⁰

37. Specifically, it is found that the following portions of the in camera records are communications that involve at least one third party:

- a. IC-Ex. K-2014-276-9: the entire page;
- b. IC-Ex. K-2014-276-11: the entire page;
- c. IC-Ex. K-2014-276-12: the entire page other than the email sent on March 3, 2014 at 11:04 AM;
- d. IC-Ex. K-2014-276-13: the entire page;

⁸ The Commission notes that IC-Ex. K-2014-276-17 through IC-Ex. K-2014-276-19 is a one-page document labeled “17-19” in the lower left-hand corner. The Commission further notes that “17-19” refers to refers to pages 17 through 19 of Complainant’s Exhibit K.

⁹ The Commission notes that IC-Ex. K-2014-276-36 through IC-Ex. K-2014-276-37 is a one-page document labeled “36-37” in the lower left-hand corner. The Commission further notes that “36-37” refers to pages 36 and 37 of Complainant’s Exhibit K.

¹⁰ While the Commission uses the term “third party” in this paragraph, which is a singular reference to one party outside of the attorney-client relationship, most of the communications in question are forwarded to more than one third party from the same outside entity.

- e. IC-Ex. K-2014-276-14: the entire page;
- f. IC-Ex. K-2014-276-15: the top email sent on March 3, 2014 at 8:19 AM and the bottom email sent on March 3, 2014 at 7:59 AM;
- g. IC-Ex. K-2014-276-16: the email sent on February 26, 2014 at 2:46 PM and the email sent on February 24, 2014 at 3:08 PM;
- h. IC-Ex. K-2014-276-29: the entire page;
- i. IC-Ex. K-2014-276-30: the entire page other than the email sent on March 3, 2014 at 11:04 AM;
- j. IC-Ex. K-2014-276-31: the entire page;
- k. IC-Ex. K-2014-276-32: the entire page;
- l. IC-Ex. K-2014-276-33: the email sent on March 3, 2014 at 8:41 AM and the email sent on March 3, 2014 at 8:19 AM;
- m. IC-Ex. K-2014-276-34: the entire page;
- n. IC-Ex. K-2014-276-35: the email sent on February 24, 2014 at 3:08 PM;
- o. The first in camera record labeled "38-47": the entire page;
- p. The third in camera record labeled "38-47": the entire page;
- q. The fourth in camera record labeled "38-47": the entire page other than the email sent on March 3, 2014 at 11:04 AM; and
- r. The fifth in camera record labeled "38-47": the entire page.

38. No evidence was produced at the contested case hearing that would tend to show that the third party was engaged by the respondents' attorney as an agent necessary to the attorney's rendering of legal advice to the respondents. In fact, it is found that there is no evidence in the record that would tend to show that the respondents' attorney had any kind of privileged relationship with this third party. It is therefore found that the remaining in camera records are not communications made in confidence between the respondents and their attorney.

39. Accordingly, it is concluded that the attorney-client privilege was waived by the presence of the third party in the communications between the respondents and their attorney, and vice versa.

40. It is further concluded that other than the redactions contained in IC-Ex. H-2014-276-1 and the specific portions of IC-Ex. K-2014-276-12, IC-Ex. K-2014-276-30 and IC-Ex. K-2014-276-46 (all of which is set forth in paragraph 32, above), the remaining in camera records are not exempt from disclosure pursuant to the attorney client privilege. It is therefore concluded that the respondents violated the FOI Act when they denied the complainant unredacted copies of such records.

41. On their index to the in camera records, the respondents claim that the records identified in paragraphs 24 and 25, above, are partially or entirely exempt from public disclosure pursuant to 1-210(b)(4), G.S.

42. Section 1-210(b)(4), G.S., provides that nothing in the FOI Act shall require the disclosure of:

Records pertaining to strategy or negotiations with respect to pending claims or pending litigation to which the public agency is a party until such litigation or claim has been finally adjudicated or otherwise settled.

43. It is found that, at no time during the contested case hearing, did the respondents raise, identify, or present any evidence with regard to “a pending claim” or “pending litigation” to which they are a party. Similarly, it is found that at no time during the contested case hearing did the respondents provide testimony or other evidence that the records at issue reflect strategy or negotiations with respect to an ongoing claim or litigation. In addition, it is further found that a review of the relevant in camera records raises no indicia that would in any way suggest that the respondents are currently involved in a pending claim or pending litigation and that the records at issue pertain to strategy or negotiations relating thereto.

