

FREEDOM OF INFORMATION COMMISSION  
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

FINAL DECISION

Jay Hardison,

Complainant

Docket # FIC 2017-0231

against

Superintendent of Schools, Darien Public  
Schools; and Darien Public Schools,

Respondents

February 28, 2018

The above-captioned matter was heard as a contested case on June 8, 2017, at which time the complainant and respondents appeared, stipulated to certain facts and presented testimony, exhibits and argument on the complaint.

On August 3, 2017 the complainant made a request that the hearing in this matter be reopened because the the complainant believed that the respondent's witness had committed perjury. The complainant offered no reason to question the credibility of the witness's testimony, or any explanation of how any particular testimony was relevant to any issue before the Commission. The request to reopen was denied on August 14, 2017.

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. By letter of complaint filed May 1, 2017, the complainant appealed to the Commission, alleging that the respondents denied his requests for certain public records. More specifically, the complainant alleged that records provided to him had been excessively redacted.
3. It is found that the complainant made requests on December 5, 2016, January 27, 2017 and March 6, 2017 for, broadly speaking, all communications between school officials pertaining to the suspension of the high school football coach.
4. It is found that the respondents acknowledged the December 5 request on December 8, 2017; the January 27 request on January 31, 2017, and the March 6 request on March 7, 2017.
5. It is found that the respondents conducted a thorough key word electronic search, and initially generated about 3,500 records consisting of about 30,000 pages. After review, 121

pages were determined to be responsive, and were redacted because the respondents believed the redactions were necessary in order to comply with the Family Educational Rights and Privacy Act, 20 U.S.C. §1232g [“FERPA”] or to preserve the attorney-client privilege, or to delete unresponsive portions of the records.

6. It is found that the respondents provided 121 pages of redacted records to the complainant on April 28, 2017.

7. It is found that the respondents provided 21 of the same pages on June 1, 2017, but without redaction of unresponsive material that was not subject to FERPA.

8. It is found that there are no additional records responsive to the requests at issue in his matter.

9. The respondents submitted the records at issue (as to which the complainant contests the redactions) for an in camera inspection. The records are numbered 1 through 29.

10. 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.

11. 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.

12. 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.”

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

14. The information the respondents believe to be exempt within in camera records 1, 2 and 3 is described on the respondents’ index as “preliminary draft of a second press release.”

15. Section 1-210(b)(1), G.S., provides that disclosure is not required of “Preliminary drafts or notes provided the public agency has determined that the public interest in withholding such documents clearly outweighs the public interest in disclosure . . . .’

16. However, the respondents did not cite §1-210(b)(1), G.S., in support of a claim of exemption<sup>1</sup>, and no evidence was offered to prove that the respondents had determined the public interest in withholding such documents clearly outweighed the public interest in disclosure.

17. It is concluded that the respondents failed to prove that in camera records 1, 2 and 3 are exempt from disclosure.

18. The respondents on their in camera index claim that the entireties of records 4 and 26-29 are exempt from disclosure pursuant to §1-210(b)(1) and (17), G.S.

19. The respondents offered no evidence to prove that they had determined that the public interest in withholding these records clearly outweighs the public interest in disclosure.

20. It is therefore concluded that the respondents failed to prove that in camera records 4 and 26-29 are exempt from disclosure pursuant to §1-210(b)(1), G.S.

21. Section 1-217(b)(17), G.S., provides that disclosure is not required of “[e]ducational records which are not subject to disclosure under the Family Educational Rights and Privacy Act, 20 USC 1232g....”

22. The Family Educational Rights and Privacy Act, 20 U.S.C. §1232g(b)(2), provides in relevant part that:

No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of releasing, or providing access to, any personally identifiable information in education records other than directory information, or as is permitted under paragraph (1) of this subsection unless – (A) there is written consent from the student’s parents specifying records to be released, the reasons for such release, and to whom, and with a copy of the records to be released to the student’s parents . . . .

23. “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.” Further, 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;

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<sup>1</sup> The omission does not appear inadvertent, as the appropriate column of the in camera index for an exemption statute is marked “N/A.”

