

Since 1975



FREEDOM OF INFORMATION



Connecticut Freedom of Information Commission • 18-20 Trinity Street, Suite 100 • Hartford, CT 06106
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M. Jeffry Spahr,
Complainant(s)

against

Notice of Rescheduled
Commission Meeting

Docket #FIC 2011-513

Board of Education,
Norwalk Public Schools,
Respondent(s)

August 8, 2012

This will notify you that the Freedom of Information Commission has rescheduled the above-captioned matter, which had been noticed to be heard on Wednesday, August 8, 2012 at 2 p.m.

The Commission will consider the case at its meeting to be held at the Freedom of Information Commission Hearing Room, 18-20 Trinity Street, 1st floor, Hartford, Connecticut, at **2:00 p.m. on Wednesday, August 22, 2012.**

Any brief, memorandum of law or request for additional time, as referenced in the July 23, 2012 Transmittal of Proposed Final Decision, should be received by the Commission on or before August 14, 2012.

By Order of the Freedom of
Information Commission

W. Paradis

Acting Clerk of the Commission

Notice to: M. Jeffry Spahr
Mark J. Sommaruga, Esq.

2012-08-08/FIC# 2011-513/ReschedTrans/wrbp/TCB//TAH

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M. Jeffry Spahr,
Complainant(s)
against

Notice of Meeting

Docket #FIC 2011-513

Board of Education, Norwalk Public Schools,
Respondent(s)

July 23, 2012

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, August 8, 2012**. 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 July 30, 2012**. 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, the Commission requests that an **original and fourteen (14) copies** be filed **ON OR BEFORE July 30, 2012**. 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 July 30, 2012**, 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: M. Jeffry Spahr
Mark J. Sommaruga, Esq.

7/23/12/FIC# 2011-513/Trans/wrbp/TCB/TAH

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In The Matter of a Complaint by

Report of Hearing Officer

M. Jeffry Spahr,

Complainant

against

Docket #FIC 2011-513

Board of Education, Norwalk Public Schools,

Respondent

July 23, 2012

The above-captioned matter was heard as a contested case on March 16, 2012 at which time the complainant and the respondent appeared, stipulated to certain facts and presented testimony, exhibits and argument on the complaint.

For purposes of hearing, the above-captioned matter was consolidated with Docket #FIC 2011-571; M. Jeffry Spahr v. Director, Pupil Personnel Services, Norwalk Public Schools; and Norwalk Public Schools.

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

1. The respondent is a public agency within the meaning of §1-200(1), G.S.
2. By letter dated and filed on September 23, 2011, the complainant appealed to this Commission alleging that the respondent violated the Freedom of Information ("FOI") Act by failing to comply with his August 24 and August 25, 2011 records requests.

3. 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.

4. 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.

5. 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.”

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

7. It is found that in August of 2011, the complainant was assessing the Norwalk Public School’s special education program and that certain records were critical to his assessment and were required prior to the start of the school year. It is found that by e-mail dated August 24, 2011, the complainant made a request to the respondent to inspect the following records:

- a. “the job descriptions for the special education assistant or paraprofessional position(s) – i.e. those individuals who supply the ‘1:1 adult support’ as referenced in Student A’s¹ proposed IEP (hereinafter referred to as the ‘Para’);”
- b. “the applications and personnel files for those Para’s assigned to the Cranbury Elementary School for the 2011-2012 school year including, but not limited to, (a) their application and other submissions, (b) C.V.’s/resumes (c) records regarding experience, (d) records regarding training, and (e) pay rate/scale;”
- c. “the application and personnel file as described above for the ‘Para’ assigned to Student A for the 2011-2012 school year;”
- d. “copies of any and all settlement or other agreements (‘confidential’ or otherwise) for the last 5 school years

¹ In order to protect the identity of the student involved, the student will be referred to as Student A throughout this decision.

involving students who have or are attending the Eagle Hill Southport school with or without NPS assistance;”

