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FREEDOM OF INFORMATION



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Lee Smith,
Complainant(s)
against

Notice of Meeting

Docket #FIC 2013-333

Superintendent of Schools, Middletown Public
Schools; and Middletown Public Schools,
Respondent(s)

December 20, 2013

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, January 22, 2014**. 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 10, 2014**. 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 10, 2014**. **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 January 10, 2014**, 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: Lee Smith
Ann Littlefield, Esq.

12/20/13/FIC# 2013-333/Trans/wrbp/VDH//CAL

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In The Matter of a Complaint by

Report of Hearing Officer

Donna Gagnon-Smith,

Complainant

against

Docket #FIC 2013-333

Superintendent of Schools,
Middletown Public Schools; and
Middletown Public Schools,

Respondents

December 16, 2013

The above-captioned matter was heard as a contested case on October 31, 2013, at which time the complainant and the respondents appeared, stipulated to certain facts and presented testimony, exhibits and argument on the complaint.

Prior to the contested case hearing, by motion dated and filed October 24, 2013, the respondents moved to dismiss the case its entirety based on a lack of subject matter jurisdiction. The hearing officer ordered the complainant's representative to respond to the motion. On October 28, 2013, Donna Gagnon-Smith, Mr. Lee Smith's wife, filed an objection.

The respondents' motion to dismiss is premised on the fact that the named complainant, Lee Smith, passed away on August 16, 2013. The respondents contend that, because Mr. Smith is the only named complainant, the Commission no longer has subject matter jurisdiction to consider this matter. Mrs. Gagnon-Lee argued that the case should not be dismissed because the documents to which Mr. Lee was seeking access continued to be of value to his daughters. She further contended that she was the executor of Mr. Lee's estate, and, as such, she requested that the case go forward.

Connecticut's survival statute, Conn. Gen. Stat. §52-599, provides, in relevant part, as follows:

- (a) A cause or right of action shall not be lost or destroyed by the death of any person, but shall survive in favor of or against the executor or administrator of the deceased person.

(b) A civil action or proceeding shall not abate by reason of the death of any party thereto, but may be continued by or against the executor or administrator of the decedent. If a party plaintiff dies, his executor or administrator may enter within six months of the plaintiff's death or at any time prior to the action commencing trial and prosecute the action in the same manner as his testator or intestate might have done if he had lived. . . .

(c) The provisions of this section shall not apply: (1) To any cause or right of action or to any civil action or proceeding the purpose or object of which is defeated or rendered useless by the death of any party thereto, (2) to any civil action or proceeding whose prosecution or defense depends upon the continued existence of the persons who are plaintiffs or defendants, or (3) to any civil action upon a penal statute.

(Emphasis supplied).

The respondents contend that this case does not survive under Connecticut's survival statute because the matter at hand—a request for public records—does not add monetary value to the decedent's estate, a requirement that, according to the respondents, must be met for an administrative matter to survive. The respondents raised two cases to support this proposition: City of Groton v. CHRO, et al., 169 Conn. 89 (1975) ("Groton"), and CHRO v. Greenwich Catholic Elementary Sch. Sys., Inc., 202 Conn. 609 (1987) ("Greenwich").

In Groton, Charles M. Richardson alleged an act of discrimination against Pioneer Hose Company No. 1 ("Pioneer"), one of two organized volunteer fire companies in Groton. Richardson had submitted an application for membership to Pioneer. Id. at 91. The application provided a space for the signature of the applicant's sponsor. Richardson offered to have a relative who was a fireman with the Mystic Fire Department sign as his sponsor. He was advised that only a member of Pioneer could act as his sponsor. Richardson submitted his application without a sponsor's signature. Id. His application was accepted, but he was later notified that it was not valid because it lacked a sponsor's signature as required by the bylaws of the organization. Id. at 92. In fact, the bylaws did not contain a provision with regard to a sponsor's signature. Richardson was black, and there were no black members of Pioneer at the time Richardson applied for membership. Id.

Richardson filed a complaint with the CHRO, alleging that Pioneer's sponsorship requirement violated his rights. The CHRO concluded that the procedure of requiring an applicant to obtain a sponsor exclusively from among its own membership discriminated against blacks and other members of minority groups. Because Richardson had died during the pendency of the administrative proceedings, the CHRO issued a cease and desist order that addressed the general practice of requiring a sponsor from within Pioneer. Id. at 93.

On appeal, the Supreme Court took up the issue of what effect Richardson's death had on the case. The superior court had determined that, although Richardson's right to personal

relief did not survive, the public interest was not extinguished by his death. The Supreme Court disagreed, finding that, upon Richardson's death, the CHRO could have amended the complaint by, for example, naming itself as a complainant, and thereby addressing Pioneer's requirement for a sponsor generally, as opposed to the effect of such policy on Richardson particularly. Because the CHRO did not amend the complainant, it could only offer relief in conformity with the complaint. Because Richardson had alleged a violation of his personal rights, upon his death, the CHRO lost jurisdiction "to issue an award in conformity with the decedent's personal complaint." Id. at 100-01.

