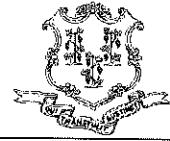


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FREEDOM OF INFORMATION



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George Martocchio,
Complainant(s)
against

Notice of Meeting

Docket #FIC 2015-373

Superintendent of Schools, Regional School District #7;
and Regional School District #7,
Respondent(s)

January 13, 2016

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, February 10, 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 January 29, 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 January 29, 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 January 29, 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: George Martocchio
Mark J. Sommaruga, Esq.

2016-01-13/FIC# 2015-373/Trans/wrbp/CAL//PSP

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In The Matter of a Complaint by

Report of Hearing Officer

George Martocchio,

Complainant

against

Docket #FIC 2015-373

Superintendent of Schools,
Regional School District #7; and
Regional School District #7,

Respondents

October 2, 2015

The above-captioned matter was heard as a contested case on September 21, 2015, at which time the complainant and the respondents appeared, stipulated to certain facts and presented testimony, exhibits and argument on the complaint.

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 letter dated April 21, 2015 to the respondent Superintendent of Schools, counsel for the complainant requested access to ten categories of records related to the alleged assault on Hanna Martocchio on October 9, 2014, including “[a]ny statements from witnesses or students, employees, faculty or paraprofessional(s)” and “all incident reports”.
3. It is found that, by letter dated April 29, 2015, counsel for the respondents acknowledged and responded to the complainant’s request. Specifically concerning the request for witness statements and incident reports, the respondents claimed that the requested records were exempt from disclosure pursuant to federal and state law protecting “the privacy rights of students” and also pursuant to the attorney client privilege. Counsel for the complainant countered with a letter dated May 11, 2015, requesting records “with personally identifiable information redacted.” By letter dated May 20, 2015, counsel for the respondents rejoined that “mere redaction of personally identifiable information regarding other students would not suffice for protecting such students’ federal privacy rights (via the Family Educational Rights and Privacy Act). . . .”
4. By letter dated and filed May 29, 2015, the complainant appealed to this Commission, alleging that the respondents violated the Freedom of Information Act (“FOIA”)

by failing to provide records responsive to the request.

5. 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.

6. 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.

7. 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.”

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

9. At the hearing, the parties agreed that, among the ten items originally requested, only the witness statements and incident reports remained contested. The respondents claimed that the requested records are exempt from disclosure pursuant to §1-210(b)(17), G.S. The respondents further contended that, because the complainant knows the identity of the other student involved in the incident giving rise to the investigation, disclosure of the investigation report, even in redacted form, would reveal “personally identifiable information” about the other student. The respondents also claimed that the requested records are exempt from disclosure pursuant to §1-210(b)(10), G.S.

10. It is found that the respondents submitted thirteen pages of records for in camera inspection, and on the index to the in camera records claimed the exemptions at §§1-210(b)(10) and 1-210(b)(17), G.S., for each record. Such records are hereby identified as IC-2015-373-1 through IC-2015-373-13.

11. Section 1-210(b)(10), G.S., permits an agency to withhold from disclosure records of “communications privileged by the attorney-client relationship.” The applicability of this exemption is governed by established Connecticut law defining the privilege. Maxwell v. Freedom of Information Commission, 260 Conn. 143 (2002) stated that §52-146r, G.S., merely codifies for communications between public agencies and their attorneys “the common-law attorney-client privilege as this court previously had defined it.” Id. at 149.

12. Section 1-210(b)(17), G.S., provides that nothing in the FOIA shall be construed to require the disclosure of “[e]ducational records which are not subject to disclosure under the Family Educational Rights and Privacy Act, 20 USC 1232b.”

13. “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.

14. 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. Docket #FIC 1999-306; Brenda Ivory v. Vice-Principal Griswold High School, Griswold Public Schools; and Griswold Public Schools (January 26, 2000).

15. 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 added)

16. 34 C.F.R. §99.12 provides, in relevant part, as follows:

What limitations exist on the right to inspect and review records?

(a) If the education records of a student contains information on more than one student, the parent or eligible student may inspect and review or be informed of only the specific information about that student.

17. Based on the in camera inspection, it is found that IC-2015-373-1 and IC-2015-373-13 constitute an email to an attorney for the respondents and an information sheet prepared by the respondents for their attorneys. These communications related to seeking legal advice from a professional legal advisor in his capacity as such, and the communications were made in confidence by the client or their agent.

18. Based on the in camera inspection, it is found that IC-2015-373-2 through IC-2015-373-12 resulted from the investigation by the respondent School District concerning an allegation that one student was assaulted by another student. It is found that the investigation records discuss the behavior of both students, one of whom is the complainant's daughter. It is found that the complainant knows the identity of the other student who is a subject of the underlying investigation because the complainant's daughter made the allegations concerning the behavior of the other student that caused the investigation. The investigation records also record at IC-2015-373-10 a statement by a third student who had conversations with the complainant's daughter after the alleged assault.

19. It is therefore found that the respondents could not meaningfully redact the investigation records because, pursuant to 34 C.F.R. §99.3(g), such redaction could not adequately protect the confidentiality obligations that the respondents have to the students discussed in the records who are not the complainant's daughter.

20. It is found that neither the parents of the other students mentioned in the investigation records, nor the students themselves, provided consent for the complainant to inspect the education records pertaining to the other students.

21. Finally, at the hearing, the complainant requested that the respondents provide him with a summary of those parts of the investigation records that involved his child, in a manner similar to the summary provided to the parents in Docket #FIC 2013-333; Donna Gagnon-Smith v. Superintendent of Schools, Middletown Public Schools; and Middletown Public Schools (January 30, 2014). The FOIA does not, of course, require the creation of records. Moreover, it is found that any such summary would have the same infirmity

identified concerning redactions at paragraph 18, above. No summary could adequately protect the confidentiality obligations that the respondents have to the students discussed in the records who are not the complainant's daughter. The fact situation here is different from the bullying by a group of students that was alleged in Docket #FIC 2013-333.

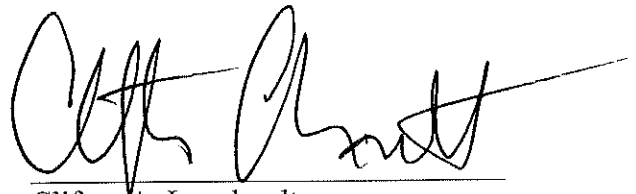
22. It is concluded that IC-2015-373-1 and IC-2015-373-13 are exempt from disclosure as attorney-client privileged records, pursuant to the provisions of §1-210(b)(10), G.S.

23. It is concluded that IC-2015-373-2 through IC-2015-373-12 are exempt from disclosure as protected educational records, pursuant to the provisions of §1-210(b)(17), G.S., and FERPA.

24. It is concluded that the respondents did not violate §§1-210(a) and 1-212(a), G.S., as alleged in the complaint.

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

1. The complaint is dismissed.



Clifton A. Leonhardt
as Hearing Officer