- e. “the educational transcripts and professional training, CEU, Professional Day or other educational or training records of the educational individuals who, in Student A’s proposed IEP, would be working with Student A for the 2011-2012 school year. It is the intent of this request to receive records of whatever specific education or training these individuals received for working with/teaching children who present with Student A’s profile – including ASD, ADHD-combined, significant executive functioning deficits, severe memory deficits, social skills, deficits, AUTISM, etc.;
- f. “the curriculum, classroom and/or program schedule that is proposed for Student A for the 2011-2012 school year and/or for those students that are or would be in Student A’s classroom or section (including physical education classes);”
- g. “copies of the Mathematics assignments for Student A’s section for the 2011-2012 school year (these can be provided on a month-for-month basis as the school year progresses);”
- h. “all records pertaining to the calculation and assessment of the per capita and average cost of providing an education for (a) typical students, and (b) atypical students, or those students who receive special education, for the NPS District for the past 3 school years as well as the current school year;”
- i. “copies of any and all materials that have been designed or prepared (and the date thereof) for Student A for the upcoming academic year including the transition plan referred to in the IEP, the FBA plan, the BIP, etc. If none have been prepared please indicate so;” and
- j. “copies of the personnel file and/or credentials of the BCBA who has been retained to work with Student A for the upcoming academic year.”

8. It is found that the complainant’s August 25, 2011 request included six requests for certain legal bills and related records, however, at the hearing on this matter, the complainant withdrew his complaint with respect to that request.

9. It is found that prior to filing his September 23, 2011 complaint, the complainant sent a follow-up e-mail dated September 3, 2011 to the respondent and

offered to meet with the respondent to clarify his request, but the respondent did not respond to that e-mail.

10. It is found, however, that by e-mail dated November 3, 2011, the respondent informed the complainant that the records responsive to his request had been compiled and requested pre-payment for 200 copies of records.

11. It is found that the complainant eventually inspected those records on February 10, 2012 but he was not satisfied with the respondent's purported compliance.

12. With respect to the requested records described in paragraphs 7a, 7f, and 7h, above, the complainant indicated at the hearing on this matter that those requests were no longer at issue. Therefore, those requests will not be addressed further.

13. With respect to the requested records described in paragraph 7b, it is found that when the complainant inspected the records on February 10, 2012, the records responsive to that request were not made available.

14. At the hearing on this matter and in their brief, the respondent explained that the applications were copied for his inspection but were erroneously excluded from the records made available on February 10, 2012. The respondent also explained that due to some confusion within the Human Resources office, the personnel files were not copied and included with the records the complainant inspected on February 10, 2012.

15. It is found that the respondent, through counsel, apologized to the complainant for the "confusion" and suggested that the complainant contact the respondent again and indicate the specific personnel files he wanted to inspect. It is found that, at the hearing on this matter, the respondent offered to provide a copy of the applications free of charge.

16. Notwithstanding the findings in paragraphs 14 and 15, above, it is found that the respondent did not comply with the complainant's request described in paragraph 7b, above, at the time of the request and it is therefore concluded that the respondent violated the disclosure provisions of the §1-210(a), G.S., in that regard.

17. With respect to the requested records described in paragraph 7c, above, it is found that Student A was placed in a school in a different school system and that, therefore, the respondent had no need to, and did not, assign a paraprofessional to Student A. It is found, therefore, that no such records exist.

18. With respect to the requested records described in paragraph 7d, above, the respondent contended at the hearing and on brief that the records are exempt pursuant to §1-210(b)(17), G.S., arguing that because there is such a small number of students at issue via the settlement agreements, even in a redacted form, disclosure of the agreements will disclose "personally identifiable information" about students.

19. Section 1-210(b)(17), G.S., provides that nothing in the FOI Act 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 1232g” (hereinafter “FERPA”).

20. “Education 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.

21. This Commission has concluded that 20 U.S.C. §1232g prohibits public schools that receive federal funding from disclosing information concerning a student that would personally identify that student, without the appropriate consent. See contested case docket #FIC 1999-306, Brenda Ivory v. Vice-Principal, Griswold High School, Griswold Public Schools; and Griswold Public Schools (Final Decision dated January 26, 2000).

22. Title 34 §99.3 of the Code of Federal Regulations provides that:

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.

23. The respondents provided the records described in paragraph 7d, above, for in camera inspection which records have been identified as IC 2011-513 -1 through IC 2011-513-42.