In Greenwich, Ruth Marciano filed a complaint with the CHRO, alleging that, after twenty-four years as a teacher, she had been discriminated against because of her age. Id. at 610. The defendant had refused to renew her contract on the basis of declining enrollment, while younger teachers with less experience were being retained. Id. While the complaint was pending Mrs. Marciano died, and John Marciano was approved as executor of her will. Id. He filed an amended complaint with the CHRO on behalf of the estate, attempting to secure any remedy to which the deceased complainant would have been entitled. Id. The defendant filed a motion to dismiss with the superior court, claiming that, upon the death of the complainant, the CHRO lost jurisdiction to adjudicate the complaint. Id. at 611. The superior court granted the motion.

On appeal, the Supreme Court considered what effect the complainant's death had on the case. It noted that the lower court had relied upon Groton in rendering its decision that the death of the complainant while the administrative proceeding was pending before the agency terminated the authority of the CHRO to proceed with the complaint. The Supreme Court distinguished Groton, noting that "[i]n Groton . . . no representative of the complainant's estate had attempted to continue the case, and no claim for relief that might have accrued to the estate had been made in accordance with the complaint." Id. 614. The Supreme Court also noted that the "broad sweep" of Connecticut's survival statute was intended to save rights, not to extinguish them. Based on the policy embodied by the statute, the fact the executor stepped forward to pursue the claim, and because recovery would "enhance the value" of the decedent's estate, the Supreme Court held as follows: "We conclude that the deceased complainant's claim for monetary relief does not fall within any of the exceptions to the survival of actions statute and may continue to be pursued by her estate." Id. at 614.

The respondents contend that Greenwich stands for the proposition that, in order to survive under the statute, a claim must be one that, if successful, will enhance the value of the decedent's estate. The respondents further contend that the only thing that can enhance the value of an estate is money. The Commission does not believe that Greenwich should be read so broadly. In determining that the administrative agency did not lose jurisdiction, the Greenwich court considered the totality of the facts presented in that particular case, as well as the purpose of the statute itself.

Here, just like in Greenwich, the executor stepped forward to pursue the FOI appeal. She contended that the request continues to have value to the decedent's daughters. Moreover, while only Mr. Lee signed the actual appeal filed with this Commission, the appeal itself makes reference to both Mr. and Mrs. Lee's efforts to obtain the requested records from

the respondents. In addition, the respondents' acknowledgement of the underlying request is directed to both Mr. and Mrs. Smith. The hearing officer determined that, under such circumstances, it was appropriate to substitute Mrs. Smith, as the executor of her late husband's estate, as the complainant, and proceed to a contested case hearing. See Perkins v. FOIC, 228 Conn. 158, 167 (1993) ("As a practical matter, the FOIA is used repeatedly by members of the public who are unschooled in technical, legalistic language distinctions. It would be unreasonable to deny a member of the public access to the FOIA simply because of arguable imperfections in the form in which a request for [or an appeal concerning] public records is couched."). Accordingly, the respondents' motion to dismiss was denied. The case caption of the instant matter is herein amended.

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 email dated May 25, 2012, the complainant sent an email to Colleen Werner, the Middletown High School Assistant Principal, Dr. David H. Larson, the Interim Superintendent of Schools for the Middletown Public Schools, Gene P. Nocera, the Chairman of the Middletown Board of Education, and the Middletown Board of Education, in which a copy of a bullying investigation report pertaining to her was requested daughter. It is further found that, on May 14, 2013, the complainant renewed the request for records with Patricia Charles, the Superintendent of Schools for Middletown Public Schools.

3. It is found that, by letter dated May 23, 2013, Superintendent Charles acknowledged the complainant's request. It is further found that, at this time, Superintendent Charles informed the complainant that the requested records were exempt from disclosure pursuant to the Family Educational Rights and Privacy Act, 20 U.S.C. §1232g, and therefore the request was denied.

4. By letter dated May 29, 2013 and filed May 31, 2013, the complainant appealed to this Commission, alleging that the respondents violated the FOI Act 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. The respondents claim that the requested records are exempt from disclosure pursuant to §1-210(b)(17), G.S. The respondents contend that, because the complainant knows the identity of all of the students 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 students.

10. 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 1232b.”

11. “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.

12. 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).

13. 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.

14. 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.

15. It is found that the requested records resulted from the Middletown Board of Education's Title IX investigation concerning an allegation that one student was being bullied by other students (the "investigation report"). It is found that the investigation report discusses the behavior of four students, one of whom is the complainant's daughter. It is found that the complainant knows the identities of the students who are the subject of the underlying investigation and who are discussed in the investigation report because Mr. and Mrs. Smith brought forward the allegations concerning three students' behavior that triggered the investigation.

16. It is therefore found that the respondents could not meaningfully redact the investigation report 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 report who are not the complainant's daughter.

17. It is found that the parents of the students mentioned in the investigation report did not provide consent for the Smiths to inspect the education records pertaining to their children.

18. It is further found that, in order to provide Mr. and Mrs. Smith with access to those parts of the investigation report that involved their child, the respondents summarized the report as it pertained to Mr. and Mrs. Smith's daughter and provided the summary to the Smiths.

19. It is found the investigation report itself is exempt from disclosure pursuant to the provisions of §1-210(b)(17), G.S., and FERPA.

20. It is concluded that the respondents did not violate the FOI Act 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.



Valicia Dee Harmon
Valicia Dee Harmon
as Hearing Officer