44. Accordingly, it is concluded that the respondents failed to prove that such records are exempt from public disclosure pursuant to §1-210(b)(4), G.S.

45. The respondents next claim that portions of the following records are exempt pursuant to FERPA: IC-Ex. K-2014-276-5; IC-Ex. K-2014-276-23; IC-Ex. K-2014-276-27; IC-Ex. K-2014-276-28; and IC-Ex. K-2014-276-53.

46. Section 1-210(b)(17), G.S., provides that nothing in the FOI Act shall require the disclosure of: “Education records which are not subject to disclosure under the [FERPA], 20 USC 1232g.”

47. “Educational records” are defined at 20 U.S.C. §1232g (a)(4)(A) as those records, files, documents, and other materials which (i) contain information directly related to a student and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.

48. This Commission has concluded that 20 U.S.C. §1232g prohibits public schools that receive federal funds from disclosing information concerning a student that would personally identify that student, without the appropriate consent. See Brenda Ivory v. Vice-Principal Griswold High Sch., Griswold Pub. Sch.; and Griswold Pub. Sch., Docket #FIC 1999-306 (Jan. 26, 2000).

49. 34 C.F.R. §99.3 provides, in relevant part, as follows:

Personally Identifiable Information

The term includes, but is not limited to--

(a) The student's name;

(b) The name of the student's parent or other family members;

- (c) The address of the student or student's family;
- (d) A personal identifier, such as the student's social security number, student number, or biometric record;
- (e) Other indirect identifiers, such as the student's date of birth, place of birth, and mother's maiden name;
- (f) Other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty; or
- (g) Information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates.

(Emphasis supplied).

50. After a careful inspection of the in camera records, it is found that the redacted material is information maintained by an educational institution. It is further found that the redacted material is comprised of names and addresses of various parents. It is further found that the redacted information could very easily be linked to specific students. It is further found that no consent has been obtained for the disclosure of this information.

51. Accordingly, it is concluded that the redacted portions of the records identified in paragraph 45, above, are exempt from public disclosure pursuant to the provisions of §1-210(b)(17), G.S., and FERPA. It is further concluded that the respondents did not violate the FOI Act when they denied the complainant unredacted copies of such records.

52. Finally, the respondents contend that portions of the following records are exempt pursuant to §10-151c, G.S.: IC-Ex. K-2014-276-21 and IC-Ex. K-2014-276-24.

53. Section 10-151c, G.S., entitled "Nondisclosure of records of teacher performance and evaluation. Exceptions," provides, as follows:

Any records maintained or kept on file by the Department of Education or any local or regional board of education that are records of teacher performance and evaluation shall not be deemed to be public records and shall not be subject to the provisions of section 1-210, provided that any teacher may consent in writing

to the release of such teacher's records by the department or a board of education. Such consent shall be required for each request for a release of such records. Notwithstanding any provision of the general statutes, records maintained or kept on file by the Department of Education or any local or regional board of education that are records of the personal misconduct of a teacher shall be deemed to be public records and shall be subject to disclosure pursuant to the provisions of subsection (a) of section 1-210. Disclosure of such records of a teacher's personal misconduct shall not require the consent of the teacher. For the purposes of this section, "teacher" includes each certified professional employee below the rank of superintendent employed by a board of education in a position requiring a certificate issued by the State Board of Education.

54. It is found that IC-Ex. K-2014-276-21 and IC-Ex. K-2014-276-24 are records arising out of the respondents' teacher evaluation process. It is therefore found that both records are "records of teacher performance and evaluation," within the meaning of §10-151c, G.S.

55. It is therefore concluded that the redacted material contained in these records is exempt from disclosure pursuant to §10-151c, G.S, and that the respondents did not violate the FOI Act when they denied the complainant unredacted copies of such records.

56. At the contested case hearing, the complainant contended that the respondents' disclosure of records in this case violated the promptness requirements of the FOI Act. The complainant also challenged the redactions contained in the records provided to her, as well as the fact that she was provided with duplicate and non-responsive records. Finally, the complainant contended that, while some email attachments were disclosed to her, other email attachments were not.

