FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by | FINAL DECISION

Jonathan Pelto,

Complainant | Docket # FIC 2016-0375

against

Commissioner, State of Connecticut, Department of Education; and State of Connecticut, Department of Education,

Respondents | April 26, 2017

The above-captioned matter was heard as a contested case on August 30, 2016, at which time the complainant and 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 email dated March 7, 2016, the complainant made a request to the respondents for "electronic copies of any emails, attachments, correspondence, memos or any other documents that were sent to, from or mention the Connecticut Coalition for Achievement Now (ConnCAN) OR relate to the development, review, revision, submission or comment on what has become HB 555[1][1] - *AN ACT CONCERNING THE COMMISSIONER'S NETWORK OF SCHOOLS* for the period of September 1, 2015 – March 7, 2016."

3. It is found that, as of May 15, 2016, the respondents provided the complainant with approximately 465 pages of documents that were responsive to his March 7th request, described in paragraph 2, above. It is found that the respondents withheld certain records claiming that such documents were protected from disclosure under the "preliminary drafts or notes" exemption under the Freedom of Information ("FOI") Act.

4. By email dated May 18, 2016, the complainant appealed to this Commission, alleging that the respondents violated the FOI Act by failing to provide him with copies of all records responsive to his March 7th request described in paragraph 2, above.

[1] At the August 30, 2016 hearing, the complainant testified that there was a typographical error in his original request and that the proposed legislation at issue was House Bill 5551, and not House Bill 5555.

5. 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.

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 . . . (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 "any 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 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.

9. At the hearing and in their post-hearing brief, the respondents contended that they provided the complainant with all records responsive to his request, except for five emails which they claimed were exempt from disclosure pursuant to §1-210(b)(1), G.S. The complainant is only challenging the withholding of such emails.

10. After the hearing in this matter, the respondents submitted five pages of unredacted documents to the Commission for in camera review, which are identified as IC-2016-0375-1 through IC-2016-0375-5, and consist of emails, all dated March 2, 2016, relating to House Bill 5551, An Act Concerning Commissioner's Network of Schools.[2]

11. Section 1-210(b)(1), G.S., provides that disclosure is not required of "[p]reliminary drafts or notes provided the public agency has determined that the public interest in withholding such documents clearly outweighs the public interest in disclosure."

12. Section 1-210(e)(1), G.S., further provides, in relevant part that, notwithstanding the provisions of §1-210(b)(1), G.S., disclosure shall be required of:

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[2] At the hearing, the respondents indicated that they are not claiming that the "To" "From" "Sent" (date) and "Subject" lines contained in any email submitted for in camera inspection are exempt from disclosure. Accordingly, such information shall not be further addressed herein.

> [i]nteragency or intra-agency memoranda or letters, advisory opinions, recommendations or any report comprising part of the process by which governmental decisions and policies are formulated, except disclosure shall not be required of a preliminary draft of a memorandum, prepared by a member of the staff of a public agency, which is subject to revision prior to submission to or discussion among the members of such agency.

13. The Supreme Court ruled in Shew v. Freedom of Information Commission, that "the concept of preliminary [drafts or notes], as opposed to final [drafts or notes], should not depend upon...whether the actual documents are subject to further alteration..." but rather "[p]reliminary drafts or notes reflect that aspect of the agency's function that precede formal and informed decision making.... It is records of this preliminary, deliberative and predecisional process that...the exemption was meant to encompass." Shew v. Freedom of Information Commission, 245 Conn. 149, 165 (1998). In addition, once the underlying document is identified as a preliminary draft or note, "[i]n conducting the balancing test, the agency may not abuse its discretion in making the decision to withhold disclosure. The agency must, therefore, indicate the reasons for its determination to withhold disclosure and those reasons must not be frivolous or patently unfounded." State of Connecticut, Office of the Attorney General v. Freedom of Information Commission, 2011 WL 522872, *8 (Conn. Super. Ct. Jan. 20, 2011) (citations omitted).

14. At the hearing, Peter Haberlandt, Director of the respondents' Office of Legal and Governmental Affairs, testified that the records at issue consist of emails among personnel within the respondent State Department of Education ("CSDE") including, but not limited to, the Commissioner and legislative liaison for CSDE. He testified that the emails exist in connection with assisting and advising the Commissioner of CSDE in making a decision regarding the agency's position on House Bill 5551, described in paragraph 2, above. Mr. Haberlandt testified that CSDE engages in a multi-faceted, multi-phased process of deliberation and discussion to assist and advise the Commissioner with making decisions regarding the CSDE's position on proposed legislation and whether to submit written testimony and/or testify at a public hearing concerning such legislation. As part of that process, the legislative liaison for CSDE sends out an informal notice to CSDE staff notifying them of a hearing date on which the legislative committee of cognizance will consider various pieces of proposed legislation, and requesting input on such legislation and how to proceed. The respondents underwent the same process regarding House Bill 5551, resulting in several email exchanges among CSDE staff members and/or the Commissioner, which are now at issue in this matter. In addition, Mr. Haberlandt testified that while the Commissioner was questionned by legislators at the public hearing on House Bill 5551, a decision was made by the Commissioner "effectively to be neutral" on such proposed bill as "was reflected in the absence of written testimony."

15. Mr. Haberlandt also testified that the respondents determined that the public interest in withholding the emails outweighed the public interest in disclosure in that disclosing them would have a chilling effect on the frank, sharing of ideas and advice to the Commissioner, and

would create a distorted, incomplete and inaccurate depiction of the process by which a decision was reached regarding the CSDE's position on proposed legislation if only a few communications were disclosed.

16. Under the facts and circumstances of this matter, and after a careful review of the in camera records, it is found that IC-2016-0375-1 through IC-2016-0375-5 cannot fairly be described as "preliminary drafts or notes" within the meaning of §1-210(b)(1), G.S. Rather, such records consist of an informal exchange of ideas or opinions akin to an oral conversation.

17. It is further found that IC-2016-0375-1 through IC-2016-0375-5 are intra-agency recommendations comprising part of the process by which governmental decisions and policies are formulated, within the meaning of §1-210(e)(1), G.S., and that none is a preliminary draft of a memorandum, prepared by a member of the staff of a public agency, which is subject to revision prior to submission to or discussion among the members of the agency.

18. Accordingly, it is concluded that the in camera records are not exempt from mandatory disclosure pursuant to §§1-210(b)(1) and 1-210(e)(1), G.S.

19. It is further concluded that the respondents violated the disclosure provisions of §§1-210(a) and 1-212(a), G.S., by denying the complainant's request for copies of the in camera records.

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, free of charge, with a copy of IC-2016-0375-1 through IC-2016-0375-5.

Approved by Order of the Freedom of Information Commission at its regular meeting of April 26, 2017.

Cynthia A. Cannata
Acting Clerk of the Commission

PURSUANT TO SECTION 4-180(c), G.S., THE FOLLOWING ARE THE NAMES OF EACH PARTY AND THE MOST RECENT MAILING ADDRESS, PROVIDED TO THE FREEDOM OF INFORMATION COMMISSION, OF THE PARTIES OR THEIR AUTHORIZED REPRESENTATIVE.

THE PARTIES TO THIS CONTESTED CASE ARE:

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and State of Connecticut, Department of Education
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FIC/2016-0375/FD/cac/4/26/2017