- (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.

24. The respondents contended that in camera records 4 and 26-29 are educational records containing personally identifiable student information, and are therefore exempt from disclosure pursuant to the Family Educational Rights and Privacy Act, 20 U.S.C. §1232g and §1-210(b)(17), G.S.

25. It is found that the in camera records 4, 28 and 29 contain extensive personally identifiable student information that relates to an incident between a coach and a student. It is further found that these three records contain much the same, if not more, personally identifiable information as the surveillance video of the same incident, which the Commission has previously concluded to be protected by FERPA, Docket #FIC 2017-036, Hardison v. Darien Public Schools et al.

26. It is therefore concluded that in camera records 4, 28 and 29 are exempt from disclosure pursuant to FERPA and §1-210(b)(17), G.S.

27. Accordingly, it is concluded that the respondents did not violate the FOI Act when they declined to provide the complainant with a copy of the requested record.

28. In contrast, it is found that in camera records 26 and 27, with the exception of a parent's email address in the first line of the first page of record 27, do not contain any significant personally identifiable student information. It is found that the drafts of the press releases in records 26 and 27 are not significantly different from the draft press releases provided to the complainant.

29. Therefore, it is concluded that the respondents violated the FOI Act by withholding (with the exception of the parent's email address described in paragraph 28, above) in camera records 26 and 27.

30. The respondents in their in camera index claim that specific personally identifiable information in a number of records, such as a parent's or student's name or email address, or a discussion of a student, is exempt from disclosure pursuant to §1-210(b)(17), G.S. The respondents' index lists each of in camera records 5 through 21, 23 and 25 separately, and identifies the particular line or lines within each of those records that contain personally identifiable information.

31. It is found that the information described in paragraph 30, above, is personally identifiable information that is exempt under FERPA, and that the respondents did not violate the FOI Act by redacting it.

32. It is found that the remainder of the information within in camera records 5 through 21, 23 and 25 was provided to the complainant.

33. It is concluded that the respondents did not violate the FOI Act as alleged by redacting personally identifiable information from in camera records 5 through 21, 23 and 25.

34. The respondents in their in camera index claim that specific communications, identified by line numbers within in camera records 22 and 24, are exempt from disclosure pursuant to §1-210(b)(10), G.S., the attorney-client privilege.

35. The applicability of the exemption contained in §1-210(b)(10), G.S., is governed by established Connecticut law defining the privilege. *Maxwell v. FOI Commission*, 260 Conn. 143 (2002). In *Maxwell*, 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.

36. 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. . . .

37. The Supreme Court has also 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.

38. It is found that the portions of the records identified in paragraph 37, above, satisfy all the elements of the attorney-client privilege.

39. It is concluded that the respondents did not violate the FOI Act as alleged by redacting privileged information from in camera records 22 and 24.

40. It is found that, with some relatively small exceptions, the respondents only withheld from the complainant records, or portions of records, that are exempt from disclosure.

41. However, it is also found that the respondents violated the FOI Act by withholding in camera records 1, 2, 3, 26 and 27.

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 to the complainant copies of in camera records 1, 2, 3, 26 and 27 (with the exception of the parent's email address and any other personally identifiable information relating to parents or students).

Approved by Order of the Freedom of Information Commission at its regular meeting of February 28, 2018.



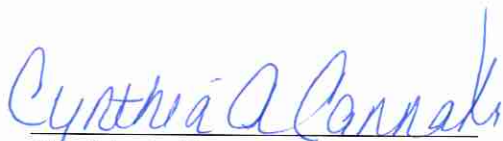
Cynthia A. Cannata  
Acting Clerk of the Commission

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:

**JAY HARDISON**, 11 Nearwater Lane, Darien, CT 06820

**SUPERINTENDENT OF SCHOOLS, DARIEN PUBLIC SCHOOLS; AND DARIEN PUBLIC SCHOOLS**, c/o Attorney Thomas B. Mooney, Shipman & Goodwin LLP, One Constitution Plaza, Hartford, CT 06103-1919



Cynthia A. Cannata  
Acting Clerk of the Commission