57. With regard to promptness, the Commission has previously opined that the word "promptly" in §1-210, G.S., means "quickly and without undue delay, taking into account all of the factors presented by a particular request . . . [including] the volume of statements requested; the amount of personnel time necessary to comply with the request; the time by which the requester needs the information contained in the statements; 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 loss of the personnel time involved in complying with the request." See FOI Commission Advisory Opinion #51 (Jan. 11, 1982). The Commission also recommended in Advisory Opinion #51 that, if immediate compliance is not possible, the agency should explain the circumstances to the requester.

58. It is found that, before Ms. Rollinson could review and assemble the records described in paragraphs 13 through 15, above, the respondents' Information Technology Specialist had to search for and gather all of the electronic records on the respondents' computer system. It is found that the respondents' Information Technology Specialist conducted a search for electronic records pursuant to the terms and parameters set forth in paragraph 2, above. It is further found that, once the relevant emails were gathered, the Information Technology Specialist saved the records to a separate electronic mail box and informed Ms. Rollinson that the search was complete and the records were ready for her review. With regard to email attachments, it is found that while the attachments would have been accessible as a result of the search performed by the Information Technology Specialist, each attachment would have had to have been opened manually to be reviewed.

59. The Commission takes administrative notice of the fact that, at the time of the instant contested case hearing, the complainant had issued numerous requests for records to these respondents (many within days of each other), and, between March 3, 2014 and September 23, 2014, had filed twenty-six appeals with the Commission against these respondents, or other public agencies and individuals associated with the Town of Wilton.

60. It is further found that the respondents have produced thousands of pages of records to the complainant. It is further found that, in connection with the totality of the requests for records that the respondents have received from this complainant, they have expended numerous hours reviewing, redacting, and assembling records.

61. With regard to the complainant's contention concerning missing attachments, it is found that, on five separate occasions, the complainant informed the respondents that she was missing an attachment to a particular email. It is found that, on each occasion, the respondents provided such attachment to her, sometime within the hour. With regard to the complainant's contentions concerning duplicate and non-responsive records, it is found that, in a case such as this with four installments of records totaling almost two thousand pages, it is understandable when some records are produced more than one time. It is also understandable that not all records will contain the same degree of responsiveness to the request. However, it is found that the varying degrees of responsiveness is a product of the breadth of the request itself, which by its terms requested a host of emails and other communications "on any subject" from multiple individuals. See ¶2.III, above. With regard to the complainant's request for a privilege log, (see ¶ 3, above), it is concluded that there is nothing in the FOI Act that requires the respondents to create a privilege log after denying a records request absent an order from this Commission. Finally, although the complainant requested that the records be produced to her digitally, the fact that the respondents produced hardcopy records to the complainant instead of digital records was never addressed by the complainant at the contested case hearing. Accordingly, such issue is deemed abandoned.

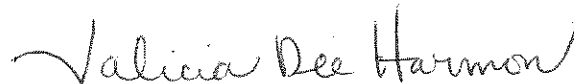
62. Based on the totality of the findings in this case, it is concluded that the respondents did not violate the promptness requirements §§1-210(a) and 1-212(a), G.S., as alleged in the complaint.

63. It is concluded, that, with the exception of the redactions contained in IC-Ex. H-2014-276-1, and the specific portions of IC-Ex. K-2014-276-30 and IC-Ex. K-2014-276-46 determined to be exempt from disclosure in paragraph 32, above, the respondents violated the disclosure provisions of §§1-210(a) and 1-212(a), G.S., when they failed to disclose the records listed in paragraphs 24 and 25, above (records claimed subject to the attorney-client privilege).

64. Based on the fact and circumstances of this case, the Commission declines to consider the imposition of civil penalties.

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

1. The respondents shall forthwith provide the complainant with a copy of the records described in paragraphs 24 and 25 of the findings, above, free of charge. In complying with this order, the respondents are not required to disclose the redacted material in IC-Ex. H-2014-276-1, or the specific portions of IC-Ex. K-2014-276-12, IC-Ex. K-2014-276-30 and IC-Ex. K-2014-276-46 described paragraph 32 of the findings, above, (records exempt from disclosure pursuant to the attorney-client privilege); or the records described in paragraph 45 of the findings, above, (records exempt from disclosure pursuant to FERPA); or the records described in paragraph 52 of the findings, above, (records of teacher performance and evaluation exempt pursuant to §10-151c, G.S.)



Valicia Dee Harmon
as Hearing Officer