24. It is found that IC 2011-513 -01 through IC 2011-513-23 are 7 settlement agreements responsive to the complainant's specific request for agreements involving out of district placements of students in Eagle Hill-Southport School.

25. It is found, after careful review of the in camera records, that even with redacting the names of the students and the parents, there would still be 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.

26. It is found, therefore, that the in camera records constitute "personally identifiable information" under 34 C.F.R. §99.3 and that the records are "educational records" under 20 U.S.C. §1232g(a)(4)(A).

27. It is concluded, therefore, that the respondent did not violate §§1-210(a) and 1-212(a), G.S., by withholding the in camera records.

28. With respect to the requested records described in paragraph 7e, above, it is found that the complainant was given a copy of the responsive records for one of three fifth grade teachers even though he contends that he asked for the records pertaining to all of them.

29. At the hearing on this matter, the respondent contended that the complainant was informed that the records were omitted as a result of some confusion and that the records would be made available if he contacted the respondent again and indicates that he wants to inspect the records of the other two teachers.

30. It is found, however, that upon a fair reading of the complainant's request, it was not unreasonable for the respondent to have believed that the complainant was only requesting the records for the teacher, or teachers, who would have been assigned to Student A.

31. It is found that the complainant was provided with the responsive records for the fifth grade teacher who would have been assigned to Student A and that no other individual teacher would have been assigned to that student.

32. It is concluded, therefore, that the respondent complied with the complainant's request described in paragraph 7e, above.

33. With respect to the requested records described in paragraph 7g, above, it is found that at the time of the complainant's request no such records existed with the

exception of a "pacing guide" which the complainant obtained online at the respondent's suggestion.

34. It is found, however, that the pacing guide was not the record the complainant was seeking and that he clarified, in a February 10, 2011 e-mail to the respondent's counsel, that he was seeking the math homework assignments. The complainant contended at the hearing on this matter that the math textbook was available at the time of his request and should have been provided to him at the time of his request. He also contended that some homework assignments should have been available by either September 3, 2011 (the date of his follow-up e-mail), by November 3, 2011 (the date of the respondents' e-mail), or by February 10, 2011 (the date he inspected the compiled records).

35. It is found that the entire math textbook does not comport with a conventional understanding of homework assignments and therefore does not fall within the scope of the complainant's request. It is further found that while homework assignments may have been generated during the subsequent months, the operative date in this regard is the date of his request and as already found, above, no homework assignments existed at that time.

36. With respect to the requested records described in paragraph 7i and 7j, above, it is found that no such records exist and therefore it is concluded that the respondent did not violate the FOI Act as alleged by the complainant.

37. The complainant also alleged that the respondent's response and compliance with his request was not prompt within the meaning of §§1-210(a), G.S.

38. With respect to the timeliness of the respondent's compliance, the meaning of the word "promptly" is a fact-based question that has been previously addressed by the FOI Commission. 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. The Commission also gave the following guidance:

The Commission believes that timely access to public records by persons seeking them is a fundamental right conferred by the Freedom of Information Act. Providing such access is therefore as much a part of their mission as their other major functions. Although each agency must determine its own set of priorities in dealing with its responsibilities within its limited resources, providing access to public records should be considered as one such priority.

39. The advisory opinion describes 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.

40. It is found that while the respondent promptly acknowledged receipt of the complainant's request, it was not until November 3, 2011 that he was informed that records responsive to his requests were available. The respondent further requested payment for the copies of the requested records when he only sought to inspect them.

41. It is found that the respondent was aware of the importance of the records to the complainant and that there is no evidence in the record to justify why it took the respondent 71 days to compile the responsive records.

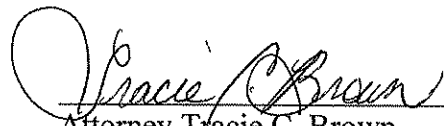
42. It is found that the respondents unduly delayed complying with the complainant's requests.

43. Consequently, it is found that the respondent violated the promptness provisions of §1-210(a), G.S.

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

1. The respondent shall provide the complainant with a copy of the records described in paragraphs 7b, above, free of charge.

2. Henceforth, the respondent shall strictly comply with the prompt disclosure provisions of §1-210(a), G.S.



Attorney Tracie C. Brown
as Hearing Officer